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The Censorship of Violent Motion Pictures: A Constitutional Analysis

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Violence in motion pictures and television shows has recently become an issue in the courts and legislatures. For example, in Florida, a youth charged with murder offered the defense of temporary insanity resulting from watching television. In California, a plaintiff in a tort action against a television network sought damages for injuries allegedly inflicted upon her by juveniles imitating a scene of brutality in a television drama. In Chicago, the City Council in 1976 amended an ordinance in order to set up a procedure for censoring violent motion pictures for audiences under eighteen years of age.

The existence of the Chicago ordinance, plus the public concern over controversially violent media, necessitates an inquiry into the constitutionality of censoring violent motion pictures. Although the censorship of obscene motion pictures is constitutional if done by means of a system with procedural

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4 Id., at § 155.5. The amendments [hereinafter referred to as Chicago Ordinance] read in part:

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted anywhere in the city, any motion picture, whether an admission fee is charged or not, without first having secured a permit therefrom of the Superintendent of Police.

155-1 It shall be the duty of the Superintendent of Police to refuse to issue such permit if the motion picture, considered as a whole, is harmful [obscene] when viewed by children, as defined herein.

The term "children" means any persons less than eighteen years of age.

"Harmful when viewed by children" means "obscene when viewed by children" or "violent when viewed by children," as those terms are defined below.

A. A motion picture is "obscene when viewed by children" when taken as a whole it (1) to the average child, applying contemporary community standards, appeals to the prurient interest, (2) depicts or describes in a patently offensive way sexual conduct as defined herein, and (3) lacks serious literary, artistic, political, or scientific value. Each of these three elements shall be applied in terms of what the adult community judges is appropriate for children.

B. A motion picture is "violent when viewed by children" (1) when its theme or plot is devoted primarily or substantially to patently offensive deeds or acts of brutality or violence, whether actual or simulated, such as but not limited to assaults, cuttings, stabbings, shootings, beatings, sluggings, floggings, eye gougings, brutal kicking, burnings, dismemberments and other reprehensible conduct to the persons of human beings or to animals and (2) which, when taken as a whole, lacks serious literary, artistic, political, or scientific value. Both of these elements shall be applied in terms of what the adult community, applying contemporary, standards, judges is appropriate for children.
safeguards, the Supreme Court has not decided whether violent motion pictures can be censored. This note will examine whether traditional modes of First Amendment analysis—nonprotected categories of speech, balancing, and the current version of the clear and present danger test—can justify such censorship, and as an aid in deciding the legal issue of censorship, recent social science research on the effects of viewing violent media will be reviewed.

DEFINING VIOLENCE OUT OF THE FIRST AMENDMENT'S PROTECTION

The first amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . .", and "speech" includes motion pictures. Although this phrasing of the first amendment sounds absolute, it has not been interpreted to protect all speech; some categories of speech, such as obscenity and fighting words, clearly lie outside of its protection. Until recently, commercial speech and group libel were also considered unprotected. If violent movies could fit into a nonprotected category or be recognized as a new category of nonprotected speech, such media would be susceptible to censorship or other legislative control.

Violence Outside Established Categories of Nonprotected Speech

It would seem that violent expression cannot be strained to fit into the two established categories of nonprotected speech, obscenity and fighting words. Obscenity is limited by the Supreme Court to "works which depict or

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6The Supreme Court did review a case involving an ordinance permitting classification of violent movies as unsuitable for young persons, but decided the case on vagueness grounds. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968). See text accompanying note 87 infra.
7U.S. CONT. amend. I.
8Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
12If censorship of violent media is constitutionally permissible, the censorship process must include certain procedural safeguards. First, the burden or proving that the film is unprotected must rest on the censor. Although the State may require advance submission of films, the requirement cannot lend an effect of finality to the censor's determination. Only a judicial determination suffices to impose the final restraint. Thus, the censor, within a short specified period must either issue a license or go to court. In addition, the procedure must assure a prompt final judicial decision. Freedman v. Maryland, 380 U.S. 51 (1964).

The Chicago ordinance appears to include such safeguards. CHICAGO ORDINANCE, supra note 4, at § 155-5, 155-7.1, 155-7.2. The Superintendent of Police is the initial censor. If he refuses to issue a permit, a Motion Picture Appeal Board must review the decision within five days. If the Board affirms the Superintendent's decision, the Board must file with a court an action for an injunction within three days. Assuming that such filing will lead to a prompt judicial determination in which the Board must bear the burden of proof, Freedman's requirements are satisfied. See Teitel Film Corp. v. Cusack, 390 U.S. 199 (1968).
describe sexual conduct," and the Court expressly declined to include violence within that category in Winters v. New York, which struck down as void for vagueness a definition of obscenity and indecency that included "stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person." In apparent recognition of this distinction between obscenity and violence, drafters of the Chicago ordinance provided separate definitions for movies which are "obscene when viewed by children" and for movies which are "violent when viewed by children." Thus, violence does not fall within the nonprotected category of obscene speech.

