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MISSOURI STATUTE ATTACKS "VIOLENT" VIDEOS: ARE FIRST AMENDMENT RIGHTS IN DANGER?

I. INTRODUCTION

When a St. Louis, Missouri mother came home from work one day, she was horrified to find her 12-year old son and a group of his friends gathered around the family's television set, watching a movie in which a graphic rape was followed by the victim's revenge: castration of her attackers.¹ Compounding her consternation was the realization that her child had rented this so-called "slasher" film at the corner grocery store. Her reaction led one of her friends to contact Missouri State Representative Douglas Harpool, who sponsored a bill to address the mother's concerns.²

When Missouri Governor John Ashcroft signed the resulting "Missouri Violence Bill"³ ("Bill") into law on June 20, 1989,⁴ he described the Bill's provisions as dealing with a "new class of pornography . . . that cater[s] to a morbid interest in violence."⁵ Harpool stated, "Missouri is the first state in the nation to declare excessively violent movies off-limits to minors. It will not be the last . . . I believe Missouri has taken a bold and imperative step."⁶

While those affected by the Bill may question if this action is a "bold and imperative step," the Bill definitely seeks changes in the way that videocassettes are rented, displayed and sold. Under the Bill's provisions, videocassettes, other video reproduction devices and their jackets, cases or coverings are to be displayed or maintained in a separate area

1. *No 'Slasher' Movies for Missouri Kids*, GOVERNING, Aug. 1989, at 13-14.

2. *Id.* at 14.

3. Conference Committee Substitute for House Committee Substitute for House Bill No. 225, 85th General Assembly. The bill repealed MO. REV. STAT. (Supp. 1988) § 573.010, relating to pornography and enacted three new sections known as §§ 573.010, 573.011 and 573.012. This comment only addresses § 573.011.

4. "Show Me" State Won't Show Violence, HOLLYWOOD REP., Aug. 25, 1989, at 22.

5. "Ashcroft Signs Video Bill," United Press Int'l, June 21, 1989 (NEXIS, videos).

6. *Slasher Video Law Draws Contrasting Reviews*, THE STATESMAN, July 1989, at 6. Other states have considered or are considering video violence bills similar to the one enacted in Missouri. According to Business Week, video violence bills were pending in at least eight states, including Ohio, Massachusetts and Texas. BUS. WEEK, Sept. 11, 1989, at 34. In the early part of 1989, the Texas Legislature considered and later defeated Texas House Bill 328, which would have forbidden the sale or rental to minors of videocassettes defined as "graphically violent." Text of defeated Texas House Bill 328, proposed amendment to Penal Code, ch. 43, § 43.27.

and not rented or sold to persons under the age of seventeen if they meet the following three-part violence test:

- (1) Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interest in violence for persons under the age of seventeen; and
- (2) It depicts violence in a way which is patently offensive to the average person applying contemporary adult community standards with respect to what is suitable for a person under the age of seventeen; and
- (3) Taken as a whole, it lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen.⁷

On August 21, 1989, one week before the Bill was to take effect, the Motion Picture Association of America ("MPAA"), the Video Software Dealers Association ("VSDA") and the Missouri Retailers Association ("MRA") filed a suit to challenge the constitutionality of the Missouri statute.⁸ In a press release announcing the lawsuit, *Video Software Dealers Association v. Webster*,⁹ MPAA's president and chief executive officer Jack Valenti stated, "We have joined in this action because we believe the Missouri bill impermissibly extends the boundaries of content regulation far beyond the standards established by the Supreme Court in *Miller v. California*¹⁰ and as a result infringes on the First Amendment freedoms."¹¹

On August 24, 1989, Judge Brook Bartlett of the United States District Court for the Western District in Kansas City, Missouri heard arguments from both sides on the merits of an injunction preventing enforcement of the Bill.¹² James Mercurio, a Washington attorney repre-

7. MO. REV. STAT. (Supp. 1990) § 573.011(1). The Missouri statute closely parallels defeated Texas House Bill 328. Under the Texas bill,

'Graphically violent' means material or a performance that:

(A) depicts, displays, describes, represents, or portrays violence against persons within a sexual context, actual human execution or violent death, cannibalism, dismemberment, sexual mutilation, animal slaughter, or ritualistic killing;

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

(C) is utterly without redeeming social value for minors.

Texas House Bill 328, proposed amendment to Penal Code, ch. 43, § 43.27.

8. HOLLYWOOD REP., Aug. 28, 1989, at 7.

9. No. 89-4353-CV-C-9 (W.D. Mo. Aug. 25, 1989).

10. 413 U.S. 15 (1972). In *Miller*, the United States Supreme Court created a three-part standard by which local communities could determine if the subject matter in question was obscene.

11. Joint press release from MPAA, MRA and VSDA dated August 21, 1989, and entitled "Industry Coalition Challenges Missouri 'Violence' Statute."

12. Kansas City Times, Aug. 25, 1989, at 4, col. 3.

senting the interests of the MPAA, VSDA and MRA, emphasized the Bill's vague and overly broad reach: "Is the violence of a football game something that comes under this law? We don't know. [The Missouri Violence Bill] is simply censorship of a form of rather ill-defined content."¹³ Kathy Mescher, an assistant Missouri attorney general, countered that the statute did not violate the Missouri and United States Constitutions simply because the law "breaks new ground" in regulating minors' access to violent videos. "Yes, it is a new law," Mescher stated, "but so were the laws we have that regulate pornography If we use one test for pornography, we can use one test for violence."¹⁴

In issuing a temporary restraining order delaying implementation of the Missouri Violence Bill, Judge Bartlett said the law needed further examination since it could have a chilling effect on first amendment rights.¹⁵ "The gray areas are the important ones in this case," the judge stated at the hearing, "because that's where a prosecutor and store owner could have a difference of opinion which could get the store owner in trouble."¹⁶ The restraining order is binding on the state Attorney General and "a class defined by the judge as all persons in the State who are empowered to enforce the provisions" of the Bill.¹⁷

This comment will analyze why Judge Bartlett should rule the Missouri Violence Bill unconstitutional and why failure to do so could severely erode first amendment expression by those whose views may be unpopular with a majority of the public.

II. FIRST AMENDMENT PROTECTS ALL BUT NARROWLY DEFINED FORMS OF SPEECH

On its face, the first amendment to the United States Constitution provides a strong prohibition against *any* governmental action regulating speech or the press: "Congress shall make no law . . . abridging the freedom of speech, or of the press"¹⁸ The Supreme Court emphasized this point in *Police Dept. of Chicago v. Mosley*,¹⁹ a case involving a Chicago ordinance that limited picketing based on the subject matter of

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Press release Judge Bartlett ordered issued on August 25, 1989, and entitled "Court Restricts Enforcement of Missouri Video Violence Act." According to attorneys involved with the case, Judge Bartlett was expected to hear arguments in the case in January or February of 1990, with a final ruling expected later this year.

