UNBAKING THE ADOLESCENT CAKE: THE CONSTITUTIONAL IMPLICATIONS OF IMPOSING TORT LIABILITY ON PUBLISHERS OF VIOLENT VIDEO GAMES

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> [N]obody goes to the theater, or switches on the tube, to view a movie entitled *The Village of the Happy Nice People.*
>
> —Professor Richard Walter[1]

I. INTRODUCTION

Armed with guns and homemade bombs, a student went to school and triggered the fire alarm.[2] He killed a janitor, climbed a tower, and fired on bystanders and emergency services personnel, killing two more people and wounding eleven others.[3] A junior high school student who had been bullied for years killed his principal with an M-1A rifle and wounded three other people.[4] Another student went to school with a semiautomatic pistol, 200 rounds of ammunition, and three firebombs.[5] He killed one teacher and wounded another.[6]

Many people would probably think that these appalling incidents happened in the 1990s, when school violence made the national headlines on a regular basis and some people blamed violent video games. These shootings, however, actually occurred earlier than that. Anthony Barbaro committed the

* The Author wishes to thank Kevin Rudh, Kelly Mooney, Barbara Butler, Geoffrey Butzine, and Erica McCallum for editing and shaping the various incarnations of this Note. The Author is also grateful to Patrice Goya for her invaluable love and support during the entire writing process. Her patience and encouragement have helped the Author through some difficult times.

1. RICHARD WALTER, SCREENWRITING: THE ART, CRAFT, AND BUSINESS OF FILM AND TELEVISION WRITING 27 (1992). Professor Walter teaches at the UCLA School of Film and Television.

2. Bill Dedman, *Bullying, Tormenting Often Led to Revenge in Cases Studied*, CHI. SUN-TIMES, Oct. 15, 2000, at 14, *available at* 2000 WL 6699694.

3. Dutton v. City of Olean, 401 N.Y.S.2d 118, 119 (N.Y. App. Div. 1978).

4. Shelter Mut. Ins. Co. v. Williams, 804 P.2d 1374, 1376 (Kan. 1991).

5. Dedman, *supra* note 2, at 14.

6. *Id.*

sniper attacks in the first example on December 30, 1974.[7] James Alan Kearbey killed his principal in the second example on January 21, 1985.[8] And Nicholas Elliott committed the third shooting on December 16, 1988.[9] Most notably, these school shootings occurred well before the release of violent video games like "Doom" and "Quake."[10]

Nevertheless, some of the school shootings that occurred in the 1990s were the most notorious because they usually involved more brutality, more victims, and more tragedy. For example, Luke Woodham killed his mother at home, fatally shot two students at his high school, and injured seven other students on October 1, 1997.[11] Two months later, Michael Carneal opened fire on a prayer group at his school, killing three girls and wounding five people.[12] On March 24, 1998, thirteen-year-old Mitchell Johnson and eleven-year-old Andrew Golden triggered a fire alarm at their junior high school and opened fire on students as they evacuated, killing four girls and a teacher and injuring ten other people.[13] Kip Kinkel fatally shot his parents on May 20, 1998, and opened fire in his school's cafeteria the next morning, killing two students and wounding twenty-two people.[14] And in the worst school shooting in history, on April 20, 1999, Eric Harris and Dylan Klebold massacred twelve students and a teacher, injured twenty-three other people, and committed suicide at Columbine High School.[15]

In the aftermath of these horrific outbursts of violence, many people have struggled to comprehend the shooting sprees and their possible causes. Commentators have offered a variety of explanations, such as harassment by other students, easy access to firearms, and parental neglect.[16] Dating problems and abnormal brain chemistry have also been cited as contributing factors.[17] Even

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7. *Dutton*, 401 N.Y.S.2d at 119.

8. *Shelter Mut. Ins. Co.*, 804 P.2d at 1376.

9. Dedman, *supra* note 2, at 14.

10. *See* ID SOFTWARE, ID HISTORY (indicating that id Software published "Doom" on December 10, 1993, and "Quake" sometime in 1996), *at* http://www.idsoftware.com/business/home/history/index.php?flash=true&version=6 (last visited Mar. 10, 2003).

11. Woodham v. State, 779 So. 2d 158, 160 (Miss. 2001).

12. James v. Meow Media, Inc., 90 F. Supp. 2d 798, 800 (W.D. Ky. 2000).

13. Golden v. State, 21 S.W.3d 801, 801–02 (Ark. 2000); Dedman, *supra* note 2, at 14.

14. State v. Kinkel, 56 P.3d 463, 465 (Or. Ct. App. 2002).

15. Dedman, *supra* note 2, at 14; *see also* CNN, CNN IN-DEPTH SPECIALS—ARE U.S. SCHOOLS SAFE?—RECENT SHOOTINGS (featuring an interactive map that summarizes the school shootings that occurred during the 1990s), *at* http://www.cnn.com/interactive/specials/9904/school.shootings/frameset.exclude.html (last visited Mar. 10, 2003).

16. Geoffrey Cowley et al., *Why Children Turn Violent*, NEWSWEEK, Apr. 6, 1998, at 24–25, *available at* 1998 WL 9578295.

17. Sharon Begley et al., *Why the Young Kill*, NEWSWEEK, May 3, 1999, at 32–35 (examining the effects of incompetent parenting on young children's neurochemical development), *available at* 1999 WL 9500105; Amanda Bower, *Life on the Inside*, TIME, May 28, 2001, at 34 (discussing how Justin Davis, a high school student in Fayetteville, Tennessee, had shot and killed his girlfriend's former boyfriend), *available at* 2001 WL 17216333; John Cloud, *Of Arms and the Boy*, TIME, July 6, 1999, at 58 (stating that Woodham, Johnson, and Golden may have been motivated by girls who had broken up with

Hollywood has been accused of inciting school violence. *The Basketball Diaries*,[18] a film in which Leonardo DiCaprio plays a character who daydreams about walking into a classroom and shooting other students, may have inspired Carneal's shooting spree.[19] Along with *The Basketball Diaries*, Harris and Klebold used to watch *Natural Born Killers*,[20] a film about a couple's multi-state killing spree.[21]

Some people have also criticized the digitized depictions of violence found in some video games.[22] Before the Columbine massacre occurred, U.S. Senators Joseph Lieberman, Herbert Kohl, and Byron Dorgan had expressed concern about children's exposure to video game violence and introduced the Video Game Rating Act of 1994.[23] This Act would have created the Interactive Entertainment Rating Commission, an agency that was intended to implement a ratings system in the event the video game industry failed to voluntarily develop its own system.[24] In response to this congressional prodding, the industry established the Entertainment Software Rating Board (ESRB) in September 1994.[25] Critics, however, have continued to blame video games for real-life violence. For instance, Gloria DeGaetano and Lieutenant Colonel Dave Grossman,

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them and that Carneal had an unrequited crush on one of his victims); Dedman, *supra* note 2, at 14 (suggesting that Thomas Solomon shot and injured six students in Conyers, Georgia, because he was upset at being rejected by a girlfriend).

18. THE BASKETBALL DIARIES (New Line 1995).

19. James v. Meow Media, Inc., 90 F. Supp. 2d 798, 800–01 (W.D. Ky. 2000).

20. NATURAL BORN KILLERS (Warner Brothers 1994).

21. Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1268 (D. Colo. 2002); Richard Corliss, *Bang, You're Dead*, TIME, May 3, 1999, at 49, *available at* 1999 WL 15940923.

22. These games fall into distinct genres. Games like "Doom" and "Quake" are "first-person shooters" or "3-D shooters." *See* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 953 (S.D. Ind. 2000) (describing 3-D shooters). Other genres that have been implicated in school shootings include martial arts fighting games (i.e., the "Mortal Kombat" series), survival horror games (i.e., the "Resident Evil" series), and even role-playing games (i.e., the "Final Fantasy" series). *See Sanders*, 188 F. Supp. 2d at 1269.

23. 140 CONG. REC. S771-01 (daily ed. Feb. 3, 1994) (statement of Sen. Lieberman); *see* Video Game Rating Act of 1994, S. 1823, 103d Cong. (2d Sess. 1994); *see also* Video Game Rating Act of 1994, H.R. 3785, 103d Cong. (2d Sess. 1994) (introducing identical bill by Rep. Tom Lantos).

24. *See* S. 1823.

25. *See* ENTERTAINMENT SOFTWARE RATING BOARD, ABOUT ESRB, *at* http://www.esrb.org/about.asp (last visited Mar. 10, 2003) (on file with author); Interactive Digital Software Ass'n v. St. Louis County, Mo., 200 F. Supp. 2d 1126, 1130–31 (E.D. Mo. 2002) (explaining that the ESRB labels each video or computer game with one of five ratings: "EC" or "Early Childhood" (content is suitable for children ages three and over), "E" or "Everyone" (content is suitable for children ages six and older), "T" or "Teen" (content is suitable for children ages thirteen and older), "M" or "Mature" (content is suitable for people ages seventeen and older), and "AO" or "Adults Only" (content is suitable only for adults)); *see also* ENTERTAINMENT SOFTWARE RATING BOARD, ESRB GAME RATINGS—GAME RATING & DESCRIPTOR GUIDE (indicating that a rating may also be accompanied by a specific content descriptor, such as "Animated Blood" or "Animated Violence"), *at* http://www.esrb.org/esrbratings_guide.asp#symbols (last visited Mar. 10, 2003) (on file with author).

a military psychologist with the Killology Research Group, have characterized violent video games as "firearms trainers" and "murder simulators."[26]

Anecdotal evidence also suggests a possible link between video games and youth violence. Mitchell Johnson used to rent "Mortal Kombat," a brutal fighting game.[27] Carneal liked to play "Doom," "Quake," "Castle Wolfenstein," "Redneck Rampage," "Nightmare Creatures," "Mech Warrior," "Resident Evil," and "Final Fantasy," mostly games in which the player hunts down and shoots virtual enemies.[28] And Harris and Klebold have been described as "avid, fanatical and excessive consumers of violent . . . video games."[29] In a home video discovered after the Columbine massacre, Harris brandished a shotgun that he called "Arlene," the name of a character in "Doom."[30] "It's going to be like f___ing Doom," Harris exclaimed. "That f___ing shotgun is straight out of Doom!"[31]

As teenagers, these school shooters have been virtually judgment-proof. Therefore, the possible connections between violent video games and school shootings have prompted personal injury litigation against the deep-pocket publishers of these games. In *James v. Meow Media, Inc.*, the families of the three girls murdered by Carneal filed a claim against a broad spectrum of entertainment industry firms, including several video game publishers.[32] The plaintiffs alleged that these particular defendants "manufactured and/or supplied to Michael Carneal violent video games which made the violence pleasurable and attractive, and disconnected the violence from the natural consequences thereof, thereby causing Michael Carneal to act out the violence."[33] The district court dismissed the case on common law tort grounds[34] and the Sixth Circuit recently affirmed the dismissal.[35] On April 20, 2001, relatives of the victims of the Columbine shootings filed a $5 billion lawsuit against twenty-two entertainment companies, including some of the

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26. DAVE GROSSMAN & GLORIA DEGAETANO, STOP TEACHING OUR KIDS TO KILL: A CALL TO ACTION AGAINST TV, MOVIE & VIDEO GAME VIOLENCE 111 (1999).