If movies trigger a physically violent reaction, perhaps they are "fighting movies," synonymous with unprotected "fighting words" "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." However, the fighting words exception to the first amendment stems from the need to avoid fights or insults hurled at policemen, and has little relevance to movie-watching, which involves no face-to-face confrontation or personal insults. The nonprotected category of fighting words thus does not accommodate the violence classification either.

Violence as a New Category of Nonprotected Speech

Although distinct from existing nonprotected speech, violent expression may warrant recognition as a new category of nonprotected speech, particularly if such expression is of slight social value or devoid of ideas. The ingredients of a nonprotected category of speech include:

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20Id. at 518. Winters invalidated § 1141(2) of the New York Penal Law entitled "Obscene prints and articles." A commentator notes that "Winters also struck in a subtle way at the rationale of obscenity regulation itself. . . . By containing the remedy, the Justices expressed doubt about the disease." Krislov, From Ginsburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation, 1968 Sup. Ct. Rev. 153, 159 [hereinafter cited as Krislov].
21CHICAGO ORDINANCE. supra note 4, at § 155.5. See note 4 supra.
23The recent offensive speech cases make clear the narrow focus of the fighting words category of unprotected speech. Cohen v. California, 403 U.S. 15 (1971) reversed a conviction for disturbing the peace based on Cohen's wearing a jacket bearing the words "Fuck the Draft." Mr. Justice Harlan explained that the expression was not obscene, since not erotic, that it was not equivalent to fighting words, as it was "not directed to the person of the hearer" and no individual could reasonably have regarded the words as a direct, personal insult, that it was not a proper exercise of the police power to prevent a speaker from provoking a group to a hostile reaction, and that it was not a captive audience situation. The Court thus drew a line of constitutional protection around such expression. As a result, a very narrow category of "fighting words," limited to personal insults in a face-to-face confrontation which could trigger physical violence, remains unprotected. Rutzick, Offensive Language and the Evolution of First Amendment Protection, 9 Harv. C.R.-C.L. L. Rev. 1, 8 (1974). Gooding v. Wilson, 405 U.S. 518 (1972), further emphasizes how narrowly drawn this category of speech must be. In Gooding, a statute using the terms "opprobrious words" and "abusive language" was deemed invalid for overbreadth, as the construction of these terms was not confined to fighting words.
24Implicit in the history of the First Amendment is the rejection of obscenity as utterly
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. . . . [S]uch 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.  

To assess whether violent media lacks social importance, and is therefore outside first amendment protection, one must examine the policies or societal interests promoted by regulation of violent media. Relevant interests may include: (1) the prevention of antisocial conduct, (2) the unwillingness to advocate immoral behavior, and (3) avoidance of revolting public displays.  

The prevention of antisocial conduct is a primary interest underlying the regulation of violent expression, for antisocial conduct triggered by depictions of violence could culminate in overt, destructive, and criminal acts. Some members of the public apparently blame the media for murders and other crimes of violence. However, proof of a causal connection should be required to remove the protection of the First Amendment, and so far, con-
exclusive evidence of that causal connection is lacking. Thus the interest espoused does not support the nonprotection desired.

The unwillingness to advocate immoral behavior is an interest apparently aimed more at thoughts than at conduct. Promoters of this interest might be concerned with instilling negative attitudes in viewers by exposing them to destructive models on the screen. In other words, those who oppose the media advocating violent behavior are concerned about putting ideas in viewers' minds. Yet the first amendment's protection is designed to protect "all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion . . . ." Thus, using this interest to avoid "bad ideas" would clash with the "marketplace of ideas" concept and would be rejected.

However, if the impact on "character" could eventually produce a change in conduct, perhaps attempting to avoid advocating immoral behavior is not altogether specious. Whereas the first interest discussed seeks to prevent immediate antisocial conduct, this second interest attacks gradually emerging antisocial behavior; again, substantiating evidence would make the argument more convincing.

The avoidance of revolting public displays may also seem a specious interest at first blush. As a commentator states in reference to obscene movies, "arousing disgust and revulsion in a voluntary audience seems an impossibly trivial base for making speech a crime." Yet revulsion at sexual scenes on

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24See text accompanying notes 32 & 33 infra.
25EMERSON, supra note 21, at 499.
26Two social scientists comment:
Some individuals who are opposed to the depiction of violence on television are not concerned chiefly with the possibility that the adult viewer will himself go out and shoot a neighbor or that the child who enjoys "Batman" will kick the family dog. Many critics of what they consider excessive programming of violence are well aware of the social constraints which usually keep children and adults alike from injuring each other often or seriously. They are more concerned with the attitudes which television may be inculcating and the emotional responses which it may be engendering. Specifically, they point to the fact that most television programs involving violence include a good guy or guys who, in the name of "my" country, "our" side, or law and order, inflict injury or death on the bad guys. . . . The result of being exposed to such attitudes, it is argued, is not particularly violence on the part of the viewer but the increased probability that he will support, condone, or justify aggression on the parts of his own police department or armed forces.
29Kalven, supra note 21, at 4. Mr. Justice Harlan seemed to rely on this gradual effect on conduct as a justification for obscenity laws. He stated in Roth v. United States, "[t]he State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." 343 U.S. at 502 (Harlan, J., concurring). But see EMERSON, supra note 21, at 499.
30Kalven, supra note 21, at 4.
the screen may be of a lesser magnitude than revulsion at watching the dismemberment of a human being. Depicting the brutal destruction of human beings for the sake of entertainment and commercial gain could strike too deeply at shared societal values. Whether governmental sanction of noninterference with such displays will cause harm to society may be an unanswerable question, but the specter of such harm may be enough to justify some regulation of grossly violent and brutal movies. Empirical research studying the effects of viewing violent media may help in deciding whether this and the preceding interests discussed are strong enough to justify setting up a new category of nonprotected speech.