18. U.S. CONST. amend. I.

19. 408 U.S. 92 (1972).

the protest.²⁰ In overturning the statute, the Court said, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."²¹

From this broad definition of protected expression, the Supreme Court carved out narrow exceptions to the rule in *Chaplinsky v. New Hampshire*.²²

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.²³

In *New York v. Ferber*,²⁴ the Supreme Court added child pornography to the list of speech unprotected by the first amendment.

III. MISSOURI VIOLENCE BILL DOES NOT FALL INTO ANY OF THE EXCEPTIONS TO FIRST AMENDMENT EXPRESSION

A. *Clear and Present Danger of Inciting an Imminent Breach of the Peace*

Under the clear and present danger exception to the first amendment, certain speech may be restricted if the speech in question presents a clear and present danger of inciting an immediate breach of peace.²⁵ In *Whitney v. California*,²⁶ the United States Supreme Court considered a case in which a woman was convicted under the Criminal Syndicalism

20. *Id.* at 92-93. At issue in this case was the constitutionality of a Chicago ordinance stating that a person had committed disorderly conduct when he knowingly

(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute Municipal Code, c.193-1(i).

(cited in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92-93 (1972)).

21. *Id.* at 95.

22. 315 U.S. 568 (1942).

23. *Id.* at 571-72 (footnote omitted). The Supreme Court cited with favor the majority of this quotation in *Miller v. California*, 413 U.S. 15, 20-21 (1973), a landmark case which set up the standard for judging allegedly obscene matter, and in *New York v. Ferber*, 458 U.S. 747, 754 (1982), a case challenging the constitutionality of a New York child pornography law.

24. 458 U.S. 747 (1982).

25. *Chaplinsky*, 315 U.S. at 571-72.

26. 274 U.S. 357 (1927). *Whitney* was later overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Act of California²⁷ because of her involvement and leadership in the Communist Labor Party. Although the moderate viewpoints she advocated were defeated and more radical views adopted, Whitney remained a member of the organization. At her trial, however, she testified "that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence."²⁸ In upholding the conviction, the Supreme Court stated the statute was not an unwarrantable infringement of any right of free speech, assembly or association.²⁹

In a concurring opinion, Justice Brandeis (joined by Justice Holmes) provided his "clear and present danger" exception which allowed regulation of speech in certain situations. "In order to support a finding of clear and present danger[,] it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."³⁰

During the decades that followed, the courts grappled with what constituted a clear and present danger with varying results.³¹ In *Dennis v. United States* ("*Dennis*"),³² a case decided during the height of the Cold War that involved the leaders of the Communist Party in the United States, the Court noted that the right of free speech was not an unlimited right, but occasionally must be subordinated to other values and considerations.³³ "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of

27. 1919 Cal. Stat., ch. 58, p. 88. The pertinent provisions of the Act stated:

[s]ection 1. term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change. Sec. 2. Any person who: . . . 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism. . .

Is guilty of a felony and punishable by imprisonment.

(cited in *Whitney v. California*, 274 U.S. 357, 359-60 (1927)).

28. *Whitney*, 274 U.S. at 366.

29. *Id.* at 372.

30. *Id.* at 376.

31. For example, see *Fiske v. Kansas*, 274 U.S. 380 (1927) (holding unconstitutional an application of the Kansas version of criminal syndicalism law); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (setting aside a conviction under Oregon's criminal syndicalism legislation); and *Herndon v. Lowry*, 301 U.S. 242 (1937) (overturning a conviction for an "attempt to incite insurrection" based on first amendment grounds and vagueness).

32. 341 U.S. 494 (1951).

33. *Id.* at 503.

free speech as is necessary to avoid the danger."³⁴ In *Dennis*, the petitioners intended to overthrow the United States government as quickly as possible.³⁵ The Justices determined that the situation posed a very serious threat to the future of the country.³⁶ Thus, the Court determined, the petitioners' conspiracy and advocacy "created a 'clear and present danger' of an attempt to overthrow the Government by force and violence."³⁷

The current standard for the clear and present danger test was stated in *Brandenburg v. Ohio*,³⁸ in which the Supreme Court reviewed the case of a Ku Klux Klan ("KKK") leader who was convicted under the Ohio Criminal Syndicalism statute³⁹ for leading a KKK rally.⁴⁰ In his speech, the KKK leader told the white-hooded listeners:

The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi⁴¹

In overturning the conviction and expressly overruling *Whitney*, the Court considered decisions⁴² which held that freedom of speech and freedom of the press do not permit a state to forbid advocacy of the use of

34. *Id.* at 510.

35. *Id.* at 516-17.

36. *Id.*

37. *Dennis*, 341 U.S. at 516-17.

38. 395 U.S. 444 (1969).

39. The statute forbade "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform and voluntarily assembl[ing] with any society, group, assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." OHIO REV. CODE ANN. § 2923.13. *Brandenburg*, 395 U.S. at 444-45.

40. *Brandenburg*, the appellant in this case, telephoned a reporter at a local television station and invited him to attend the KKK rally. The reporter and a cameraman attended and filmed the event. Part of the film was later broadcast on the local TV station and a national network. The prosecutor based his case on the films and on testimony identifying *Brandenburg* as the person who spoke with the reporter and at the rally. *Id.* at 445.

41. *Id.* at 446.

42. See *Herndon v. Lowry*, 301 U.S. 242, 259-61 (1937), *Bond v. Floyd*, 385 U.S. 116, 134 (1966), and *Noto v. United States*, 367 U.S. 290 (1961). In *Noto*, the court stated, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448 (citing *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

force or violation of the law "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁴³

Since the Ohio statute punished mere advocacy and forbade "assembly with others merely to advocate the described type of action[.]" the Court said that such a statute fell "within the condemnation of the First and Fourteenth Amendments."⁴⁴ The Court then overruled *Whitney v. California* since its contrary teachings could not be supported by recent Court decisions.⁴⁵

1. Recent Court Decisions Have Held that Contested Movies and Television Shows Did Not Meet the Clear and Present Danger Test

Although the United States Supreme Court and various courts of appeal have not considered whether the violence portrayed in movies, television or videocassettes is subject to a "clear and present danger" test, several cases have been decided at the federal district court and state appellate level.⁴⁶

In *Zamora v. CBS*,⁴⁷ a United States District Court considered a case where a 15-year old boy and his parents sued the three major television networks.⁴⁸ The boy had been convicted of killing his 83-year old neighbor.⁴⁹ The suit claimed that the boy's violent sociopathic behavior was the result of his becoming involuntarily "addicted to and 'completely subliminally intoxicated' " by extensive viewing of television violence during the previous ten years.⁵⁰

The federal district court noted that "there is ' . . . no doubt that

43. *Brandenburg*, 395 U.S. at 447-48. In the footnote directly following this sentence, the court said,

[i]t was on the theory that the Smith Act, 54 Stat. 670, 18 U.S.C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis v. United States*, 341 U.S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates v. United States*, 354 U.S. 298, 320-24 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

44. *Brandenburg*, 395 U.S. at 449.