27. Cloud, *supra* note 17; *see also* Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 169–70 (D. Conn. 2002) (describing "Mortal Kombat").

28. James v. Meow Media, Inc., 300 F.3d 683, 687–88 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 967 (2003).

29. Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1268 (D. Colo. 2002).

30. Nancy Gibbs & Timothy Roche, *The Columbine Tapes*, TIME, Dec. 20, 1999, at 40, *available at* 1999 WL 29489220.

31. *Id.*

32. 90 F. Supp. 2d 798, 801 n.2 (W.D. Ky. 2000) (listing the defendants from the video game industry as Midway Home Entertainment, Apogee Software, Inc., id Software, Inc., Acclaim Entertainment, Inc., GT Interactive Software Corporation, Interplay Productions, Inc., Nintendo of America, Sega of America, Inc., Virgin Interactive Media, Activision, Inc., Capcom Entertainment, Inc., Williams Entertainment, Inc., Square Soft, Inc., and Sony Computer Entertainment).

33. *Id.* at 801.

34. *Id.* at 818.

35. James v. Meow Media, Inc., 300 F.3d 683, 701 (6th Cir. 2002).

video game publishers that were earlier named in *James*.[36] In *Sanders v. Acclaim Entertainment, Inc.*, the plaintiffs alleged that the defendants' video games made violence pleasurable and attractive to Harris and Klebold, disconnected the violence from its natural consequences, and trained them to point and shoot a gun.[37] The language of the complaint in *Sanders* has been characterized as "virtually identical" to the complaint filed in *James*.[38] Since video games constitute one of the most lucrative sectors of the entertainment industry, with 225.1 million units sold and $6.35 billion in revenue collected in 2001,[39] future litigation over the liability of video game publishers is likely.

This Note examines the constitutional obstacles that a plaintiff will likely encounter in bringing a claim against a publisher of a violent video game for injuries caused by a player of such a game. This analysis assumes that a plaintiff has succeeded in proving the elements of a negligence cause of action. Since courts have consistently dismissed such cases on common law tort grounds,[40] any additional analyses of the free speech issues in these cases could be considered dicta.[41] Therefore, the First Amendment is a less established aspect of the adjudication of the tort liability of video game publishers.

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36. *Columbine Families Sue Game Makers, Web Sites*, HOLLYWOOD REPORTER, Apr. 24, 2001, at 101, *available at* 2001 WL 16814285; *see also* Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1268–69 (D. Colo. 2002) (listing the video game defendants as Acclaim Entertainment, Inc., Activision, Inc., Apogee Software, Inc., Atari Corporation, Capcom Entertainment, Inc., EIDOS Interactive, id Software, Inc., Infogrames, Inc., Interplay Entertainment, Corp., Midway Home Entertainment, Nintendo of America, Sega of America, Inc., Sony Computer Entertainment America, Inc., Square Soft, Inc., and Virgin Entertainment Group, Inc.). In contrast to the plaintiffs' $5 billion claim against the entertainment industry, they settled their claims against the parents of Harris and Klebold, and three people who supplied the killers with their weapons, for a significantly lower $2.855 million. Jim Kirksey, *Columbine Kin Get Settlement*, DENVER POST, Oct. 18, 2001, at 3B, *available at* 2001 WL 27669068.

37. 188 F. Supp. 2d 1264, 1269 (D. Colo. 2002).

38. *Id.* at 1272.

39. Interactive Digital Software Ass'n, *Essential Facts About the Computer and Video Game Industry* 9, *at* http://www.idsa.com/pressroom.html (last visited Mar. 10, 2003) (on file with author). Compare these figures to the $8.41 billion that the film industry raked in as box office receipts in 2001. Press Release, Jack Valenti, Valenti Reports Record-Breaking Box Office Results, Continued Decrease in Production Costs and Praises Movie Industry War Efforts in ShoWest Address (Mar. 5, 2002), *at* http://www.mpaa.org/jack/2002/2002_03_05a.htm (on file with author).

40. *See James*, 300 F.3d at 701 (holding that the video game publishers did not owe a duty of care to Carneal's victims); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1273 (D. Colo. 2002) (also holding that video game publishers did not owe a duty of care to the Columbine victims).

41. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'") (quoting Liverpool, N.Y. and Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)); James v. Meow Media, Inc., 90 F. Supp. 2d 798, 818 (W.D. Ky. 2000) (declining to address the constitutional issues because Kentucky tort law disposed of the case).

Part II of this Note argues that video games should constitute "speech" that is protected by the First Amendment. Part III analyzes several exceptions to First Amendment protection and contends that they should not apply to video games. Part IV examines the policy implications of imposing tort liability on video game publishers for crimes committed by third parties. Finally, Part V proposes a regulatory scheme that would balance a state's interest in preventing youth violence with the free speech interests of video game publishers.

II. VIDEO GAMES SHOULD CONSTITUTE "SPEECH" WITHIN THE MEANING OF THE FIRST AMENDMENT

The First Amendment states, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[42] The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.[43] While the First Amendment explicitly refers to federal legislation, the U.S. Supreme Court has held that the imposition of civil liability constitutes state action that is subject to constitutional limitations.[44] Therefore, the First Amendment provides a defense against tort liability that would otherwise be imposed because of an injury that allegedly resulted from the defendant's speech.

The threshold issue is whether video games constitute "speech" that is entitled to First Amendment protection. The general rule holds that "[e]ntertainment, as well as political and ideological speech, is protected" by the First Amendment.[45] The U.S. Supreme Court has extended First Amendment protection to various forms of entertainment, including motion pictures,[46] broadcast programs,[47] live entertainment,[48] musical performances,[49] theatrical productions,[50] nudity on film,[51] and even nude dancing.[52] The Court has not yet addressed the applicability of the First Amendment to video games.[53] A couple of principles, however, are illustrative here. A medium of expression should be judged by standards that are suited to it because each medium may present its own problems.[54] Therefore, communication that is expressed in computer code does not

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42. U.S. CONST. amend. I.

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

44. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (rejecting the proposition that the First and Fourteenth Amendments apply only to state action and not to private action).

45. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981).

46. Jenkins v. Georgia, 418 U.S. 153, 161 (1974); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

47. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

48. *Schad*, 452 U.S. at 72–73.

49. Southeastern Promotions, Inc. v. Conrad, 420 U.S. 546, 559 (1975).

50. Schacht v. United States, 398 U.S. 58, 63 (1970).

51. Erznoznik v. City of Jacksonville, 422 U.S. 205, 211–12 (1975).

52. *Schad*, 452 U.S. at 66 ("[N]ude dancing is not without its First Amendment protections from official regulation."); Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975).

53. *See* Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 179 (D. Conn. 2002) (indicating that there are no U.S. Supreme Court cases on point).

54. *Southeastern Promotions*, 420 U.S. at 557.

automatically lose constitutional protection as speech.[55] Also, based on the general principle that entertainment that communicates some idea or information constitutes "speech,"[56] the expressive nature of modern video games should warrant First Amendment protection for this particular medium.

A. Early Cases Denied Video Games the Status of "Speech"

Several courts have determined that video games are not designed to communicate or express information and have consequently held that such games do not constitute "speech" within the meaning of the First Amendment.[57] *America's Best Family Showplace Corp. v. City of New York* was the first case to do so.[58] In that case, a corporation challenged the constitutionality of zoning and licensing regulations that prohibited it from installing more than four video games in its restaurant.[59] In holding that these laws did not infringe on the plaintiff's First Amendment rights, the district court declared that video games are not meant to inform.[60] The court compared video games to pinball, chess, and baseball, forms of entertainment that lack a communicative element.[61] The fact that some of the games "talked" to the player, played music, or displayed written instructions was insufficient to satisfy the requirement of "information."[62] As a result, the court held that video games "'contain so little in the way of particularized form of expression' that video games cannot fairly be characterized as a form of speech protected by the First Amendment."[63] Several state and federal courts followed this reasoning and excluded video games from First Amendment protection.[64]

While this flurry of decisions was handed down in the 1980s, few courts addressed the issue in the 1990s, a period of substantial innovation in video game

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55. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001).

56. America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170, 173 (E.D.N.Y. 1982) ("[B]efore entertainment is accorded First Amendment protection there must be some element of information or some idea being communicated.").