A considerable number of studies on the effects of media violence on children now exist. Some focus on television violence, others on motion pictures. Present knowledge on the effects of violent media is difficult to summarize, partially because of the quantity of studies, but primarily because interpreters of the same data often reach opposite conclusions. It is difficult to

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As recently as 1970, a law journal writer remarked that "a few inconclusive studies have been undertaken to determine the effect of motion pictures on children" and cited only two studies which took place in the 1930's. Note, Private Censorship of Movies, 22 STAN. L. REV. 618, 643 (1970). The two studies are H. BLUMER & H. HAUSER, MOVIES, DELINQUENCY AND CRIME (1933); W. HEALY & H. BRENNER, NEW LIGHT ON DELINQUENCY AND ITS TREATMENT (1936).

Since the writing of that 1970 note, volumes of studies on the subject have been published. In part, this publication of research was due to the work of the 1969 National Commission on the Causes and Prevention of Violence, and the Surgeon General's Scientific Advisory Committee on Television and Social Behavior, which began in 1969 and completed its work in 1972. For the relevant research collected by the Commission, see D. LANGE, R. BAKER & S. BALL, 9 MASS MEDIA AND VIOLENCE (1969); 9A MASS MEDIA HEARINGS (1969). See SURGEON GENERAL'S ADVISORY COMMITTEE ON TELEVIONS AND SOCIAL BEHAVIOR, TELEVISION AND GROWING UP: THE IMPACT OF TELEVISION VIOLENCE (1972); 3 TELEVISION AND ADOLESCENT AGGRESSIVENESS (1972). At the same time, behavioral scientists published results of studies collected or conducted independently of the government projects. See, e.g., A Bandura, supra; S. Feshbach & R. Singer, supra.

One group of social scientists conclude that "[t]here is a clear and reliable relationship between the amount of violence which a child sees on entertainment television and the degree to which he is aggressive in his attitudes and behavior." Liebert, Davidson, & Neale, Aggression in Childhood: The Impact of Television, in WHERE DO YOU DRAW THE LINE? (V. Cline ed. 1974) 119-20. Others declare that "the Mass Media do not have any significant effect on the level of violence in society." D. Howitt & G. Cumberbatch, supra note 32, at vii. Examples of a few well-known studies may help to reconcile these conflicting conclusions.

Albert Bandura has conducted several studies with very young children. See, e.g., Bandura, Influence of Models' Reinforcement Contingencies on the Acquisition of Imitative Responses, 1 J. PERSONALITY & SOC. PSYCH. 589-95 (1965); Bandura, Ross, & Ross, Vicarious Reinforcement and Imitative Learning, 67 J. ABNORMAL & SOC. PSYCH. 601-07 (1965); Bandura, Ross, & Ross, Imitation of Film-Mediated Aggressive Models, 66 J. ABNORMAL & SOC. PSYCH. 9-71 (1965). His summary of one important study illustrates a social science laboratory experiment designed to test whether children will adopt aggressive behavior portrayed by adult models in various situations.

The first group observed real-life adults. . . .
In one corner [of the test room], the child found a set of play materials; in another corner, he saw an adult sitting quietly with a set of tinker toys, a large inflated plastic Bobo doll and a mallet. Soon after the child started to play with his toys, the adult model began attacking the Bobo doll. . . .

The second group of children saw a movie of the adult model beating up the Bobo doll. The third group watched a movie—projected through a television console—in which the adult attacking the doll was costumed as a cartoon cat. Children in the fourth group did not see any aggressive models; they served as a control group.

At the end of 10 minutes the experimenter took each child to an observation room, where we recorded his behavior. . . . [W]e mildly annoyed each child before he came in.

The observation room contained a variety of toys. Some could obviously be used to express aggression, while others served more peaceful purposes. . . .

Bandura, What TV Violence Can Do to Your Child, in VIOLENCE AND THE MASS MEDIA, supra note 32, at 124-25. The study is Bandura, Ross & Ross, Imitation of Film-Mediated Aggressive Models, supra.

Two important findings resulted from this study. Children who had observed the aggression prior to being frustrated were more aggressive in their play than those who had not observed any adult aggression. Further, the aggressive play was imitative, modeled on the behavior the children had observed in adults, whether live or on film. The study is discussed in Siegel, The Effects of Media Violence on Social Learning, in Lange, Baker, & Ball, supra note 32, at 174-75.