45. *Id.*

46. *Zamora v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979) and *Olivia N. v. NBC*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1982) are discussed later in this subsection.

47. 480 F. Supp. 199 (S.D. Fla. 1979).

48. At that time, the major TV networks were Columbia Broadcasting System ("CBS"), American Broadcasting Company ("ABC") and National Broadcasting Company ("NBC").

49. *Zamora*, 480 F. Supp. at 200.

50. *Id.*

moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment'⁵¹ In the court's opinion, the action alleged in the plaintiffs' complaint did not appear to fall into any of the exceptions to first amendment free speech outlined in *Chaplinsky*.⁵² The complaint did not suggest that the boy's killing of the elderly woman was a reaction to a specific program of an inflammatory nature or that the minor was "incited" or goaded into unlawful behavior by a particular call to action.⁵³ In dismissing the action, the court stated:

this Court lacks the legal and institutional capacity to identify isolated depictions of violence, let alone the ability to set the standard for media dissemination of items containing "violence" in one form or the other The importance of the First Amendment to our freedoms as a whole cannot be over-emphasized. It is the lens through which the operations of government are viewed and the support and protection for the commentary which may result. Thus any action, legislative or otherwise[,] which has as its purpose placing limitations upon freedom of expression must be viewed with suspicion.⁵⁴

In *Olivia N. v. NBC*,⁵⁵ the California Court of Appeals considered a case in which a nine-year old girl was forcibly "artificially raped" with a bottle by minors at a San Francisco beach.⁵⁶ The plaintiff alleged that the assailants had viewed and discussed an artificial rape scene in *Born Innocent*, a television film about the harmful effect of a state-run home upon an adolescent girl who had become a ward of the state.⁵⁷

51. *Id.* at 203 (citing *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948)).

52. "Those areas which are not afforded constitutional protection include 'the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words.'" *Zamora*, 480 F. Supp. at 202 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

53. *Zamora*, 480 F. Supp. at 202.

54. *Id.* at 203.

55. 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1982).

56. *Id.* at 492, 178 Cal. Rptr. at 888 (citing *Olivia N. v. NBC*, 74 Cal. App. 3d 383, 386, 141 Cal. Rptr. 511 (1977)).

57. *Id.* at 491-92, 178 Cal. Rptr. at 891. The court described the action that took place in the movie:

[i]n one scene of the film, the young girl enters the community bathroom of the facility to take a shower. She is then shown taking off her clothes and stepping into the shower, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes across her face. Four adolescent girls are standing across from her in the shower room. One of the girls is carrying a 'plumber's helper,' waving it suggestively by her side. The four girls violently attack the younger girl, wrestling her to the floor. The young girl is shown naked from the waist up, struggling as the older girls force her legs apart. Then, the television film shows the girl with the plumber's helper making intense thrusting motions with the handle of the plunger

Before impaneling a jury, the trial court viewed the film, determined that the film did not serve to incite the violence and depraved conduct committed against the plaintiff, and rendered judgment for the defendants.⁵⁸ The court of appeals reversed, stating that the judge violated the appellant's right to trial by jury by acting as a fact finder.⁵⁹

On remand, plaintiff's attorney acknowledged in his opening statement his inability to meet the *Brandenburg* incitement test.⁶⁰ After determining that the plaintiff had to prove incitement in order to win the case, the court granted defendant's motion for a judgment of nonsuit and dismissed the action.⁶¹

On appeal, the plaintiff contended that where there was negligence, liability could constitutionally be imposed despite the absence of proof of incitement as defined in *Brandenburg*.⁶² The court rejected the argument, stating "the chilling effect of permitting negligence actions for a television broadcast is obvious. 'The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.'" ⁶³

The court noted that the effect of imposing liability "could reduce the [United States] adult population to viewing only what is fit for children."⁶⁴ The California Court of Appeals applied the *Brandenburg* incitement test to uphold the trial court's determination that the first amendment barred the plaintiff's claim.⁶⁵

Based on judicial analysis of relevant precedent in *Zamora* and *Olivia N.*, and on the strict *Brandenburg* requirement that unprotected speech must be likely to incite or produce imminent lawless action,⁶⁶ the

until one of the four girls says, 'That's enough.' The young girl is left sobbing and naked on the floor.

Id.

58. *Olivia N.*, 126 Cal. App. 3d at 490, 178 Cal. Rptr. at 890.

59. *Id.*, 178 Cal. Rptr. at 890.

60. *Id.* at 491, 178 Cal. Rptr. at 890.

Appellant's counsel stated that: 'The plaintiffs in this case at no time in this trial are going to prove what is known as 'incitement.' At no time in this trial are we going to prove that either through negligence or recklessness there was incitement, which incitement is telling someone to go out encouraging them, directing them, advising them, that there will be no evidence that NBC ever told anybody or incited anyone to go out and rape a girl with an artificial instrument or in any other way.'

Id. at 491 n.1, 178 Cal. Rptr. at 890 n.1.

61. *Id.* at 491, 178 Cal. Rptr. at 890.

62. *Olivia N.*, 126 Cal. App. 3d at 492, 178 Cal. Rptr. at 891.

63. *Id.* at 494, 178 Cal. Rptr. at 892 (citing *New York v. Sullivan*, 376 U.S. 254, 277 (1964)).

64. *Id.* at 494-95, 178 Cal. Rptr. at 893.

65. *Id.* at 495, 178 Cal. Rptr. at 893.

66. *Brandenburg*, 395 U.S. at 447.

Missouri Violence Bill and the videocassettes the Bill attempts to regulate would not likely fall within this exception to the first amendment.