57. *See* Malden Amusement Co., Inc. v. City of Malden, 582 F. Supp. 297, 299 (D. Mass. 1983); *America's Best Family*, 536 F. Supp. at 173–74; Kaye v. Planning & Zoning Comm'n, 472 A.2d 809, 810 (Conn. Super. Ct. 1983); Caswell v. Licensing Comm'n for Brockton, 444 N.E.2d 922, 925 (Mass. 1983); Marshfield Family Skateland, Inc. v. Town of Marshfield, 450 N.E.2d 605, 609–10 (Mass. 1983); People v. Walker, 354 N.W.2d 312, 316–17 (Mich. Ct. App. 1984); City of St. Louis v. Kiely, 652 S.W.2d 694, 696 (Mo. Ct. App. 1983); Tommy & Tina, Inc. v. Dep't of Consumer Affairs, 459 N.Y.S.2d 220, 226–27 (N.Y. Sup. Ct. 1983); *see also* Rothner v. City of Chicago, 725 F. Supp. 945, 948–49 (N.D. Ill. 1989).

58. *See* Interactive Digital Software Ass'n v. St. Louis County, Mo., 200 F. Supp. 2d 1126, 1133 (E.D. Mo. 2002).

59. *America's Best Family*, 536 F. Supp. at 171.

60. *Id.* at 174.

61. *Id.*

62. *Id.*

63. *Id.* (citing Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 857 (2d Cir. 1982)).

64. *See* cases cited *supra* note 57; *see also* David C. Kiernan, Note, *Shall the Sins of the Son be Visited upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 212 n.34 (2000).

technology.[65] In *Rothner v. City of Chicago*, the Seventh Circuit reflected the judicial uncertainty regarding the constitutional status of video games:

> [W]e cannot tell whether the video games at issue here are simply modern day pinball machines or whether they are more sophisticated presentations involving storyline and plot that convey to the user a significant artistic message protected by the [F]irst [A]mendment. Nor is it clear whether these games may be considered works of art . . . . [W]e must confess an inability to comprehend fully the video game of the 1990s.[66]

The court also indicated that a blanket conclusion that all video games are completely devoid of artistic value would probably contradict reality.[67] *Rothner* represented a turning point in the judicial treatment of video games that would later lead to the recognition of video games as "speech" within the meaning of the First Amendment.

B. Modern Video Games Should Now Constitute "Speech" That is Protected by the First Amendment

By the turn of the millennium, courts began to recognize that modern video games contain elements of communication and expression. In *American Amusement Machine Ass'n v. Kendrick*, video game publishers sued to enjoin the enforcement of an Indianapolis ordinance that restricted the access of minors to violent arcade games.[68] The district court commented that "at least some contemporary video games include protected forms of expression."[69] On appeal, the Seventh Circuit did not question this particular statement.[70] In fact, the Seventh Circuit granted even more free speech protection to video games by requiring Indianapolis to show compelling, and not just plausible, grounds to believe that violent video games are harmful to minors or to the public at large.[71] The court emphasized that video games are critical to the next generation's capacity for self-governance, a core First Amendment value.[72] The court also emphasized that most of the games that would have been regulated by the ordinance were stories or even

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65. *See* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 951 (S.D. Ind. 2000).

66. 929 F.2d 297, 303 (7th Cir. 1991).

67. *Id.*

68. 115 F. Supp. 2d 943, 945–46 (S.D. Ind. 2000).

69. *Id.* at 954.

70. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 574 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

71. *Id.* at 576.

72. *Id.* at 577. The court stated:

> Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise . . . . People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

Id.

vehicles for literary and political themes, akin to classic literature.[73] Thus, the same court that had hesitated to recognize video games as speech in *Rothner* finally acknowledged the advances achieved by video games.

Not every court has embraced the Seventh Circuit's liberal treatment of modern video games. In *Interactive Digital Software Ass'n v. St. Louis County, Missouri*, the district court reviewed another ordinance that regulated violent video games.[74] In holding that video games do not constitute protected speech under the First Amendment, the court "found no conveyance of ideas, expression, or anything else that could possibly amount to speech" in the games that it reviewed.[75] The court rejected *Kendrick* and followed the *America's Best Family* line of cases, comparing video games to baseball and Bingo.[76] The court even rejected the plaintiffs' argument that the use of creative "scripts" to develop video games entitled the games to free speech protection.[77]

As a case decided in 2002, *Interactive Digital Software* was ill-conceived and failed to recognize the reality of modern video games. First, the court reviewed only four games: "The Resident of Evil Creek," "Mortal Combat," "Doom," and "Fear Effect."[78] Second, while these games constituted a tiny sample of the huge universe of video games on the market, the court applied its analysis to the medium as a whole:

> This Court has difficulty accepting that some video games do contain expression while others do not, and it finds that this is a dangerous path to follow. The First Amendment does not allow us to review books, magazines, motion pictures, or music and decide that some of them are speech and some of them are not. It appears to the Court that either a "medium" provides sufficient elements of communication and expressiveness to fall within the scope of the First Amendment, or it does not.[79]

The court's "all or nothing" approach ignored the multitude of games that do contain expression and are more representative of the medium as a whole. Also, First Amendment jurisprudence has generally treated works individually and does not grant or deny protection to an entire medium based on potentially anomalous

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73. *Id.* at 577–78 (noting that "The House of the Dead" involves themes of self-defense, protection of others, and dread of the "undead" and that "Ultimate Mortal Kombat 3" conveys a feminist ideology).

74. 200 F. Supp. 2d 1126, 1129–31 (E.D. Mo. 2002).

75. *Id.* at 1134.

76. *Id.* at 1133–34.

77. *Id.* at 1135.

78. *Id.* at 1131. The court somehow mangled the names of two of these games; the correct titles should have been "Resident Evil" and "Mortal Kombat." *See* WAGNER JAMES AU, PLAYING GAMES WITH FREE SPEECH, *at* http://www.salon.com/tech/feature/2002/05/06/games_as_speech/index1.html?x (last visited Mar. 10, 2003) (on file with author).

79. Interactive Digital Software Ass'n v. St. Louis County, Mo., 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).

samples.[80] Third, the court's analogy of video games to baseball and Bingo, which are not "speech" within the First Amendment, was erroneous. The court reasoned that an ordinary game with no free speech protection does not become communicative or expressive when translated into video form.[81] Even if case law supports this notion, the court was not dealing with video Bingo. Instead, games like "Resident Evil" and "Mortal Kombat" were original works, not based on pre-existing games or sports. The court's recognition that the games' "scripts" were creative and detailed undercut its analogy of these games to baseball and Bingo.[82]

The *America's Best Family* line of cases that the court relied on was decided in a relative Stone Age in video game history. The 1980s featured such rudimentary games as "Missile Command," "Defender," and "Pac-Man."[83] These early games probably had little creative or expressive value. Storylines were minimal and characters like "Pac-Man" were not very complex.

In the two decades since *America's Best Family* was decided, video games have become more sophisticated by taking advantage of innovations in computer technology. The processing power of video game consoles has progressed from the 8-bit Nintendo Entertainment System that was released in 1985[84] to the powerful 128-bit PlayStation 2 that Sony introduced in 2000.[85] In 1995, CD-ROM based systems, such as the Sega Saturn and the original PlayStation, debuted.[86] Such advances have enabled video games to incorporate full motion video[87] and render complex three-dimensional environments.[88]

Because of these technological developments, modern video games are much more capable of creativity and expression than they were in the 1980s. Recent games like "Metal Gear Solid 2"[89] and "Deus Ex"[90] are capable of portraying complex characters and sophisticated stories. These games resemble

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80. *See* Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 181 (D. Conn. 2002) ("Because a pinball machine is not protected speech, a video game that only simulated a pinball machine would not be protected speech. Conversely, comic books and movies are protected speech, so interactive versions of the same genre are also protected, even though they are labeled 'games.'").

81. *Interactive Digital Software*, 200 F. Supp. 2d at 1134.

82. *Id.* at 1135.

83. *See* RUSEL DEMARIA & JOHNNY L. WILSON, HIGH SCORE! THE ILLUSTRATED HISTORY OF ELECTRONIC GAMES 60–62 (2002).

84. *Id.* at 231–32; NINTENDO, NES, *at* http://www.nintendo.com/systems/nes/nes_overview.jsp (last visited Mar. 10, 2003) (on file with author).

85. DEMARIA & WILSON, *supra* note 83, at 314; PLAYSTATION.COM, HARDWARE, *at* http://www.us.playstation.com/hardware/ps2/ (last visited Mar. 10, 2003) (on file with author).

86. DEMARIA & WILSON, *supra* note 83, at 282–83.

87. *See id.* at 206–08 (discussing the "Wing Commander" series); *id.* at 207 (stating that the later "Wing Commander" games included live-action clips with actors like Mark Hamill of "Star Wars" fame).

88. *See id.* at 274–75 (discussing "Doom" and "Quake").

89. KONAMI OF AMERICA, METAL GEAR SOLID 2: SONS OF LIBERTY, *at* http://www.konami.com/mgs2/ (last visited Mar. 10, 2003) (on file with author).

90. EIDOS INTERACTIVE, DEUS EX, *at* http://www.deusex.com/ (last visited Mar. 10, 2003) (on file with author).

motion pictures, especially animated motion pictures, which the First Amendment already protects.[91] Furthermore, Hollywood and the video game industry have apparently formed a symbiotic relationship, with the former producing movies based on video games and the latter developing games based on movies.[92] A medium that can complement motion pictures should certainly be considered "speech" within the meaning of the First Amendment.

Notwithstanding the anomalous *Interactive Digital Software*, the Seventh Circuit's decision in *Kendrick* has effectively overruled the *America's Best Family* line of cases.[93] Modern computer technology has rendered *America's Best Family* obsolete. The Seventh Circuit is leading the way into the twenty-first century and other courts should recognize that video games constitute "speech" within the meaning of the First Amendment.