Another study by Bandura utilized a five-minute film in which one man plays with attractive toys until another character, Rocky, aggressively takes the toys. Bandura, Ross & Ross, Vicarious Reinforcement and Imitative Learning, supra. A commentator announced to the three to five year old viewers that Rocky was the victor. Another film showed Rocky's aggressive behavior severely punished. After viewing one film, children were observed in a play session. Both Bandura studies illustrate "that young children imitate the specific acts of aggression they have observed. . . . This imitation occurs whether the dramatic presentation is realistic or fantasylike. Imitation is enhanced if the aggression brings rewards to the adult who is observed and minimized if the aggression brings punishment." Siegel, supra, at 276.

These conclusions appear definite. However, other social scientists argue that Bandura's findings are not relevant to actual violence outside of the laboratory setting, although Bandura is respected for his methodology. See D. Howitt & Cumberbatch, note 32 supra. Their whole book is devoted to illustrating how such studies are irrelevant to real-life violence.

Not all studies focus on young children in play situations, however. Several studies have measured the aggression of college students who, after viewing certain films, believed they were delivering electric shocks to confederates. E.g., Berkowitz, Some Aspects of Observed Aggression, 2 J. PERSONALITY AND SOC. PSYCH. 399-69 (1969); Walters & Thomas, Enhancement of Punitiveness by Visual and Audiovisual Displays, 16 CANADIAN J. PSYCH. 244-55 (1969). The films offered apparent justification or additional incentive for delivery of the shocks. However, critics are no more satisfied with this experimental design than with Bandura's.

The major criterion of aggression employed in most of the studies is the delivery of a shock of high intensity to another student presumably as part of a learning experiment. . . . It remains a serious question whether the delivery of the shock really is analogous to an act of overt aggression. . . . If E [experimenter] asked the frustrated S [subject] to slap the other participant in the face or to whack him with a paddle we might not get the same reaction. Conceivably by setting up a complex situation in which S gets minimal feedback from his fellow player of distress and has every reason to believe that a faculty member of a college would not permit him to harm anyone seriously, the whole situation takes on a game-like atmosphere.


Such criticisms may be unavoidable in any laboratory setting. Therefore, field studies may be more useful in proving whether violent media cause antisocial conduct. Feshbach and Singer made an effort to employ laboratory procedures in a field context. S. Feshbach & R. Singer, supra note 32. Their six-week study was carried out in the setting of three private schools and four boys' residential institutions. The subjects, adolescent boys, were required to watch television from one of two designated lists of programs. One list was an aggressive diet of shows, the other
generalize from studies based on different concepts to ultimately reach a definition of aggression showing the relation between viewing media and the actual occurrence of crime.\textsuperscript{34}

To date, empirical research paints a gloomy picture of unprovable conclusions. Behavioral science currently does not allow conclusive proof that violent movies precipitate crimes or cause serious harm to children in other ways. Empirical data does not disprove either possibility, and in some circumstances a tentative causal connection has been shown.\textsuperscript{35} But limited, tentative conclusions from empirical research do not support creation of a new category of nonprotected speech.

Additional reasons exist for keeping violent movies within the scope of the first amendment. One reason is the lack of history or tradition of censoring violent media.\textsuperscript{36} If anything, the appeal of war stories and the adventures of nonaggressive. Daily behavior rating forms were completed for each child by supervisors or teachers. Each aggressive act was rated, and personality inventories were also taken. (Methodological problems occurred, because some boys dropped out of the project and some rates were very inconsistent.)

The data collected revealed no significant effect on peer aggression scores in the private school population but showed marked effects in the boys' homes. "The significant decline in aggression toward peers in the boys exposed to aggression content in television and the increase in aggression in the boys exposed to the control diet constitute the most important finding in the study." Id. at 80-81. This result was interpreted to mean that an aggressive television diet provides "cognitive support," a coping function associated with aggressive fantasies. In other words, the vicarious imaginative activity entailed in observing aggressive content on television leads to a release of aggression. This resembles the "catharsis" hypothesis, which suggests that drive reduction from television or movie watching occurs and, therefore, that such viewing reduces real-life violence. D. Howitt & G. Cumberbatch, supra at 32.\textsuperscript{37}

Feshbach and Singer clearly utilized different underlying concepts from Bandura; Feshbach emphasizes fantasy and catharsis, while Bandura talks of observational learning and imitation. See text accompanying note 33 supra. Another problem is the measure of aggression, as the studies involve play situations and attacks on inanimate objects, with no demonstrated relation to overt aggression and actual assault on another individual.

It remains an unanswered question whether aggressive play is at all the same as a direct assault upon another child. Indeed there is evidence that one of the characteristics of imaginative children is their capacity to engage in vigorous aggressive play quite comparable to the situation occurring in the Bandura-type experiments. . . .

It remains to be seen whether such play bears a direct relation to overt aggression. Singer, \textit{The Influence of Violence Portrayed in Television or Motion Pictures Upon Overt Aggressive Behavior}, \textit{The Control of Aggression and Violence} (J. Singer ed. 1971) at 38.

The Surgeon General's Scientific Advisory Committee on Television and Social Behavior concluded that a causal connection does exist, finding:

A preliminary and tentative indication of a causal relation between viewing violence on television and aggressive behavior, an indication that any such causal relation operates only on some children (who are predisposed to be aggressive); and an indication that it operates only in some environmental contexts. Such tentative and limited conclusions are not very satisfying. They represent substantially more knowledge than we had two years ago, but they leave many questions unanswered.