As the United States Supreme Court noted in *Joseph Burstyn, Inc. v. Wilson*,⁶⁷ motion pictures are included in the free speech and free press guaranty of the first and fourteenth amendments.⁶⁸ Thus, despite the fact that legislators or their constituents may not approve of a certain videocassette, the Supreme Court has consistently held that in areas outside obscenity, "the fact that protected speech may be offensive to some does not justify its suppression."⁶⁹ Short of a videotape urging viewers to immediately go out and harm or kill a certain minority group, it is inconceivable that any videocassette could reach the level of incitement required by *Brandenburg*⁷⁰ to fall within the clear and present danger test and thus be subject to the kind of regulation contemplated by the Missouri Bill.

B. *Fighting or Insulting Words*

The fighting or insulting words exception to the first amendment also does not apply to "violent" videocassettes because the videos are not intended or likely to produce *imminent* disorder.⁷¹ The first major case in this area, *Chaplinsky v. New Hampshire*,⁷² carved out an exception to the first amendment for "fighting words." In that case, the Supreme Court upheld the conviction of a Jehovah's Witness who was distributing religious literature and attracting a "restless crowd" by calling religion a "racket."⁷³

In an exchange with the city marshal, Chaplinsky called the marshal a "damned racketeer" and a "damned Fascist."⁷⁴ Based on these statements, Chaplinsky was convicted under a state law which forbade any person from using offensive, derisive or annoying language to another person who was lawfully in a public place.⁷⁵ In affirming the conviction, the Court stated that since the statute was narrowly drawn and punished specific conduct within the domain of state power, the statute

67. 343 U.S. 495 (1952).

68. *Id.* at 502.

69. *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977).

70. *Brandenburg*, 395 U.S. at 447.

71. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

72. 315 U.S. 568 (1942).

73. *Id.* at 569-70.

74. *Id.* at 569.

75. *Id.* (citing ch. 378, § 2, of the Public Laws of New Hampshire).

did not violate the constitutional right of free expression.⁷⁶

Despite the Court's holding, *Chaplinsky* has not been relied upon by the Court in its subsequent examinations of offensive speech issues.⁷⁷ For example, in the landmark case of *Cohen v. California*,⁷⁸ the Supreme Court considered the conviction of a man under a California law for "willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct"⁷⁹ Cohen's illegal conduct was wearing a jacket with the words "Fuck the Draft" in a corridor of the Los Angeles County Courthouse.⁸⁰

In overturning the conviction, the Court said that to eliminate speech solely for protecting others from hearing it, the government must show that "substantial privacy interests are being invaded in an essentially intolerable manner"⁸¹ The Court noted that while the word displayed by Cohen is often used in a personally provocative fashion, no person present could reasonably have regarded the words on Cohen's jacket as a direct insult.⁸² Thus, the Court concluded that an "'undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression.'" ⁸³

In a similar case decided two years later, *Hess v. Indiana*,⁸⁴ the Supreme Court overturned the conviction⁸⁵ of an antiwar demonstrator on a college campus who loudly stated, "We'll take the fucking street later (or again)."⁸⁶ The Court found that, "at worst, [the statement] amounted to nothing more than advocacy of illegal action at some indefinite future time."⁸⁷

The Court found that since there was no evidence or rational inference that his words were intended to or likely to produce "imminent disorder, those words could not be punished by the State on the ground that they had a 'tendency to lead to violence.'" ⁸⁸

Based on the language of the fighting and insulting words exception,

76. *Id.* at 573.

77. G. GUNTHER, CONSTITUTIONAL LAW 1049 (11th ed. 1985).

78. 403 U.S. 15 (1971), *reh'g denied*, 404 U.S. 876 (1971).

79. *Id.* at 16 n.1 (citing CAL. PENAL CODE § 415 (West 1982)).

80. *Cohen*, 403 U.S. at 16.

81. *Id.* at 21.

82. *Id.* at 20.

83. *Id.* at 23 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969)).

84. 414 U.S. 105 (1973).

85. *Id.* at 105 n.1. Hess was convicted under the Indiana disorderly conduct statute.

86. *Hess*, 414 U.S. at 107.

87. *Id.* at 108.

88. *Id.* at 109.

videocassettes would have to contain *words* which would tend to incite imminent disorder for regulation to be allowed under this exception. Yet, according to the plain language of the Bill, the statute is designed to regulate videocassettes containing *action* that "depicts violence in a way which is patently offensive" ⁸⁹

The sponsor of the Missouri Violence Bill, State Representative Douglas Harpool, noted in an article he wrote after passage of the Bill by the Missouri legislature that the Bill was designed to regulate movies which contain such acts as "graphic sexual torture, bondage, rape, cannibalism, human brutality and mutilation." ⁹⁰ Nowhere in Harpool's article or other articles written in support of the measure do the supporters mention regulating *words*. Thus, based on the statute's language and supporting material, the Bill does not fall under the fighting or insulting words exception to the first amendment.

C. Profanity

Since *Chaplinsky*, a majority of the Supreme Court has not addressed the profane exception to the first amendment as a separate issue. Instead, courts have tended to include words which might be considered "profane" under the clear and present danger or fighting words exceptions. For example, in a trilogy of cases decided in 1972, *Rosenfeld v. New Jersey*, ⁹¹ *Lewis v. New Orleans* ⁹² and *Brown v. Oklahoma*, ⁹³ the Court considered the convictions for offensive language under state statutes forbidding such conduct. ⁹⁴

The Trilogy

a. *Rosenfeld v. New Jersey*

Rosenfeld addressed a public school board meeting attended by about 150 people, including women and children. ⁹⁵ During the course of his remarks, he used the word " 'm----- f-----' " on four occasions to describe the teachers, the school board, the town and his own country. ⁹⁶

89. MO. REV. STAT. § 573.011(1) (Supp. 1990).

90. *Slasher Video Law Draws Contrasting Reviews*, THE STATESMAN, July 1989, at 6.

91. 408 U.S. 901 (1972).

92. *Id.* at 913-14.

93. *Id.* at 914.

94. *Id.* at 902-03.

95. *Id.* at 904.