III. THE EXCEPTIONS TO FIRST AMENDMENT PROTECTION SHOULD NOT APPLY TO VIOLENT VIDEO GAMES

Some courts have already followed the lead of *Kendrick* and recognized that video games are "speech" within the meaning of the First Amendment.[94] This determination, however, is not the end of the analysis. The protection afforded by the First Amendment is not absolute.[95] A plaintiff may be able to defeat a video game publisher's First Amendment defense by demonstrating that a violent video game falls into an exception to First Amendment protection. The U.S. Supreme Court has carved out several of these exceptions: fighting words,[96] obscenity,[97] child pornography,[98] defamation,[99] clear and present dangers,[100] and speech intended to incite imminent unlawful activity.[101] Thus, the First Amendment does

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91. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

92. Examples of game-based movies include "Mortal Kombat" and "Tomb Raider." *See* THE THRESHOLD NETWORK, THE THRESHOLD NETWORK PRESENTS MORTAL KOMBAT, *at* http://www.mortalkombat.com/movies_mk2_overview.php3 (last visited Mar. 10, 2003) (on file with author); PARAMOUNT PICTURES, LARA CROFT TOMB RAIDER: THE CRADLE OF LIFE, *at* http://www.tombraidermovie.com/index.shtml (last visited Mar. 31, 2003) (on file with author). Examples of movie-based games include "Aliens v. Predator 2" and "Spider-Man: The Movie." *See* SIERRA ON-LINE, ALIENS V. PREDATOR™ 2, *at* http://avp2.sierra.com/ (last visited Mar. 10, 2003) (on file with author); ACTIVISION, SPIDER-MAN: THE MOVIE, *at* http://www.universeofheroes.com/game_themovie.html (last visited Mar. 10, 2003) (on file with author).

93. *See* Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002).

94. James v. Meow Media, Inc., 300 F.3d 683, 696 (6th Cir. 2002); *Sanders*, 188 F. Supp. 2d at 1274; Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 180 (D. Conn. 2002).

95. *See* Konigsberg v. State Bar, 366 U.S. 36, 49 (1961) (rejecting the absolutist view of the First Amendment).

96. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

97. Miller v. California, 413 U.S. 15 (1973).

98. New York v. Ferber, 458 U.S. 747 (1982).

99. Gertz v. Welch, 418 U.S. 323 (1974).

100. Schenck v. United States, 249 U.S. 47 (1919).

101. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

not protect a video game that falls into any of these exceptions, and its publisher may be held liable for a plaintiff's injuries. Since video games obviously do not constitute child pornography or defamation, these particular exceptions do not warrant discussion here.

A. Violent Video Games Do Not Constitute Fighting Words

The U.S. Supreme Court established the "fighting words" doctrine in *Chaplinsky v. New Hampshire*.[102] In that case, the defendant was convicted for cursing at a city marshal: "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[103] The Court held that the First Amendment does not protect insulting or "fighting" words because the government's interests in peace and order outweigh any social value of such speech.[104] The Court defined "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[105] The term also includes "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[106]

There is no doubt that the "fighting words" exception does not apply to violent video games. Video games generally do not contain abusive language that is likely to provoke a breach of the peace, such as insults or curses directed at a player. Instead, video games are meant to entertain and challenge their players. In *Chaplinsky*, the U.S. Supreme Court also stated that "[t]he statute, as construed, does no more than prohibit the *face-to-face* words plainly likely to cause a breach of the peace by the addressee."[107] In the case of video games, the communication between a publisher and a player is clearly not face-to-face. A court is therefore unlikely to deny First Amendment protection to video games on the basis of the "fighting words" doctrine.

B. Violent Video Games Are Not Obscene

The First Amendment also does not protect obscene materials[108] because states have an interest in regulating obscenity for quality of life and public safety purposes.[109] While the U.S. Supreme Court has struggled at times to define obscenity,[110] the Court established the current test for obscenity in *Miller v. California*:

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102. 315 U.S. 568 (1942).

103. *Id.* at 569.

104. *Id.* at 571; *see also* Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . .").

105. *Chaplinsky*, 315 U.S. at 572.

106. Cohen v. California, 403 U.S. 15, 20 (1971).

107. 315 U.S. at 573 (emphasis added).

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

109. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973).

110. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[111]

The Court even provided examples of materials that may be considered patently obscene: "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[112] Material that merely portrays nudity, however, is not obscene.[113]

Under the *Miller* three-part test, violent video games should not be considered obscene. No game on the market today displays sexual acts, either real or animated.[114] The average person should be able to determine that video games are meant to entertain, not to appeal to the prurient interest. As the Seventh Circuit noted in *Kendrick*, video games possess significant literary, artistic, and political value.[115]

Several commentators have advocated expanding the obscenity exception to encompass violent material.[116] For example, David Kiernan points out that *Miller*'s "appeals to the prurient interest" language could be easily modified to "appeals to the prurient *or morbid* interest" and that its "sexual conduct" term could be changed to "sexual *or violent* conduct."[117] Kevin Saunders argues that banning violent material through the obscenity exception has a historical basis.[118] And Kevin Barton contends that the rationale behind the obscenity exception goes beyond promoting decency to include a state's interest in controlling violent behavior.[119] These arguments may be compelling, but courts have not been persuaded.

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within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it . . . .*") (emphasis added).

111. 413 U.S. 15, 24 (1973) (citations omitted).

112. *Id.* at 25.

113. Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

114. *See* Kiernan, *supra* note 64, at 222. However, video games are starting to toe the line and become more risqué. *See* ACCLAIM.COM, BMX XXX SCREENSHOTS, *at* http://www.bmxxxx.com/thisisbmx/screenshots/index.html (last visited Mar. 10, 2003) (on file with author) (featuring screenshots of a topless bike rider).

115. 244 F.3d 572, 577–78 (7th Cir. 2001).

116. *See* Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994); Kevin E. Barton, Note, *Game Over! Legal Responses to Video Game Violence*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 158 (2002); Kiernan, *supra* note 64, at 222–23.

117. Kiernan, *supra* note 64, at 222–23 (emphasis added).

118. Saunders, *supra* note 116, at 113.

119. Barton, *supra* note 116, at 158–59.

Several courts have restricted the scope of obscenity to sexually explicit materials and have not been receptive to proposals to expand the doctrine to include violent content. The U.S. Supreme Court has already indicated that speech must be erotic before it may be considered obscene.[120] In *Video Software Dealers Ass'n v. Webster*, the Eighth Circuit considered the constitutionality of a Missouri statute that closely mirrored the *Miller* test but replaced the terms relating to prurience with the word "violence."[121] The court held that the obscenity exception only applies to sexually explicit material.[122] And in *Kendrick*, the Seventh Circuit explained that violence and obscenity are analytically distinct categories.[123] Obscenity is restricted to sex not because it would affect a person's behavior, but because it violates community norms of decency.[124] "Offensiveness is the offense," as the court put it.[125] The Sixth Circuit has agreed with the Seventh Circuit, holding that the obscenity doctrine "is a limit on the extent to which the community's sensibilities can be shocked by speech, not a protection against the behavior that the speech creates."[126] These courts have uniformly considered, and rejected, attempts to expand the obscenity exception to include violent content.

Barton argues that the underlying rationale of the obscenity exception should not be limited to regulating offensiveness.[127] In support of this argument, he cites *Paris Adult Theatre I v. Slaton*, in which the U.S. Supreme Court determined that a state is entitled to regulate obscene materials in order to control "antisocial behavior."[128] But within the factual context of the case, the Court's reference to "antisocial behavior" likely referred to sex crimes, which some studies have linked with obscene materials.[129] The issue before the Court was limited to sexually explicit materials; the Court did not consider whether a state could constitutionally prohibit extremely violent materials, even if such expression may cause "antisocial behavior" as well. As *Roth* and *Miller* have demonstrated, the essence of the obscenity doctrine is the scope of a state's power to legislate morality. Furthermore, expanding the obscenity exception to encompass violent materials on the basis of the crime that they may cause would be redundant; the *Brandenburg* doctrine already proscribes speech that incites imminent unlawful acts.[130]

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120. Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 n.10 (1975); Cohen v. California, 403 U.S. 15, 20 (1971).

121. 968 F.2d 684, 687 (8th Cir. 1992).

122. *Id.* at 688 (citing *Erznoznik*, 422 U.S. at 213 n.10).

123. 244 F.3d 572, 574 (7th Cir. 2001).

124. *Id.*

125. *Id.* at 575.

126. James v. Meow Media, Inc., 300 F.3d 683, 698 (6th Cir. 2002).

127. Barton, *supra* note 116, at 158–59.

128. *Id.* at 159 (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60–61 (1973)).

129. *Slaton*, 413 U.S. at 58 (discussing a report's finding of a correlation between obscene material and sex crimes).

130. *See James*, 300 F.3d at 698 ("This is not to say that protecting people from the violence that speech might incite is a completely impermissible purpose for regulating speech. However, we have generally handled that endeavor under a different category of our First Amendment jurisprudence, excluding from constitutional protection those communicated ideas and images that incite others to violence."); *see also infra* text accompanying notes 143–48.

C. Violent Video Games Do Not Pose a Clear and Present Danger

The "clear and present danger" exception to First Amendment protection proscribes substantive evils that the government has a right to prohibit.[131] The government has historically used this doctrine to restrict politically subversive speech. In *Schenck v. United States*, the defendant was convicted for distributing leaflets that condemned the draft of World War I.[132] In affirming the conviction, the Court promulgated the clear and present danger exception. The Court explained that "[t]he 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."[133] This definition appears to be circular, but to illustrate the doctrine, the Court explained that a man who falsely shouts "Fire!" in a theater and causes people to panic would not be entitled to any First Amendment protection.[134] The issue is one of proximity and degree.[135]

Subsequent cases dealing with the clear and present danger exception illustrate the political purposes of the doctrine. In *Frohwerk v. United States*, the Supreme Court affirmed the conviction of the publisher of twelve newspaper articles that criticized America's involvement in World War I.[136] In *Debs v. United States*, the defendant was convicted for praising socialism and condemning World War I.[137] In *Abrams v. United States*, the defendants were convicted for attempting to distribute two circulars that attacked World War I.[138] In *Schaefer v. United States*, the defendants were convicted for publishing a newspaper that falsely reported the Germans' success.[139] In *Pierce v. United States*, the Court upheld convictions for publishing and distributing pamphlets that urged insubordination in the U.S. military.[140] And in *Dennis v. United States*, the Court held that the Communist Party's advocacy of a violent overthrow of the federal government constituted a "clear and present danger."[141]

In light of the political nature of the "clear and present danger" exception, violent video games should be protected speech. No critic has seriously contended that video games constitute politically subversive speech. These games are generally designed to entertain, not to condemn a war, denounce the draft, or advocate the overthrow of the federal government. Video games do not bring about the "substantive evils" that the clear and present danger exception was intended to proscribe.