\textit{Id.}, supra note 32, at 18-19.\textsuperscript{38}


The lack of a history of censoring violence is in contrast with the historical support for censoring obscenity. In \textit{Roth v. United States}, Justice Brennan gave great weight to history as a
cowboys and Indians point to a history in support of such violent tales. The 1950's produced crime comic book legislation, aimed at censoring or limiting distribution to minors of comics featuring crime; however, that legislation does not support the Chicago ordinance inasmuch as the comic book laws were struck down by courts relying on *Winters v. New York*, the case which rejected an attempt to censor violent publications. More recently, legislation censoring violent media was likewise rejected when an ordinance censoring movies harmful to children was held void for vagueness in *Interstate Circuit, Inc. v. City of Dallas.*

Support for constitutional protection of violent media may also be drawn from the current erosion of traditional nonprotected categories of expression. For example, *New York Times v. Sullivan* has been interpreted as signaling an erosion of the "two-level approach" to speech, which creates two

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justice for excluding obscenity from constitutional protection. 354 U.S. 476, 483 (1957). Because libel laws and the crimes of blasphemy and profanity existed at the time the Constitution was ratified, speech falling within such offenses was intended to be outside of the protection of the first amendment. Although obscenity laws admittedly were not as well developed, obscene speech likewise was intended to be nonprotected, according to Brennan, who reasoned, "As early as 1712, Massachusetts made it criminal to publish 'any filthy, obscene, or profane song, pamphlet, libel, or mock sermon. . . .' Thus, profanity and obscenity were related offenses." *Id.* at 482-83.

This historical argument has been criticized by commentators and by a Justice sitting in the same case. See, e.g., Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 2 ("Although it has been argued that the utterance of obscenity was a common-law crime, early instances are infrequent and, at best, ambiguous.") Justice Douglas wrote, "Unlike the law of libel, wrongfully relied on in Beauharnais, there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment." *Roth v. United States*, 354 U.S. 476, 514 (dissenting opinion). Although the evidence of laws contemporaneous with the ratification of the Constitution has been questioned, Justice Brennan also made clear that more recent history supports his conclusion, by noting the existence of obscenity laws in all the states. Roth v. United States, 340 U.S. at 485.


39333 U.S. 507 (1948).

40Id. at 519. Yet simultaneously, the *Winters* court found obscenity legislation more acceptable because history justified it. "They implied the 'grandfather clause' argument of Roth, which exempted obscenity from the most piercing scrutiny of First Amendment standards." *Krislov, supra* note 15, at 159.

41390 U.S. 676 (1968). The City of Dallas enacted an ordinance establishing a Motion Picture Classification Board to classify films as suitable or not suitable for young persons. "Not suitable" included "[d]escribing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons." *Id.* at 681-82. Student notes have discussed the decision and its prior lower court opinions. See 33 ALB. L. REV. 173 (1968); 55 CALIF. L. REV. 926 (1967); Comment, *Exclusion of Children from Violent Movies*, 67 Colum. L. Rev. 1149 (1967); Note, *Constitutional Law—The Sale of Obscene Material to Minors*, 37 U.M. KANSAS CITY L. REV. 127 (1969).


categories: that which is worthy enough to require "the application of First Amendment protection and that which is beneath First Amendment" concerns. Lower-level speech traditionally included fighting words, group libel, obscenity, and commercial speech. Utilizing the traditional approach, the plaintiffs in New York Times argued that libel was lower-level, not constitutionally protected, speech. Mr. Justice Brennan rejected the argument:

[W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we are to other "mere labels" of state law. . . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

This statement may indeed signal the elimination of much lower-level speech, as commercial speech and group libel are now placed back under the protection of the first amendment. Even though obscenity and fighting words may remain nonprotected categories, other broad categories of non-protected speech have become less acceptable, so that creation of an analogous category for violent speech would probably not be warmly received.

The unacceptability of a broad category does not, however, preclude

Id. at 217.
9376 U.S. at 269 (footnotes omitted).
But see Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), in which Mr. Justice Stevens indicates that society's interest in some types of expression is of a lesser magnitude than the interest in expression at the core of the first amendment. The Justice states,

Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

Id. at 70-71.

Where violent expression would fit into Mr. Justice Stevens' graduated approach to the first amendment is not apparent.
line-drawing or rule-making which does not attempt to create "talismanic immunity" for violent speech. Just as a "deliberate, calculated falsehood" remains nonprotected, so might a narrow class of violent expression in certain circumstances. Instead of carving out a broad category of nonprotected speech, one may engage in a more refined "definitional balancing," which "draws the constitutional line generically, by determining the meaning of constitutional guarantees for different classes of situations."53

However, delineating a narrow class of violent expression and distinguishing it from the violent expression which remains protected by the first amendment is a difficult task. For instance, "violent when viewed by children" in the Chicago ordinance does not apparently create a narrow class of violent expression.54 Instead, modeled on the definition of obscenity formulated in Miller v. California,55 the Chicago definition includes violent movies which lack serious artistic, political or scientific value.56 As an attempt to accommodate free speech with the interests in preventing antisocial conduct and related harms, the Chicago formula is over-inclusive.