96. 408 U.S. at 904.

b. *Lewis v. New Orleans*

The New Orleans police were in the process of arresting Lewis' son. She intervened and addressed the police officers as "'g-- d--- m----- f----- police.'"⁹⁷

c. *Brown v. Oklahoma*

Brown spoke to a large group of students gathered in the University of Tulsa chapel. During a question and answer period, he referred to some policemen as "'m----- f----- fascist pig cops'" and to a particular Tulsa police officer as that "'black m----- f----- pig'"⁹⁸

The Court summarily vacated and remanded the three convictions for the use of offensive language.⁹⁹ One of the dissenting opinions,¹⁰⁰ however, argued that Lewis' words were "fighting words" and that the words in the other two cases were "lewd and obscene" and "profane" under the *Chaplinsky* standard.¹⁰¹

As with the fighting or insulting words exception, the emphasis of the profane exception is on the *words* being spoken. The dissent's opinion in the trilogy of cases cited above emphasized the language aspect of the profane exception. "[T]he exception to the First Amendment protection is not limited to *words* whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous *language* calculated to offend the sensibilities of an unwilling audience."¹⁰²

Based on the decisions in these cases, it seems clear that the profane exception's emphasis is on *language* and not on the *action* taking place in videocassettes. Thus, while so-called violent videos may contain strong language, the Missouri Violence Bill's focus is not to regulate movies with strong language, but the certain *action* depicted in the videocassettes.¹⁰³ Thus, the Bill does not fall under the profane exception to the first

97. *Id.* at 909 (Rehnquist, J., dissenting). Lewis was convicted under a New Orleans ordinance providing:

[i]t shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty. § 49-7, Code of City of New Orleans.

Id. at 909-10.

98. *Id.* at 911.

99. *Id.* at 901-02, 913-14.

100. This dissenting opinion was written by Justice Rehnquist.

101. 408 U.S. at 909-13.

102. *Id.* at 905 (Powell, J., dissenting).

103. As stated earlier, the Missouri Violence Bill seeks to regulate videocassettes which depict violence that is patently offensive. MO. REV. STAT. § 573.011(1) (Supp. 1990).

amendment.

D. Libel

Libel has been defined as "a maliciously written or printed publication which tends to blacken a person's reputation"¹⁰⁴ In *New York Times v. Sullivan*,¹⁰⁵ the Supreme Court considered the case of Montgomery, Alabama city commissioner, L.B. Sullivan ("Sullivan") who claimed he had been libeled by a full-page advertisement which was published in the *New York Times*.¹⁰⁶ Although Sullivan was never mentioned by name in the pro-civil rights advertisement which alleged police abuses against Martin Luther King, Jr. and civil rights protesters, Sullivan claimed the statements¹⁰⁷ referred to him since his duties included supervising the city police department.¹⁰⁸

At the state trial, it was undisputed that some of the statements in the paragraphs did not accurately describe events which occurred in Montgomery.¹⁰⁹ Sullivan, however, made no effort at trial to prove he had suffered actual pecuniary damages from the alleged libel.¹¹⁰

The trial court submitted the case to the jury with the instructions that the statements in the advertisement were "libelous per se" and not privileged. Thus, the petitioners could be held liable if they had published the ad and the statements were made about Sullivan.¹¹¹ The court also stated that "falsity and malice are presumed" and that the jurors did not have to differentiate between compensatory and punitive damages.¹¹²

104. BLACK'S LAW DICTIONARY 824 (5th ed. 1979).

105. 376 U.S. 254 (1964).

106. *Id.*

107. Two of the ten paragraphs in the ad were the basis of the libel claim. They read: In Montgomery, Alabama, after students sang 'My Country, Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering,' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*. . . .
376 U.S. at 257-58.

108. *Id.* at 258.

109. *Id.*

110. *New York Times*, 376 U.S. at 260. Approximately 394 copies of the edition of the *Times* which contained the advertisement were circulated in Alabama. Of these, about 35 copies were circulated in Montgomery County. The total circulation for the *Times* on that date was about 650,000 copies. *Id.* at 260 n.3.

111. *Id.* at 262.

112. *Id.*

After its deliberations, the jury awarded Sullivan \$500,000.¹¹³ The Alabama Supreme Court affirmed¹¹⁴ and the petitioners appealed to the United States Supreme Court.¹¹⁵

In analyzing the case, the Supreme Court noted "a profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹¹⁶ The Court then set out the new federal rule that prohibits public officials from recovering damages for a defamatory falsehood relating to official conduct unless the official can prove that the statement was made with "actual malice."¹¹⁷ The Court defined actual malice as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not."¹¹⁸

In overturning the decision, the Court concluded that the facts did not support a finding of actual malice.¹¹⁹ At the most, the evidence against the Times supported "a finding of negligence for failing to discover the misstatements in the advertisements, and [was] constitutionally insufficient to show the recklessness . . . required for a finding of actual malice."¹²⁰ In *Curtis Publishing Co. v. Butts*,¹²¹ the Court considered the case of a Saturday Evening Post feature article which alleged that the University of Georgia athletic director attempted to "fix" a football game between his school and the University of Alabama.¹²² The Court analyzed the application of *New York Times* to the present case and then fashioned a new rule for a "public figure" who is not a public official.¹²³ Such public figures may recover damages for a defamatory falsehood when substantial danger to the plaintiff's reputation is apparent "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."¹²⁴

In affirming the lower court's ruling that the athletic director had been libeled, the Court noted ample evidence in *Curtis Publishing* indi-

113. *Id.* at 256.

114. *Id.* at 263.

115. *New York Times*, 376 U.S. at 264.

116. *Id.* at 270.

117. *Id.* at 279-80.

118. *Id.* at 280.

119. *Id.* at 286.

120. *New York Times*, 376 U.S. at 288.

121. 388 U.S. 130 (1967), *reh'g denied*, 389 U.S. 889 (1967).

122. *Id.* at 135.

123. *Id.* at 155.

124. *Id.*

cating a serious departure from good investigative standards of accuracy.¹²⁵

As cases such as *New York Times* and *Curtis Publishing* illustrate, libel law applies to a narrow range of cases in which a statement was made with actual malice¹²⁶ or the individual did not properly investigate the defamatory falsehood before reporting it to the public.¹²⁷ Although characters such as Jason in the *Friday the 13th*¹²⁸ movies, Michael Myers of the *Halloween*¹²⁹ movies¹³⁰ or Freddy Krueger of *Nightmare On Elm Street*¹³¹ fame may have "actual malice" against their hapless victims, these fictional characters are just that — fictional. The libel exception conceivably applies only to those videocassettes based on readily identifiable real-life events and individuals.¹³² Even then, the contested depiction in the videocassette would have to meet the strict standards outlined in *New York Times*¹³³ and *Curtis Publishing*¹³⁴ before the statements or action could be considered libelous.

While a very small percentage of videocassettes *might* include depictions which fall into this category,¹³⁵ trying to include the Bill in the libel exception would go against the stated intentions of the Bill's sponsor¹³⁶ since this would effectively gut the Bill and its scope of regulation. This is because many of the movies which the Bill's sponsor found objectionable¹³⁷ are based on obviously fictitious characters and story lines.¹³⁸ Thus, if the Bill was meant to fall under the libel exception, the vast

125. *Id.* at 158.