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131. Schenck v. United States, 249 U.S. 47, 52 (1919).
132. *Id.* at 49–51.
133. *Id.* at 52.
134. *Id.*
135. *Id.*
136. 249 U.S. 204, 208–09 (1919).
137. 249 U.S. 211, 212–14 (1919).
138. 250 U.S. 616, 617–18 (1919).
139. 251 U.S. 466, 468 (1920).
140. 252 U.S. 239, 241 (1920).
141. 341 U.S. 494, 509 (1951).

Recent decisions have questioned the viability of the "clear and present danger" doctrine as a distinct exception to the First Amendment. The U.S. Supreme Court has observed that the *Brandenburg* doctrine of "incitement" has superseded *Schenck* and the "clear and present danger" exception.[142] Therefore, this exception to free speech protection has apparently become obsolete.

D. Violent Video Games Do Not Incite Imminent Unlawful Activity

The U.S. Supreme Court established the "incitement to imminent unlawful activity" exception to First Amendment protection in *Brandenburg v. Ohio*.[143] In that case, the defendant was convicted for giving a speech at a Ku Klux Klan rally.[144] Among other comments, he stated: "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."[145] The U.S. Supreme Court held that the First Amendment protects the advocacy of the use of violence unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[146] The Court pointed out that the mere abstract teaching of the propriety or necessity of violence is distinct from "preparing a group for violent action and steeling it to such action."[147] To pass constitutional muster, a statute must criminalize the latter without infringing on the former.[148]

The Supreme Court later clarified the *Brandenburg* doctrine in *Hess v. Indiana*.[149] In *Hess*, antiwar demonstrators were blocking traffic on a public street.[150] A sheriff overheard the defendant say, "We'll take the fucking street later (or again)."[151] The defendant was then arrested and subsequently convicted of disorderly conduct.[152] The Supreme Court held that *Brandenburg* could not proscribe the defendant's statement because there was no evidence that his words "were intended to produce, and likely to produce, *imminent* disorder."[153] The Court pointed out that "[a]t best . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some *indefinite* future time."[154] Therefore, the defendant's words constituted protected speech.

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142. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 778 (1996).

143. 395 U.S. 444 (1969).

144. *Id.* at 445–46.

145. *Id.* at 446.

146. *Id.* at 447.

147. *Id.* at 447–48 (citing Noto v. United States, 367 U.S. 290, 297–98 (1961)).

148. *Id.* at 448 (indicating that a statute that fails to draw this distinction violates the First and Fourteenth Amendments).

149. 414 U.S. 105 (1973).

150. *Id.* at 106.

151. *Id.* at 106–07.

152. *Id.* at 105.

153. *Id.* at 109.

154. *Id.* at 108 (emphasis added).

This case refined *Brandenburg* in a couple of ways. As one commentator observed, *Hess* added an element of intent to the *Brandenburg* analysis.[155] More significantly, the unlawful activity that is being incited must be *imminent*. As *Hess* implies, speech that may incite an unlawful act at an indefinite time is still protected by the First Amendment.[156] On this point, *NAACP v. Claiborne Hardware Co.* is also instructive.[157] In 1966, members of an NAACP chapter voted to boycott local white-owned businesses.[158] Charles Evers, the field secretary of the chapter, gave a speech in which he declared that any "uncle toms" who broke the boycott would "have their necks broken."[159] For months after the speech, some blacks committed several acts of intimidation against those who ignored the boycott.[160] The white business owners sued the boycotters to recover their losses.[161] The Supreme Court held that Evers could not be held jointly liable because his speech did not incite the violence against the blacks who refused to participate in the boycott.[162] The Court pointed out that the violence occurred weeks, even months, after Evers' speech, not immediately after it.[163] The Court also emphasized the political value of Evers' speech: "An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech."[164]

Hess and *Claiborne Hardware* demonstrate that the time that passes between an act of violence and the speech that allegedly incited it must be short enough for a court to reasonably conclude that the speech actually incited the violence. Causal connections dissipate over time. Violent conduct that occurs long after the speech may be attributed to intervening events, rather than the speech. The U.S. Supreme Court has not yet established any guidelines to determine whether an act of violence occurred soon enough after the speech to be attributable to it. The weeks- or months-long gap between Evers' speech and the subsequent violence, however, is certainly instructive.

The few courts that have addressed video game publisher liability for youth violence have held that violent video games do not constitute "incitement." In *James* and *Sanders*, both courts observed that the defendants obviously did not intend to cause their consumers to commit violent crimes.[165] The *James* court also

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155. Kiernan, *supra* note 64, at 227.

156. 414 U.S. at 108.

157. 458 U.S. 886 (1982).

158. *Id.* at 900.

159. *Id.* at 900 n.28.

160. *Id.* at 904–06 (stating that shots were fired at homes, a brick was thrown through a windshield, and a flower garden was destroyed, among other incidents).

161. *Id.* at 889–90.

162. *Id.* at 929.

163. *Id.* at 928.

164. *Id.*

165. James v. Meow Media, Inc., 300 F.3d 683, 698 (6th Cir. 2002); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1280 (D. Colo. 2002) ("The *Rice* Court stated that 'it will presumably never be the case that the broadcaster or publisher actually intends' to assist or encourage a crime.") (citing Rice v. Paladin Enters., Inc., 128 F.3d 233, 265–66 (4th Cir. 1997)).

observed that the plaintiffs' theory of the case, that violent entertainment had gradually desensitized Carneal to the moral consequences of violence, was inconsistent with the *Brandenburg* doctrine.[166] In *Sanders*, the district court rejected the plaintiffs' argument that illegal action at some future time satisfies the imminence requirement of *Brandenburg*.[167] Both courts also refused to distinguish the entertainment content of video games from the political advocacy of Brandenburg's speech.[168] In particular, the Sixth Circuit cited cases that distinguished pornography from incitement and emphasized that the *Brandenburg* doctrine does not depend on the political nature of the speech.[169]

1. Brandenburg *and the Entertainment Industry*

An analysis of *Brandenburg*'s application in other entertainment industry cases is probative to the question of whether the doctrine also applies to video games. The following cases are grouped in these categories: Motion Picture Cases; Television and Radio Show Cases; Music Cases; and Literature and Game Cases.[170]

a. Motion Picture Cases

In *Yakubowicz v. Paramount Pictures Corp.*, the plaintiff brought a wrongful death claim against Paramount after a teenager stabbed his son to death.[171] The killer had watched *The Warriors*, a Paramount film that featured gang violence in the subways of New York.[172] After viewing the film, the killer encountered the victim on a subway and challenged him to fight.[173] The victim refused to fight, but as he left the subway station, the killer jumped on him and stabbed him.[174]

The plaintiff alleged that Paramount "produced, distributed, and advertised 'The Warriors' in such a way as to induce film viewers to commit violence in imitation of the violence in the film."[175] The Supreme Judicial Court of Massachusetts held that the film was not incitement under *Brandenburg*.[176] The court explained that "[a]lthough the film is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful

166. *James*, 300 F.3d at 698 ("This glacial process of personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test.").

167. *Sanders*, 188 F. Supp. 2d at 1280 ("The First Amendment does not permit someone to be punished for advocating illegal conduct at some indefinite future time.").

168. *James*, 300 F.3d at 699; *Sanders*, 188 F. Supp. 2d at 1279–80.

169. *James*, 300 F.3d at 699 (citing Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1199–1200 (9th Cir. 1989); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1024 (5th Cir. 1987)).

170. Similar categories appeared in Kiernan, *supra* note 64, at 229.

171. 536 N.E.2d 1067, 1068 (Mass. 1989).

172. *Id.* at 1069.

173. *Id.* at 1070.

174. *Id.*

175. *Id.* at 1068.

176. *Id.* at 1071.

or violent activity on the part of viewers,"[177] and the film did not "purport to order or command anyone to any concrete action at any specific time, much less immediately."[178]

The court's analysis comports with *Brandenburg*. It draws a distinction between mere teaching of the necessity or propriety of violence on the one hand, and preparing and steeling a person for violent conduct on the other. The court's reasoning also clarified the meaning of "incitement"; it may require an "order" or "command" to commit an illegal act.

b. Television and Radio Show Cases

In *Olivia N. v. NBC*, a nine-year-old girl brought a tort action against NBC after several minors who had watched "Born Innocent," an NBC show, sexually assaulted her.[179] The show included a scene in which four girls in a state-run home "artificially raped" a young orphan in the shower with the handle of a plunger.[180] The plaintiff's attackers had viewed and discussed this scene and apparently attempted to imitate it with the plaintiff.[181] The California Court of Appeals held that "Born Again" did not constitute "incitement."[182] The court refused to distinguish fictional programming from constitutionally protected news broadcasts and documentaries.[183] The court also held that negligence could not be imposed on the basis of *Weirum v. RKO General, Inc.*[184] because the radio station in that case had encouraged its listeners to drive recklessly in a race to win prizes.[185] NBC, on the other hand, did not encourage the viewers of "Born Innocent" to commit sexual assaults.[186]

NBC was sued again in *DeFilippo v. NBC*.[187] In that case, a thirteen-year-old boy accidentally hung himself trying to imitate a trick that Johnny Carson and a stuntman performed on "The Tonight Show."[188] The boy's parents claimed that NBC negligently broadcasted the stunt and failed to warn its viewers of the dangers.[189] The Rhode Island Supreme Court held that the show did not constitute "incitement" and was, therefore, protected speech.[190] The court emphasized that the plaintiffs' son was the only person known to have imitated the stunt and that the stuntman had warned viewers about the dangers of the stunt, saying, "[I]t's not