To avoid over-inclusiveness, the definition could be limited to violent movies causing viewers to engage in actual violence and criminal acts. Although this narrower definition may be less objectionable constitutionally, it may be currently unworkable given the inconclusive results of empirical studies attempting to relate violent media and crime. Separation of media into causal and noncausal categories would be guesswork, risking intrusion of censorship power into protected speech. This risk looms too large to warrant classification of even this narrow class of expression as nonprotected.57

54CHICAGO ORDINANCE. supra note 4, at § 155.5(B).
55The Court of Appeals opinion in Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th Cir. 1966), vacated, 390 U.S. 676 (1968), states,

As forceful as these arguments may be for the expansion of the scope of the classification standards, the long history of the misuse of the censorship power convinces us that the standard for classification must be restricted to the control of obscenity. In considering the classification approach, we cannot ignore the activities of the censors. . . . Because of the very real threat to the adult's freedom of speech and expression, the Supreme Court has apparently limited censorship affecting adults to a narrowly defined area of obscenity.

Id. at 598.
Alternative Approach: Application of Danger Test

To allow limited censorship of violent media without the difficulty of labeling such media as nonprotected, their protected status might be recognized but at the same time made subject to the "clear and present danger" test. Because a major concern in censoring violent media is the prevention of antisocial, delinquent, or criminal acts, the public might well consider such media dangerous. If this dangerous quality reaches certain legal standards, the media in question may be suppressed, not because that which could be protected speech may be so harmful that it justifies regulation, but because that which could be protected speech may be so harmful that it justifies regulation. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

The convoluted history of the clear and present danger test makes it difficult to assume that the test is applicable to a motion picture censorship ordinance. Two problems impede application of the test: (1) determining the current formulation of the test and (2) evaluating whether this formula applies to entertainment as expression.

The test in its metamorphosis from clear and present danger to the current standard of inciting imminent lawless action has been formulated and

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59Mr. Justice Holmes, noting that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," first formulated the test for recognizing such speech. See Schenck v. United States, 249 U.S. 47, 52 (1919).
61When Mr. Justice Holmes first articulated the clear and present danger test in Schenck v. United States, 249 U.S. 47 (1919), he applied it to Schenck's conviction for violating the Espionage Act of 1917 by distributing a leaflet concerning opposition to the draft. The creator of the test further discussed it in his dissenting opinion in Abrams v. United States. 250 U.S. 616 (1919) (Holmes, J., dissenting). Abrams is remembered not only for the marketplace of ideas concept, but also for elevating the danger test from a rule of evidence to a constitutional level. Id. at 630. Abrams has thus been interpreted to mean that "for legislation to pass muster, it must be demonstrated that a permissible objective of government is imminently and substantially threatened." Strong, supra note 19, at 46. A few years later, Gitlow v. New York, 268 U.S. 652 (1925), attempted to limit the test to cases in which the statute was couched in nonspeech terms, distinguishing such cases from those in which the statute by its terms prohibited certain speech. The distinction was later eliminated yet may have influenced the growth of the test. See Dennis v. United States, 341 U.S. 494 (1951). Gitlow involved the statutory prohibition of advocacy of criminal anarchy.

Mr. Justice Brandeis, who had earlier joined in Mr. Justice Holmes' dissent in Abrams, further articulated the Holmes-Brandeis conception of the clear and present danger test in his concurring opinion in Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring). To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil ap-
revised in the subversive speech context. However, it has been applied in other contexts. For instance, the clear and present danger formulation was applied in four cases involving contempt citations for the publication of adverse comments on judicial behavior and pending cases. It has also been applied to speech evoking a hostile reaction from listeners, a factual situation somewhat analogous to that of evoking a hostile

prehended is so imminent that it may befall before there is opportunity for full discussion. If there be time be expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. . . .

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious. 

Id. at 377. Miss Whitney was convicted of violating the Criminal Syndicalism Act of California for assisting in the organization of the Communist Labor Party. Schenck, Abrams, Gitlow, and Whitney thus all involved the application of the test in cases of speech as part of political action. The "substantive evil" was subversion or overthrow of the government by unlawful means. Mr. Justice Brandeis' words, quoted above, re-emphasize the political context in which the danger test was employed.

The test was reformulated several years later and again applied to political speech. In Dennis v. United States, 341 U.S. 494 (1951), the Court considered whether two sections of the Smith Act, concerned with advocating the overthrow of the government by force, violated the first amendment. Chief Justice Vinson rejected the Holmes-Brandeis test and replaced it with a formulation by Judge Learned Hand. "In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Id. at 510. This Hand-Vinson formula has been much criticized; one writer terms it "so pale in tone and so neutral in emphasis that it is hard to conceive of it as being used effectively to control governmental power over expression." EMERSON, supra note 21, at 115. Another notes that "Dennis has the dubious distinction of bringing to a head the paradox that the Holmes-Brandeis formulation of the danger test as a constitutional solvent would satisfy but few . . . . But to many it became, after Dennis, largely or wholly unsatisfactory because either too virile or overly weak." Strong, supra note 69, at 53.