126. *New York Times*, 376 U.S. at 279-80. As stated above, this applies if the individual is a public official.

127. *Curtis Publishing*, 388 U.S. at 155.

128. *Friday the 13th* and its seven sequels (*II* to *VIII*) were released by Paramount in 1980, 1981, 1982, 1984, 1985, 1986, 1988 and 1989, respectively.

129. *Halloween* was released by Compass International Pictures in 1978. Universal Pictures released *Halloween 2* and *3* in 1981 and 1983, respectively. Galaxy International released *Halloween 4* in 1988 and *Halloween 5* in 1989.

130. These were two of the movie series which the Missouri Bill's sponsor referred to in an article in *THE STATESMAN*, July 1989, at 6.

131. *Nightmare on Elm Street I* to *V* were released by New Line Cinema in 1984, 1985, 1987, 1988 and 1989, respectively.

132. See *supra* text accompanying notes 104-27 for libel law requirements.

133. See *supra* note 132.

134. *Id.*

135. If any issue was raised, it would more likely be the right to privacy or the right to publicity. These issues will not be addressed in this comment.

136. The Bill's sponsor, Representative Douglas Harpool, stated, "Missouri is the first state in the nation to declare excessively violent movies off-limits to minors." *Slasher Video Law Draws Contrasting Reviews*, *THE STATESMAN*, July 1989, at 6.

137. As mentioned earlier, Representative Harpool mentioned *Friday the 13th* and *Halloween* and their sequels in an article he wrote defending the Bill after it was passed. *Slasher Video Law Draws Contrasting Reviews*, *THE STATESMAN*, July 1989, at 6.

majority of so-called violent videos would escape regulation since the underlying stories and characters are based on a creative screenwriter's imagination, not reality.

In addition, it requires a long stretch to assume that the Missouri Violence Bill can skirt first amendment objections to regulation of speech by pigeonholing "violent" videos into the libel exception of *New York Times*¹³⁹ and *Curtis Publishing*.¹⁴⁰ The Bill's own language attempts to regulate the violence in videos,¹⁴¹ not material that could conceivably libel or defame someone. Thus, the Missouri Violence Bill is not protected by the libel exception to the first amendment.

E. Bill's Restrictions Cannot Be Justified Under Obscenity Exception

As the Supreme Court held in such cases as *Chaplinsky*,¹⁴² *Roth v. United States*,¹⁴³ and *Miller v. California*,¹⁴⁴ obscenity is not protected by the first amendment. Based on the statutory language of the Bill, the drafters of the Missouri statute chose to base their restrictions on the obscenity standard created by the Supreme Court in *Miller*.¹⁴⁵ The standard provided by the *Miller* court depends on

whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁴⁶

In the Missouri Violence Bill, the drafters generally substituted the word "violence" for "sex."¹⁴⁷

138. For example, in the *Friday the 13th* movies, Jason keeps coming back to kill his hapless victims, despite the fact that he has received fatal wounds on numerous occasions.

139. See *supra* text accompanying notes 104-27 for libel law requirements.

140. See *supra* note 132.

141. The Bill would regulate videocassettes if they meet a three-part test which includes appealing to a "morbid interest in violence" and "depicting violence in a way that is patently offensive." MO. REV. STAT. § 573.011(1) (Supp. 1990).

142. 315 U.S. 568 (1942).

143. 354 U.S. 476 (1957).

144. 413 U.S. 15 (1973), *reh'g denied*, 414 U.S. 881 (1973).

145. *Id.*

146. *Id.* at 24 (citations omitted).

147. As stated earlier, the Missouri Violence Bill includes this language:

(1) Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interest in violence for persons under the age of seventeen; and

(2) It depicts violence in a way which is patently offensive to the average person

At first glance, this statutory construction patterned after *Miller* seems to allow state regulation of violent videocassettes because the Bill uses virtually identical language to the three-part *Miller* test. In fact, Missouri Governor Ashcroft drew this parallel when he described the Bill's provisions as dealing with a "new class of pornography."¹⁴⁸ However, as case law illustrates, the *Miller* rule cannot be extended this far since it was designed to cover obscenity only.¹⁴⁹

In *Sovereign News Co. v. Falke*,¹⁵⁰ a United States District Court considered an Ohio obscenity statute which included in its definition of obscene materials or performances those whose "dominant tendency is to arouse lust by displaying or depicting . . . extreme or bizarre violence, cruelty, or brutality . . ."¹⁵¹

In finding the statute unconstitutional, the court relied on the *Miller* test to reach its decision.¹⁵² The court emphasized that only material depicting or describing sexual conduct can be regulated because it is obscene.¹⁵³ Material that contains violence, brutality or cruelty cannot be considered obscene unless it also depicts or describes sexual conduct.¹⁵⁴ The court stated that "[m]aterial limited to forms of violence is therefore given the highest degree of protection, *i.e.*, it may not be restricted unless it is shown to constitute a clear and present danger to society."¹⁵⁵ Thus, the court concluded, the Ohio statute unconstitutionally restrained free expression.¹⁵⁶

In *American Booksellers Association, Inc. v. Hudnut*,¹⁵⁷ the Seventh Circuit considered an Indianapolis, Indiana ordinance which included in its definition of pornography those books, pictures or films which subordinated women, presented women as enjoying pain, humiliation, or rape, in scenarios of injury or torture or in positions of servility or sub-

applying contemporary adult community standards with respect to what is suitable for a person under the age of seventeen; and

(3) Taken as a whole, it lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen.

MO. REV. STAT. § 573.010 (Supp. 1990).

148. "Ashcroft Signs Video Bill," United Press Int'l, June 21, 1989 (NEXIS, videos).

149. See *infra* text accompanying notes 150-64.

150. 448 F. Supp. 306 (N.D. Ohio 1977), *remanded on other grounds sub nom. Sovereign News Co. v. Corrigan*, 610 F.2d 428 (6th Cir. 1979).

151. OHIO REV. CODE ANN. § 2907.01(F)(3) (cited in *Sovereign News Co. v. Falke*, 448 F. Supp. at 398-99 (1979)).

152. *Sovereign News*, 448 F. Supp. at 393-98, 400-03.

153. *Id.* at 394 (citing *Miller v. California*, 413 U.S. 15, 24 (1972)).

154. *Id.*

155. *Id.*

156. *Id.* at 400.