177. *Id.*
178. *Id.* (quoting McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988)).
179. 178 Cal. Rptr. 888, 891 (Cal. Ct. App. 1981).
180. *Id.* at 891.
181. *Id.* Incidentally, the plaintiff's attackers used a bottle instead of a plunger. *Id.*
182. *Id.* at 893.
183. *Id.*
184. 539 P.2d 36 (Cal. 1975).
185. *Olivia N.*, 178 Cal. Rptr. at 893–94.
186. *Id.*
187. 446 A.2d 1036 (R.I. 1982).
188. *Id.* at 1037–38.
189. *Id.* at 1038.
190. *Id.* at 1041.

something that you want to go and try."[191] The court pointed out that imposing liability on NBC would lead to self-censorship by broadcasters.[192]

The Rhode Island Supreme Court's emphasis on the fact that no other person was known to have imitated the stunt poses a formidable obstacle to plaintiffs in video game cases. Under this interpretation of *Brandenburg*, the number of people who commit violent acts after playing a defendant's video game would be relevant to the issue of whether the game constitutes "incitement." So far, there have been only a handful of school shootings that resulted in litigation, namely *James* and *Sanders*. There are probably several thousand youths, however, who play violent video games every day but do not turn into homicidal maniacs. Based on this tiny proportion of video game players who have turned violent, courts should conclude that violent video games do not constitute "incitement."[193]

S & W Seafoods Co. v. Jacor Broadcasting of Atlanta is a case that involved the imposition of tort liability on a radio station.[194] A radio talk show host insulted a restaurant and its manager on the air and the manager sued for damages based on intentional infliction of emotional distress, among other theories.[195] The Georgia Court of Appeals held that the First Amendment did not protect the host's exhortations to insult the manager, spit on him, and slap him in the face.[196] While nobody actually went to the restaurant to insult or spit on the manager, the court explained that he still had sufficient reason to fear such a response.[197] At one point, a caller to the radio station told the host, "Yeah, I might do that, for sure."[198] The manager eventually received numerous threatening calls at the restaurant and at his home.[199] The court held that a factfinder could reasonably conclude that the talk show host's comments were likely to lead to an imminent breach of the peace.[200]

Still, a plaintiff suing a video game publisher would not find much support from *S & W Seafoods* because that case is distinguishable from video game cases. The talk show host actively encouraged his listeners to commit certain breaches of the peace against a specific target at a specific location. The host also urged his listeners to act immediately, or sometime during that day.[201] His

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191. *Id.*

192. *Id.* (commenting that liability would infringe on "defendants' limited right to make their own programming decisions").

193. *See, e.g.*, James v. Meow Media, 90 F. Supp. 2d 798, 808 (W.D. Ky. 2000) (explaining that Carneal's crimes were "highly extraordinary in nature" and "unforeseeable in character").

194. 390 S.E.2d 228 (Ga. Ct. App. 1989).

195. *Id.* at 229–30 (stating that the host had encouraged listeners to tell the manager that he "stinks," to spit in his face, and to give him "a little five fingers in the face," among other comments).

196. *Id.* at 230.

197. *Id.* at 230–31.

198. *Id.* at 231.

199. *Id.*

200. *Id.*

201. *Id.* at 229 n.1 (stating that some of the host's comments to his listeners included: "Anybody up there . . . Would you go into that restaurant *right now*, the S & W Seafood Restaurant on Roswell Road and find out who that manager is and tell him that I

comments satisfied the *Brandenburg* requirement of imminence because, unlike the speakers in *Brandenburg* and *Hess*, the host encouraged specific actions at a specific time in the imminent future. On the other hand, there is a fierce debate as to whether video games encourage their players to commit violent acts at all. Even if video games do urge violence, there is no evidence that they urge *imminent* violence. Without this element of imminence, *Brandenburg* should not apply to video games.

c. Music Cases

In two separate cases, Ozzy Osbourne was sued because his songs allegedly caused two people to shoot themselves to death.[202] One of those songs was "Suicide Solution," which allegedly contained subliminal messages.[203] The plaintiffs contended that the *Brandenburg* exception to free speech protection applied to Osbourne's music.[204] Both courts, however, rejected this claim and held that the songs did not constitute incitement.[205]

In *Waller v. Osbourne*, the district court explained that "Suicide Solution" was discussing suicide in a philosophical sense.[206] The court stated that, "[A]n abstract discussion of the moral propriety or even moral necessity for a resort to suicide . . . is not the same as indicating to someone that he should commit suicide and encouraging him to take such action."[207] "Suicide Solution" was not directed toward any particular person or group and there was no evidence that the song was intended to cause any suicides.[208]

The court's reasoning in *McCollum v. CBS, Inc.* was similar to that of *Waller*. The court observed that the lyrics of "Suicide Solution," even when interpreted literally, did not "purport to order or command anyone to any concrete action at any specific time, much less immediately."[209] The court also rejected the plaintiff's argument that art may constitute incitement simply because it may advocate suicide or conjure negative emotions, such as depression.[210] Musical lyrics that are not intended to be interpreted literally should not amount to the "call to action" that *Brandenburg* requires.[211]

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am going up there and kick his you-know-what," and "Go by there *today* and give a little five fingers in the face there to Bob Weinberg.") (emphasis added).

202. Waller v. Osbourne, 763 F. Supp. 1144, 1145-46 (M.D. Ga. 1991); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 189 (Cal. Ct. App. 1988).

203. *Waller*, 763 F. Supp. at 1146. For the lyrics to "Suicide Solution," see *McCollum*, 249 Cal. Rptr. at 190 n.5.

204. *Waller*, 763 F. Supp. at 1150; *McCollum*, 249 Cal. Rptr. at 193.

205. *Waller*, 763 F. Supp. at 1151; *McCollum*, 249 Cal. Rptr. at 195.

206. *Waller*, 763 F. Supp. at 1151.

207. *Id.*

208. *Id.*

209. *McCollum*, 249 Cal. Rptr. at 193.

210. *Id.* at 194.

211. *Id.*

d. Literature and Game Cases

Not unlike *DeFilippo*, *Herceg v. Hustler Magazine, Inc.* involved an accidental suicide that was blamed on the defendant's speech.[212] *Hustler Magazine* had published an article about autoerotic asphyxia, a technique of masturbation that involves "'hanging' oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm."[213] Autoerotic asphyxia may induce intense sexual pleasure, but it also runs the risk of death by strangulation.[214] The plaintiff's teenage son read the article, attempted autoerotic asphyxia, and accidentally hung himself.[215]

The plaintiffs claimed that *Hustler Magazine* incited the boy into attempting autoerotic asphyxia.[216] The Fifth Circuit, however, held that the article did not advocate the practice because it contained numerous warnings of the dangers of autoerotic asphyxia.[217] More importantly, the court asserted that the *Brandenburg* doctrine was meant to apply in a different context: "Incitement cases usually concern a state effort to punish the arousal of a crowd to commit a criminal action. The root of incitement theory appears to have been grounded in concern over crowd behavior."[218] In other words, the incitement exception to the First Amendment should be limited to the proscription of speech that is likely to induce a dangerous "mob mentality" in crowds. The court's interpretation of the incitement exception is not without merit because both *Brandenburg* and *Hess*, the two landmark cases on the doctrine of incitement, addressed the criminalization of words that were spoken in front of groups of people gathered for common purposes.[219] There is no language in *Brandenburg* or *Hess* that purports to apply the incitement doctrine to entertainment, or to mass-produced speech that reaches people individually.

In *Watters v. TSR, Inc.*, the plaintiff sued the publisher of "Dungeons & Dragons," a fantasy role-playing game, alleging that the game caused her son to commit suicide.[220] The district court held that "Dungeons & Dragons" did not constitute incitement under *Brandenburg* because the plaintiff's son had played the game for as long as five years before committing suicide.[221] Therefore, if the

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212. 814 F.2d 1017 (5th Cir. 1987).

213. *Id.* at 1018.

214. *Id.* at 1019.

215. *Id.*

216. *Id.*

217. *Id.* at 1023; *see also id.* at 1018 (stating that the article ironically warned that approximately 1,000 teenagers in the United States die from autoerotic asphyxia annually).

218. *Id.* at 1023.

219. Brandenburg v. Ohio, 395 U.S. 444, 445–46 (1969) (stating that Brandenburg spoke to only twelve members of the Klan but he also referred to an impending Independence Day march with 400,000 Klansmen); Hess v. Indiana, 414 U.S. 105, 106–07 (1973).

220. 715 F. Supp. 819, 820 (W.D. Ky. 1989).

221. *Id.* at 823 ("The basis for not protecting the types of speech listed [obscenity, fighting words, libel, and incitement] is not applicable where the injury does not *immediately* result from the speech itself. . . .").

defendant's game did incite violence, it was not imminent.[222] While the Sixth Circuit affirmed the district court's judgment on common law tort grounds only,[223] the district judge later quoted from his own opinion when he decided *James*:

> The theories of liability sought to be imposed upon the manufacturer of a role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms. It cannot be justified by the benefit Plaintiff claims would result from the imposition. The libraries of the world are a great reservoir of works of fiction and nonfiction which may stir their readers to commit heinous acts of violence or evil. However, ideas expressed in one work which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness. As was stated by the second Mr. Justice Harlan, 'one man's vulgarity is another man's lyric.' Atrocities have been committed in the name of many of civilization's great religions, intellectuals, and artists, yet the [F]irst [A]mendment does not hold those whose ideas inspired the crimes to answer for such acts. To do so would be to allow the freaks and misfits of society to declare what the rest of the country can and cannot read, watch and hear.[224]

Likewise, the imposition of tort liability on video game publishers would allow mentally unstable individuals like Carneal, Harris, and Klebold to dictate to others what games they may or may not play.