The most recent formula announced by th Court is in Brandenburg v. Ohio, 395 U.S. 444 (1969), another political speech case which reversed a conviction of a Ku Klux Klan spokesman under the Ohio Criminal Syndicalism statute. The court made reference to the Dennis case, yet articulated its own test.

These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. 

Id. at 447.


"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Bridges v. California, 314 U.S. at 263. In Pennekamp v. Florida, the Court found that there was a substantive evil in the disorderly and unfair administration of justice. 328 U.S. at 335. However, no adequate showing of clear and present danger was made in any of the four cases, and on this basis all the contempt citations were reversed.

"The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to a physical attack upon those
reaction from a movie spectator. In *Terminiello v. Chicago*, the test was applied in the case of a man charged with disorderly conduct. The speaker in *Terminiello* addressed an audience of several hundred people inside an auditorium, and his address stirred the crowd outside to anger. However, the Supreme Court found no danger in the turbulent crowd; speech only becomes unprotected when "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." If an angry, turbulent crowd does not constitute a "clear and present danger," perhaps a passive audience of movie spectators may likewise not rise to the danger level.

Utilized in the context of political advocacy, contempt of court, and hostile audiences, the test, whether best phrased as clear and present, grave and probable, or likely to produce imminent lawless action, is nevertheless not easily applied to a new context. In fact, the several changes in the formula indicate difficulty in applying it in its original context. Some would limit the test to cases of subversive action and contempt of court; others press for its total demise: "Since the test—whatever sense it may have made in the limited context in which it originated—is clumsy and artificial when expanded into a general criterion of permissible speech, the decline in its fortunes... seems to be an intellectual gain." Notwithstanding these restrictive comments, use of the relatively recent test in *Brandenburg v. Ohio*, suggest its viability in certain circumstances. However, the revised formula must be applicable to the situation at hand.

belonging to another sect. When *clear and present danger* of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (emphasis added).

*Id.* at 5. Reversing the conviction on the grounds that the trial court construed the ordinance to permit the conviction if his speech merely "stirred people to anger, invited public dispute, or brought about a condition of unrest," Justice Douglas explained that a conviction resting on any of these grounds could not stand. "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Id.* at 4-5.


*Kalven, "Uninhibited, Robust, and Wide Open"—A Note on Free Speech and the Warren Court, 67 MICH. L. REV. 289, 297 (1968). Kalven praised the Warren court for "the abrogation of outmoded ideas," most significantly, "the great reduction in the status and prestige of the clear-and-present danger test."

And Mr. Justice Douglas, in his concurring opinion in *Brandenburg*, noted, "Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain that it is not reconcilable with the First Amendment in days of peace." 395 U.S. at 452 (Douglas, J., concurring).

*In 1964, Kalven stated that 'it is clear that, as of the judgment in the Times case, it has disappeared.' Kalven, supra note 43, at 16. Brandenburg was decided in 1969.

The *Brandenburg* formula may be current, yet limited to its factual context—political advocacy which incites listeners to unlawful action. But since the earlier versions of the test were
And tests focusing on advocacy and incitement are ill-suited to motion pictures as art or entertainment. Notes one commentator:

The emphasis is all on truth winning out in a fair fight between competing ideas . . . Not all communications are relevant to the political process . . . Art and belles-lettres do not deal in such ideas . . . and it makes little sense here to talk, as Mr. Justice Brandeis did in his great opinion in Whitney, of whether there is still time for counter-speech. Thus there seems to be a hiatus in our basic free-speech theory.\(^7\)

Such criticism alone need not preclude application of the test to art or entertainment.\(^2\) If a test is to be utilized, it will presumably be the Brandenburg formulation.\(^7\) Translated into the context of movie censorship, under Brandenburg, only violent movies that incite viewers to commit criminal acts within a short time would be censored. Without reliable empirical proof of the causation of antisocial conduct, a test resting on such proof would result in automatic rejection of the Chicago ordinance or any comparable scheme.\(^4\) Given the inadequacy of current attempts to show causation it is appropriate to wait for such proof.

II. PERMITTING LIMITED CENSORSHIP TO PROTECT CHILDREN

Without hard empirical evidence to provide a distinction between films which incite viewers to commit criminal acts and films which are harmless, it is sound to deny constitutional validity to a general scheme for censoring violent motion pictures under any existing first amendment analysis. Nevertheless, narrow censorship confined to the protection of children may be constitutional. The Supreme Court has signaled the acceptability of special pro-

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\(^7\) Krislov suggests that those who oppose all obscenity regulation "adopt a thinly veiled form of the same position by suggesting that publications may be censored only upon proof of a 'clear and present danger' of an evil that rather self-evidently is not provable under present conditions in the behavioral sciences." Krislov, supra note 15, at 155.
tection for children from obscenity and has offered a rough delineation of variable obscenity, which enables the state to regulate the dissemination of materials to juveniles which it could not regulate as to adults. It is conceivable that similar variable definitions for censoring violence may be acceptable. However, the case law precedents for variable obscenity have been brought into question by a subsequent change in the definition of obscenity. The weak support offered by such cases is further diluted by the fact that the cases address only the subject of obscenity and not that of violent expression.