157. 771 F.2d 323 (7th Cir. 1985).

mission or display.¹⁵⁸ Speech that portrayed women in positions of equality was lawful, regardless of how graphic the sexual content.¹⁵⁹

In overturning the law, the court noted that the ordinance did not include all the required elements of the three-part *Miller* test¹⁶⁰ and unconstitutionally expanded the definition of pornography to include violent acts against women.¹⁶¹ The court emphasized that the government has no power to restrict expression because of its message or ideas.¹⁶² Thus, the court concluded that the ordinance amounted to thought control because it established an approved view of women, how they react to sexual encounters, and how the sexes may relate to each other.¹⁶³

As these opinions illustrate, courts have narrowly limited the *Miller* rule to obscenity *only* since the *Miller* rule was created to deal with state regulations of "works which depict or describe sexual conduct."¹⁶⁴ The Supreme Court made it clear in an earlier decision, *Winters v. New York*,¹⁶⁵ that material deemed violent falls within the first amendment protection. In this case, the Court considered a New York statute that made it illegal to distribute publications principally made up of criminal news, police reports, or accounts of criminal deeds which the state had found were packaged so that the publications "became vehicles for inciting violent and depraved crimes."¹⁶⁶ While the Court recognized that the magazines had little or no serious value, it found them protected by

158. *Id.* at 324 (citing Indianapolis Code § 16-3(q)).

159. *American Booksellers Ass'n*, 771 F.2d at 325.

160. *Id.* at 324-25.

161. *Id.* at 324, 332. The city's definition of pornography under Indianapolis Code § 16-3(q) was:

the graphic sexual subordination of women, whether in pictures or words, that includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or
(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented as being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions or servility or submission or display.

Id. at 324.

162. *Id.* at 328 (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

163. *Id.*

164. *Miller*, 413 U.S. at 24.

165. 333 U.S. 507, 540 (1948).

166. *Id.* at 513.

the first amendment: "[t]hough we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."¹⁶⁷

Based on these decisions, the obscenity exception applies only to material deemed obscene.¹⁶⁸ Thus, even though the Missouri Violence Bill is patterned after the three-part *Miller* obscenity test, the Bill cannot fall under the obscenity exception to the first amendment since its purpose is to regulate material deemed violent and not material deemed obscene.¹⁶⁹

Because the Bill does not fall under the obscenity or any other first amendment exceptions, the Bill has fatal constitutional flaws. As the Supreme Court noted in *Gooding v. Wilson*,¹⁷⁰ "the statute [regulating speech] must be carefully drawn or authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression."¹⁷¹

The Missouri statute is not carefully drawn nor has it been authoritatively construed to punish unprotected speech since the Bill's explicit purpose is to regulate videocassettes deemed "violent." Yet violence is a form of first amendment expression which the *Sovereign News*¹⁷² and *Winters*¹⁷³ courts held to be *protected* expression.

This fatal flaw alone renders the Bill unconstitutional. The Missouri Violence Bill, however, has other problems which demonstrate further constitutional flaws.

IV. THE BILL'S STANDARDS FOR IDENTIFYING EXPRESSION SUBJECT TO GOVERNMENT RESTRICTION ARE VAGUE AND ILL-DEFINED

The Supreme Court stated in *Smith v. Goguen*¹⁷⁴ that "[n]o one may

167. *Id.* Subsequent decisions by state courts have relied on *Winters* to overturn state statutes which attempted to regulate "crime comic books." For example, in *Police Commissioner of Baltimore City v. Siegal Enter.*, 223 Md. 110, 122 (1960), the Maryland Court of Appeals overturned the Crime Comic Books Act of Maryland (Code, 1957, Art. 27, § 420-25, as amended by ch. 197 of the Acts of 1959). In *Katzev v. County of Los Angeles*, 52 Cal.2d 360, 341 P.2d 310 (1959), the California Supreme Court held unconstitutional a Los Angeles crime comic book ordinance which made it a misdemeanor to sell or exhibit certain publications to children under eighteen.

168. See *Miller*, 413 U.S. at 24 and *Sovereign News*, 448 F. Supp. at 394.

169. See *supra* note 7.

170. 405 U.S. 518 (1972).

171. *Id.* at 522.

172. 448 F. Supp. at 306. See *supra* text accompanying notes 150-56.

173. 333 U.S. 507. See *supra* text accompanying notes 165-67.

174. 415 U.S. 566 (1974).

be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."¹⁷⁵ This poses a problem for the Missouri Violence Bill because the Bill establishes regulations for "violent" videos without providing a definition of what "violent" means.

In *Goguen*, the Court stated that where the statute's literal scope can reach expression sheltered by the first amendment, the doctrine of fair notice demands a greater degree of specificity than in other contexts.¹⁷⁶ That doctrine "requires legislatures to set reasonably clear guidelines for law enforcement officers and triers of fact . . . to prevent 'arbitrary and discriminatory enforcement.'" ¹⁷⁷

The Bill, however, fails to do that. For example, what constitutes a "morbid interest in violence"¹⁷⁸ or "violence . . . which is patently offensive to the average person . . . ?"¹⁷⁹ While one Missouri county prosecutor may find that videos of *Friday the 13th* or *Nightmare on Elm Street* fit within this statutory language, another may decide that videos of boxing, wrestling, football, a war movie, or Road Runner cartoons violate the law.

This inherent vagueness requires a video store operator to guess at the prosecutorial standard which would be used in his or her county. This uncertainty may have a profound effect on the distribution of videocassettes in Missouri. As the Eighth Circuit Court of Appeals noted in *Pratt v. Independent School Dist.*,¹⁸⁰

when one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone' *The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform . . . what is being proscribed.*¹⁸¹

Sensitive, well-defined standards are important since "[d]ue process requires that 'all be informed as to what the State commands or forbids.'" ¹⁸² Also, the Court has held "that 'men of common intelligence'

175. *Id.* at 572 n.8 (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

176. *Id.* at 573 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) and *Smith v. California*, 361 U.S. 147, 151 (1959)).

177. *Goguen*, 415 U.S. at 572-73 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

178. MO. REV. STAT. § 573.011(1) (Supp. 1990).

179. *Id.* For a full text of the statement, see the first section of this comment.

180. 670 F.2d 771 (8th Cir. 1982).

181. *Id.* at 778 (emphasis in original) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967)).

182. *Goguen*, 415 U.S. at 574 (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

[should] not be forced to guess at the meaning of a criminal law."¹⁸³ The challenged provisions of the Missouri Violence Bill are not sufficiently defined to ensure proper, fair enforcement, and thus, must fail because they are unconstitutionally vague.