In a subsequent case, the Fourth Circuit held that the First Amendment did not protect the publisher of a detailed "hit man" instruction manual.[225] *Hit Man: A Technical Manual for Independent Contractors* contained elaborate, step-by-step instructions for working as a contract killer, including tips on finding a client, constructing a silencer, and disposing of a corpse.[226] After reading *Hit Man*, James Perry solicited a client and brutally murdered three people, meticulously following the book's instructions.[227] Relatives and representatives of the victims' estates then brought a wrongful death claim against Paladin Enterprises, the publisher of *Hit Man*.[228]

The Fourth Circuit rejected Paladin's argument that the First Amendment protected it from liability and held that the publisher was liable as an aider and abetter of the triple murder.[229] The court reasoned that speech that amounts to "legitimately proscribable nonexpressive conduct" may be criminalized.[230] The court cited Justice Black's explanation of the "speech-act" doctrine:

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222. *Id.*

223. Watters v. TSR, Inc., 904 F.2d 378, 380 (6th Cir. 1990) ("[C]onstitutional questions should be decided only where necessary . . . .").

224. James v. Meow Media, 90 F. Supp. 2d 798, 818–19 (W.D. Ky. 2000) (internal citation omitted) (quoting *Watters*, 715 F. Supp. at 822).

225. Rice v. Paladin Enters., Inc., 128 F.3d 233, 242–43 (4th Cir. 1997).

226. *Id.* at 235–39.

227. *Id.* at 239–41.

228. *Id.* at 241.

229. *Id.* at 243.

230. *Id.*

> It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.[231]

The Fourth Circuit then surveyed case law on aiding and abetting and concluded that such an offense, even when committed through speech or writing, was not protected by the First Amendment.[232] The court also held that *Hit Man* constituted incitement under *Brandenburg* because the doctrine protects criticism of government and the advocacy of lawlessness but not "the teaching of the technical methods of criminal activity."[233]

While granting First Amendment protection to speech that constitutes an essential component of a crime would certainly eviscerate a substantial portion of every state's criminal code, *Rice* is a problematic application of *Brandenburg*. The Fourth Circuit did not accord much weight to the imminence requirement of *Hess*. Perry, the hit man, had ordered *Hit Man* and *How to Make a Disposable Silencer, Volume 2*, from Paladin on January 24, 1992, but he did not begin planning his first "job" until March 3, 1993.[234] This thirteen-month gap should have bolstered the defendant's argument that its books did not incite "imminent" unlawful activity. The court, however, referred to an argument that the Department of Justice had once made in the bombmaking information context.[235] According to this argument, the "imminence" requirement does not preclude the criminalization of speech that constitutes aiding and abetting because such speech facilitates criminal conduct by teaching the means to commit it, rather than merely advocating it.[236] Since people may use information on extremely dangerous criminal activities, such as contract murder and bombmaking, at any time, *Rice* minimized the significance of the "imminence" element.

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231. *Id.* at 243 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

232. *Id.* at 244–46 (citing United States v. Fleschner, 98 F.3d 155 (4th Cir. 1996) (holding that aiding and abetting violations of tax laws was not protected by the First Amendment); United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) (holding that aiding and abetting interstate transportation of betting paraphernalia was not protected by the First Amendment); United States v. Kelley, 769 F.2d 215 (4th Cir. 1985) (holding that aiding and abetting violations of tax laws was not protected by the First Amendment); United States v. Freeman, 761 F.2d 549 (9th Cir. 1985) (holding that aiding and abetting tax fraud was not protected by the First Amendment); United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (holding that aiding and abetting a crime by publishing instructions on making illegal drugs was not protected by the First Amendment); United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978) (holding that aiding and abetting violations of tax laws was not protected by the First Amendment)).

233. *Rice*, 128 F.3d at 250.

234. *Id.* at 241 n.2.

235. *Id.* at 246.

236. *Id.*

Rice seems to be an attractive alternative for plaintiffs in video game cases because the imminence standard has otherwise been difficult to meet.[237] Video games, however, are entirely distinguishable from a detailed hit man manual. Video games are designed to entertain, not to teach sophisticated techniques of murder.

Some critics claim that video games like "Doom" and "Quake" somehow "train" youths in the use of weapons. For example, Grossman and DeGaetano have described violent video games as "firearms trainers" and "murder simulators."[238] As evidence, they point out that Carneal, who had supposedly never fired a real handgun before,[239] had fired eight shots at his school's prayer group, hitting eight different kids.[240] According to the FBI, the average law enforcement officer, in the average shootout, hits a target with only one out of every five shots fired, an accuracy rate of 20%.[241] Critics like Grossman and DeGaetano chalk up this seemingly glaring disparity between the accuracy rate of Carneal and those of law enforcement officers to Carneal's experience with 3-D shooter games. There are other factors, however, that could explain Carneal's seemingly uncanny accuracy. Police officers in a shootout are obviously under intense stress. Sometimes they are defending innocent citizens. Other times, they are being fired at. In the heat of action, an officer's decision to open fire is a split-second one. On the other hand, Carneal was likely under no such pressure. He premeditated the shootings, planned his shots, and almost certainly had the element of surprise. Unless the prayer group was armed and returning fire at Carneal, his accuracy was actually not that remarkable. His performance was not so extraordinary that he must have developed his skills through violent video games. *Rice* is inapposite here because, unlike the *Hit Man* manual in that case, video games do not teach their players how to commit murder.

*2. A Non-*Brandenburg *Case in the Entertainment Industry*

Several cases have imposed tort liability on media defendants without addressing incitement. The most famous example is *Weirum v. RKO General, Inc.*, where a radio station sponsored a contest that offered a cash prize to the first person to locate "The Real Don Steele," a disc jockey who was driving around Los Angeles.[242] Two teenagers who were pursuing Steele's vehicle forced another car into a freeway's center divider, killing the driver.[243] The driver's family brought a wrongful death action against the radio station, among other defendants.[244]

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237. *See* James v. Meow Media, Inc., 300 F.3d 683, 698 (6th Cir. 2002) (dismissing the plaintiffs' claim because they alleged a "glacial process of personality development").

238. GROSSMAN & DEGAETANO, *supra* note 26, at 4.

239. *See* Barton, *supra* note 116, at 143 (stating that, contrary to Grossman's claim, Carneal may have practiced with his gun before taking it to school).

240. GROSSMAN & DEGAETANO, *supra* note 26, at 4.

241. *Id.*

242. 539 P.2d 36, 38 (Cal. 1975).

243. *Id.* at 39.

244. *Id.*

The California Supreme Court held that there was sufficient evidence to support the jury's finding that the radio station's conduct created a foreseeable risk of injury.[245] The court emphasized that it was foreseeable that the radio station's teenage listeners would race from one location to another and ignore highway safety because it was summer during the promotion and teens were out of school.[246] The court rejected the radio station's argument that its contest was entitled to free speech protection.[247]

In spite of the imposition of tort liability on the radio station, *Weirum*'s applicability in the First Amendment context is limited because it did not discuss *Brandenburg*.[248] But even if the court had addressed *Brandenburg* and held that the radio contest constituted incitement, subsequent cases have limited *Weirum* to its particular facts. In *Olivia N.*, the court pointed out that the radio station in *Weirum* had encouraged its listeners to behave recklessly, something that NBC did not do through "Born Innocent."[249] Similarly, in *DeFilippo*, the court characterized *Weirum* as a case of "explicit incitement," unlike the stunt performed on "The Tonight Show."[250] The radio station's conduct would have constituted incitement because it had urged its listeners to race each other in "real time," while they were actually driving on the freeways.[251] The contest had encouraged *imminent* reckless driving because the cash prizes were fleeting, since they were only awarded to the listeners who reached Steele first.[252] *Weirum* is distinguishable from video game cases because the plaintiffs in these cases did not allege that the youths had committed their crimes immediately after playing violent video games.[253] Therefore, *Weirum* provides little support to plaintiffs who seek to impose tort liability on video game publishers.

E. Possible Modifications of the Brandenburg *Doctrine*

Based on First Amendment jurisprudence, modern video games should be entitled to free speech protection and courts should preclude the imposition of tort liability on the publishers of these games. *Brandenburg* imposes an exacting standard, requiring a plaintiff to show that a particular video game was likely to incite imminent unlawful activity and that its publisher intended such a result. While many video games certainly portray violence and arguably advocate violence as a means of accomplishing a game's objectives, proving that a video

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245. *Id.* at 40.

246. *Id.*

247. *Id.* ("The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.").

248. *Id.* at 40 (stating that the defendant only argued that its contest "must be afforded the deference due society's interest in the First Amendment").

249. Olivia N. v. NBC, 178 Cal. Rptr. 888, 894 (Cal. Ct. App. 1981); *see also supra* text accompanying notes 179–86.

250. DeFilippo v. NBC, 446 A.2d 1036, 1041 n.7 (R.I. 1982); *see also supra* text accompanying notes 187–92.

251. *See* Kiernan, *supra* note 64, at 233.

252. *Weirum*, 539 P.2d at 38.

253. *See, e.g.*, James v. Meow Media, 300 F.3d 683, 698 (6th Cir. 2002) (stating that the plaintiffs had alleged that violent entertainment had gradually desensitized Carneal).

game actually directed a person to commit an immediate act of violence has been almost impossible. As a result, some critics have suggested ways to modify or circumvent *Brandenburg*.

David Kiernan has contended that video games should be distinguishable from Brandenburg's speech, which did not amount to incitement under the Supreme Court's analysis. He argues that video games are distinguishable because Brandenburg's speech advocated social and political change, was not made for commercial profit, and was not directed towards children.[254] Kiernan would apparently deny First Amendment protection to video games because they do not exemplify "core" free speech values. He has interpreted *Brandenburg* too narrowly, however, because this doctrine is independent of the social or political value of speech. The distinction that the Supreme Court drew was between advocacy and incitement, not between "high value" and "low value" speech.[255] "Core" speech may still constitute incitement if it directs or encourages imminent illegal acts, even for social or political means. On the other hand, lower courts' interpretations of *Brandenburg* have demonstrated that so-called "low value" speech is still protected by the First Amendment. For example, courts have held that the *Brandenburg* exception does not apply to a film about gang war,[256] music about suicide,[257] and even hard-core pornography.[258] Regardless of social or political value, speech that does not incite imminent unlawful acts is indistinguishable from Brandenburg's speech and should be entitled to free speech protection.