It is nevertheless well settled that more stringent controls on communicative materials available to youths may be utilized in certain contexts. At the same time, it is only in relatively narrow and well-defined circumstances that the government may bar such dissemination of protected materials to minors. In other words, while recognizing that different standards may apply to legislation focused on minors, the Supreme Court has not precisely articulated the differences.

In view of the lack of guidelines, it becomes a formidable task to create legislation restricting dissemination of violent materials to minors which

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[Notes and citations omitted for brevity.]
would survive a constitutional challenge, and it appears inevitable that such legislation would be paternally susceptible to a due process challenge on the grounds of vagueness. Mr. Justice Marshall stated in Interstate Circuit that the vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing. A licensing ordinance, even if confined to films exhibited to youths, may well affect the marketability of films for adult audiences and as a consequence affect the first amendment interests of such adults. Moreover, the permissible extent of vagueness is not a function of the extent of the power to regulate or control expression with respect to children; vagueness is not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression.

Just as the Dallas licensing ordinance failed without narrowly drawn, reasonable and definite standards for the officials to follow, so might the

for the assertion that first amendment rights of minors are not coextensive with those of adults. Id. at n.11. Mr. Justice Stewart's concurring opinions in Tinker and Ginsberg are quoted for the idea that a child is like someone in a captive audience, not possessed of full capacity for individual choice. Id. If a minor's viewing of a violent movie is "like someone in a captive audience," it may qualify as one of the unnamed "precisely delineated areas" which may be regulable. Id. The finding of mootness in Jacobs v. Board of School Comm., 490 F.2d 601 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975) may be another indication of a present interest in avoiding difficult decisions on first amendment rights of children. Jacobs concerned a high school underground newspaper. An earlier precedent for regulating matters where minors' first amendment rights are involved is Prince v. Massachusetts, 31 U.S. 158 (1944), in which the Court held that parents could not ignore child labor laws in order to distribute religious literature. Prince can be interpreted as balancing first amendment rights with the concerns of child labor laws. The Fifth Circuit opinion in Interstate Circuit, 366 F.2d 590 (1966), rev'd and remanded, 390 U.S. 676 (1968), considered arguments based on Prince but rejected them in light of the long history of the misuse of censorship.

Censorship regulation must avoid the vices of vagueness and overbreadth. See Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844 (1970); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 167 (1960). The following are examples of censorship cases in which the vagueness doctrine has been used: Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) ("sacriligious"); Gelling v. Texas, 343 U.S. 960 (1952) ("of such character as to be prejudicial to the best interests of the people"); Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954) ("tend to corrupt morals").

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See note 41 infra.


*9* Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run that risk, he might choose nothing but the innocuous, perhaps save for the so-called "adult" picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults—perhaps a "Viva Maria"—may contract to show only the totally inane. The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youths under 16.

Id. at 684.

*Id. at 688-89.*

*Id. at 690.*
Chicago ordinance be fatally vague. In the absence of clear-cut empirical evidence or articulated standards of law, it follows that almost any legislative attempt to impose restrictions on expression beyond the scope of obscenity or variable obscenity would, in the words of the Supreme Court, set the censor adrift upon a boundless sea. Consequently, even if a form of censorship limited to children is theoretically permissible, a sufficiently limited ordinance may be impossible to draft or to apply, given the current lack of standards inherent in any definition of violent media harmful to children.

**CONCLUSION**

Because empirical data cannot offer conclusive proof of either the presence or absence of a causal connection between viewing violent movies and the occurrence of serious antisocial behavior, and because legal precedents are slim, carving out a new category of nonprotected expression is not justifiable. In addition, it seems erroneous to conclude that lawless action is imminent when empirical research denies such clarity. Although the state's special interest in children may justify some very limited form of censorship which would affect only minors, a sufficiently limited ordinance may be impossible to draft and impractical in application. As a model, the Chicago ordinance does not appear to be narrowly drawn and, therefore, if challenged in court, may fail on grounds of vagueness. In the absence of ascertainable standards, the risk of the censors intruding into protected speech looms too large.

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49 A judicial decision on the constitutionality of the Chicago ordinance may well rest on grounds of vagueness. This was the approach of the Court in *Interstate Circuit*, in which Mr. Justice Marshall discussed the vices of vagueness. He also noted,

Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.

390 U.S. at 689.

The Chicago definition is indeed vague. Although the ordinance includes a lengthy list of descriptive terms, the very inclusiveness of the list makes it difficult to tell what the prohibited expression is supposed to be. Furthermore, the standard of lacking serious literary, artistic, political, or scientific value is even more vague. This standard has been accepted in the area of obscenity regulation, but it may not be found so acceptable in this new area. In addition to, or instead of, being vague, the standard may be overbroad. If it invades areas of protected speech or has a chilling effect, the ordinance may be invalid for facial overbreadth. Vagueness and related overbreadth may, therefore, be the greatest weakness in the Chicago ordinance.