V. THE BILL'S PROVISIONS VIOLATE THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE

The fourteenth amendment's equal protection clause requires that "no State shall 'deny to any person within its jurisdiction the equal protection of the law,'¹⁸⁴ which is essentially a direction that all persons similarly situated should be treated alike."¹⁸⁵ While state legislatures must be given substantial latitude in establishing classifications which roughly approximate the nature of the problem perceived,¹⁸⁶ the Supreme Court has said it would not apply so deferential a standard to state legislative action which is inconsistent with basic constitutional premises.¹⁸⁷

The Court stated it would treat as "presumptively invidious" classifications which disadvantage a suspect class or impinge on the exercise of a fundamental right.¹⁸⁸ Under the Missouri Violence Bill, the state created two classifications: (1) videocassettes and other video reproduction devices which are subject to the restrictions; and (2) all other communication media which are not subject to any restrictions.¹⁸⁹ Since the Bill impinges on the exercise of a fundamental right,¹⁹⁰ the state of Missouri is required to demonstrate that its classification has been precisely tailored to serve a compelling government interest.¹⁹¹

Missouri cannot do that. Although information about the Bill was conveyed at the bill signing ceremony¹⁹² and in articles published *after*

183. *Id.* (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

184. U.S. CONST. amend. XIV.

185. *Cleburne v. Cleburne Living Centers*, 473 U.S. 432, 439 (1985).

186. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982).

187. *Id.*

188. *Id.* at 216-17.

189. According to the language of the Bill, the only items regulated are "[v]ideo cassettes or other video reproduction devices, or the jackets, cases or coverings of such video reproduction devices shall be displayed or maintained in a separate area" if they meet the three-part test outlined in the first section of this comment. MO. REV. STAT. § 573.011 (Supp. 1990).

190. Since motion pictures are included in the free speech and free press guaranty of the first and fourteenth amendments, the Missouri Violence Bill affects a fundamental right because a fundamental right is a right which has its source in the Constitution. *Plyler*, 457 U.S. at 217 n.15.

191. *Plyler*, 457 U.S. at 217.

192. Governor Ashcroft was quoted as saying that the measure would "give local prosecutors better authority to fight the scourge of pornography that threatens our families and com-

passage of the Bill,¹⁹³ the Bill contains no description of its goals or purposes. No legislative history of committee meetings or debates exists to show the state's purpose for the Bill's classification.¹⁹⁴ Even the Bill's subheading—"An Act [t]o repeal section 573.010, RSMo Supp. 1988, relating to offenses relating to pornography . . ."—does not provide any additional information about the basis for the classification system.

The Bill's classification scheme is a shotgun approach to regulating this area. While the Bill would regulate the sale and rental of videos described by the law to those under seventeen,¹⁹⁵ it places no restrictions on identical speech conveyed through network, independent, cable and pay television and movie and drive-in theaters. Nor do the Bill's provisions attempt to regulate access to books or magazines containing identical material meeting the Bill's restrictions.¹⁹⁶

In addition, the Bill would require separate display of the *jackets* of videocassettes which meet the Bill's three-part test.¹⁹⁷ However, a *poster* showing the same jacket photograph or illustration could be legally displayed in the store window or used to advertise the videocassette in every newspaper, magazine, and television station that reaches the state of Missouri.

It is apparent that the state of Missouri failed to precisely tailor its classification to serve a compelling government interest, as is required for regulation of fundamental rights.¹⁹⁸ Instead, the state singled out one *method* of conveying protected speech for regulation for no apparent reason, while leaving other forms of communicating the *identical* speech unregulated. Since there is no compelling reason for this type of regulation, the Bill violates the equal protection clause of the fourteenth amendment.

VI. POSSIBLE RESULTS IF THE BILL IS HELD CONSTITUTIONAL: COMMENTS AND OBSERVATIONS

The Missouri Violence Bill is unconstitutional on a number of

munities. This bill deals with a new class of pornography that we see on the rise, films that cater to a morbid interest in violence." "Ashcroft Signs Video Bill," United Press Int'l, June 21, 1989 (NEXIS, videos).

193. See, e.g., "No 'Slasher' Movies for Missouri Kids," GOVERNING, Aug. 1989, at 13-14, and "Slasher Video' Law Draws Contrasting Reviews," THE STATESMAN, July 1989, at 6.

194. Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, at 27, VSDA v. Webster, Civil Action No. 89-4353-CVC-9 (1989).

195. MO. REV. STAT. § 573.011(1) (Supp. 1990).

196. Such restrictions were expressly forbidden by the Supreme Court in *Winters*, discussed *supra* in text accompanying footnotes 165-67.

197. MO. REV. STAT. § 573.011(1) (Supp. 1990).

198. *Plyler*, 457 U.S. at 216-17.

grounds: the Bill's purpose to declare excessively violent videos off limits does not fall into any of the exceptions to first amendment protection¹⁹⁹ which permit state regulation; the Bill's standards for identifying expression subject to government restriction are vague and ill-defined; and the Bill violates the equal protection clause.

If the United States District Court upholds the Missouri Bill, the results could destroy first amendment rights for those individuals whose beliefs and expressions are outside of the mainstream of American society. In fact, any kind of unpopular speech could be placed at the mercy of unpredictable jury verdicts, thus leaving the police, courts and juries free to react on the basis of nothing more than their own preferences and biases. Thus, by changing a few key words in the *Miller* test so it relates to the kind of speech which a state wants to regulate, censorship which goes totally against the first amendment could be enacted.

For example, state or federal governments could outlaw certain religious beliefs by using the *Miller* pattern. Thus, unpopular beliefs would be punished if those beliefs appeal to the prurient interest in religion, depict religious conduct specifically defined by state law, and lack serious literary, artistic, political, or scientific value. While this scenario may seem farfetched, it is plausible given the groundswell of support for groups which seek to silence or stop the activities of other groups which espouse views diametrically opposed to their own.²⁰⁰

Affirmance of the Missouri Violence Bill could be a major step in chipping away at the first amendment rights which Americans have valued and treasured for more than 200 years. The United States District Court for the Western District of Missouri should protect the integrity of the United States Constitution by turning back this attempt to circumvent its principles and rule that the Missouri Violence Bill is unconstitutional.

Kenneth D. Rozell

199. "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572.

200. For example, anti-abortion groups have attempted to shut down abortion clinics through such tactics as harassing potential patients and employees of the clinics, blocking entrances to the clinics, repeatedly making false appointments and placing as many as 700 telephone hang-up calls a day. "Courts Deal Blockaders Big Setbacks," *The Nat'l L. J.*, Nov. 13, 1989, at 30, 32. Conservatives in Congress have spearheaded a reduction of funding for the National Endowment of the Arts ("NEA") due to conservative's displeasure with art exhibits sponsored by the NEA. *See L.A. Times*, Nov. 20, 1989, at F2, col. 2.