In the alternative, Kiernan argues that *Brandenburg* should be discarded in favor of a "new balance" between the free speech interests of a video game publisher and a plaintiff's interests in compensation.[259] *Brandenburg*, however, already constitutes a compromise between these interests. While a plaintiff may be entitled to compensation by proving the elements of a traditional tort cause of action, the imposition of liability on the basis of speech constitutes state action that implicates First Amendment limitations.[260] Contrary to Kiernan's interpretation, the First Amendment does not completely preclude tort actions based on speech. Instead, the First Amendment could be perceived as a modification of the elements of a tort action. Jane M. Whicher writes that the *Brandenburg* requirement of incitement operates as a higher standard of causation.[261] Whicher recognizes that application of the usual standard of proximate cause has the potential to expose the

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254. Kiernan *supra* note 64, at 236–39.

255. Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) ("Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the [syndicalism] crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.").

256. *See* Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989).

257. *See* Waller v. Osbourne, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 195 (Cal. Ct. App. 1988).

258. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1023 (5th Cir. 1987).

259. Kiernan, *supra* note 64, at 239.

260. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

261. Jane M. Whicher, *Constitutional and Policy Implications of "Pornography Victim" Compensation Schemes*, 40 FED. B. NEWS & J. 360, 362 (1993).

media to tort liability for just about any creative work that somehow inspires a child or mentally ill individual to commit an act of violence.[262] Therefore, *Brandenburg* requires "incitement" as a higher standard of causation than mere "influence" or "inspiration."[263] This heightened standard does not foreclose compensation when a plaintiff is able to demonstrate that a defendant intended to encourage an act of imminent violence through speech. *Brandenburg* also does not preclude compensation for a plaintiff because the doctrine should have the collateral effect of channeling litigation towards the actual tortfeasor, the person who injured the plaintiff by knife or gun instead of through words. Therefore, *Brandenburg* constitutes a viable compromise between a plaintiff's interests in compensation and a defendant's free speech interests. This doctrine is an essential aspect of First Amendment jurisprudence and should not be discarded.

IV. DENYING FIRST AMENDMENT PROTECTION TO VIDEO GAME PUBLISHERS WOULD HAVE HARMFUL POLICY IMPLICATIONS

The denial of First Amendment protection to video game publishers would entail serious policy considerations. This lack of constitutional protection would have a "chilling" effect on the speech of video game publishers, thereby curtailing opportunities for creative expression. Holding video game publishers liable for the actions of violent youths also fails to comport with our society's notions of personal responsibility.

The basic premise behind the First Amendment's protection of most types of speech from tort liability is that such liability would have a "chilling" effect on free speech.[264] Faced with potential liability for developing video games with violence, a video game publisher would have a very strong incentive to avoid this risk by "sanitizing" its games before releasing them to the general public. Anti-violence advocates would certainly welcome this change, but it would severely inhibit the creativity of video game publishers. For example, Grossman's website includes a list of ten recommended nonviolent games, such as "Bust a Move," "Tetris," and "Absolute Pinball."[265] The list also includes some sports games, such as "NASCAR" and "Front Page Sports: Golf."[266] Presumably, video game publishers who release these types of games should expect to avoid tort liability because these games have received the imprimatur of one of the most vocal critics of violence in video games. The games on Grossman's list, however, are limited to a few select genres, most notably the puzzle, sports, and simulation genres.[267] Under a case like *Interactive Digital Software*, some of these rudimentary games

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262. *Id.*

263. *Id.*

264. *See* James v. Meow Media, Inc., 90 F. Supp. 2d 798, 818–19 (W.D. Ky. 2000) ("The theories of liability sought to be imposed upon the manufacturer of a . . . game would have a devastatingly broad chilling effect on expression of all forms.").

265. *See* DAVE GROSSMAN, RECOMMENDED GAMES AND FIGHTING BACK, *at* http://www.killology.com/art_trained_nonviolent.htm (last visited Mar. 10, 2003) (on file with author).

266. *Id.*

267. *Id.* (listing simulation games "Theme Park" and "SimCity").

would not qualify as "speech" within the meaning of the First Amendment.[268] Free speech becomes "chilled" because tort liability would encourage the development of games with minimal creative or expressive elements.

Tort liability would have the effect of encouraging the publication of games that appeal primarily to children. The specter of liability would compel publishers to "dumb down" their games, stripping them of sophisticated plots and characters simply to avoid portraying violence. Courts have shown little tolerance for this regression. For example, the U.S. Supreme Court has held that state action that prohibits the general public from accessing material that may be inappropriate for minors is unconstitutional because it would "reduce the adult population . . . to reading only what is fit for children."[269] As District Court Judge Johnstone once wrote, holding intellectuals and artists responsible for the crimes inspired by their ideas would "allow the freaks and misfits of society to declare what the rest of the country can and cannot read, watch and hear."[270] In other words, the imposition of tort liability would permit the violent or mentally unstable among us to impair the marketplace of ideas.[271]

David Kiernan argues that video games should be entitled to less First Amendment protection because minors play them.[272] Video gaming, however, is not a pastime that is strictly limited to children. According to the Interactive Digital Software Association, the average age of video game players is approximately twenty-eight years and 61% of all game players are eighteen or older.[273] A ten-year-old who was introduced to Nintendo in 1985 will be twenty-eight years old in 2003.[274] Accordingly, video games have evolved from a simple child's toy into a sophisticated entertainment medium. Any industry-imposed restrictions on creativity and expression, implemented as a result of tort liability, would affect the rights of more than a majority of the video gaming market, not just a few adults. The rights of adults to play violent video games would be severely curtailed either because these games would cost more, as the industry passes the costs of liability on to its customers, or because these games would be taken off the market entirely. As such, the imposition of tort liability on video

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268. *See* Interactive Digital Software Ass'n v. St. Louis County, Mo., 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002) (noting that ordinary games with no free speech protection, such as baseball, do not become expressive by virtue of technology that converts it into "video" form).

269. Butler v. Michigan, 352 U.S. 382, 383 (1957).

270. Watters v. TSR, Inc., 715 F. Supp. 819, 822 (W.D. Ky. 1989).

271. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .").

272. *See* Kiernan, *supra* note 64, at 247.

273. INTERACTIVE DIGITAL SOFTWARE ASSOCIATION, VIDEO GAMES & YOUTH VIOLENCE: EXAMINING THE FACTS 4, *at* http://www.idsa.com/pressroom.html (last visited Mar. 10, 2003) (on file with author).

274. *See* DEMARIA & WILSON, *supra* note 83, at 231–32 (stating that the Nintendo Entertainment System was released in 1985).

game publishers would have the collateral effect of trampling on the First Amendment rights of their adult players.[275]

Some critics of video games also have absurd expectations of the medium. For example, Grossman and DeGaetano complain that children are not learning to negotiate conflicts with others when they play video games.[276] They claim that children are "missing priceless opportunities to gain needed cooperative learning and social skills."[277] Video games, however, should not be responsible for teaching children social skills. Video games are not "surrogate" parents. Instead, these games should be recognized for what they are: a form of entertainment, just like literature or motion pictures.[278] Like novelists or film directors, video game publishers are generally engaged in storytelling. Storytelling requires conflict between characters; otherwise, there would be no story to tell.[279] And sometimes conflict involves violence. The Seventh Circuit has pointed out that some of the greatest works of literature, such as *The Odyssey*, *The Divine Comedy*, and *War and Peace*, contain extremely graphic depictions of violence.[280] The court explained: "Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low."[281] Violence is also an essential part of the allegorical struggle between good and evil. For example, "Super Mario Brothers," a popular video game from the 1980s, would not have been nearly as interesting if Mario, in order to rescue Princess Peach, had to talk the evil Bowser into releasing her.[282] "Metal Gear Solid 2," a more recent game, pits an elite commando against terrorists out to steal a high-tech weapon, but if they just sit around a table to negotiate a nonviolent resolution, the game would surely have been a commercial failure.[283] Video games are meant to entertain, and no one should pretend that they teach social skills.

The imposition of tort liability on video game publishers would also undermine the moral principle of personal responsibility. As Professor Ausness puts it: "Allowing plaintiffs to sue media defendants arguably deflects public attention away from teenage killers and shifts it to parties who have no direct connection with the plaintiff's injury. . . . [U]ltimately the individual who commits

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275. *See, e.g.*, United States v. Davis, 902 F. Supp. 98, 101 (E.D. La. 1995) ("Courts have universally held that restrictions placed on willing speakers implicate the First Amendment rights of their audience.").

276. GROSSMAN & DEGAETANO, *supra* note 26, at 69.

277. *Id.*

278. *See* Kiernan, *supra* note 64, at 246 (acknowledging that "the primary function of video games is recreation").

279. *See* Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459, 461 (2001) (noting that conflict, along with character and resolution, is one of the basic building blocks of stories).

280. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

281. *Id.*

282. *See* THE SUPER MARIO BROTHERS COMPENDIUM—BOWSER, *at* http://www.geocities.com/cursemonkey/bowser/ (last visited Mar. 10, 2003) (on file with author).

283. *See* KONAMI OF AMERICA, *supra* note 89.

the crime must be held accountable."[284] Youths like Harris and Klebold may have devoted many of their formative years to violent video games, but the ultimate decision to take guns to school and kill other students was their own. If courts allow the victims of school shootings to collect damages from the publishers of violent video games, they would be shifting a portion of the blame away from the actual perpetrators of such crimes.[285]

This diffusion of moral responsibility would send a dangerous message to a society that has become increasingly receptive to excuses for criminal behavior. For example, Dan White, a former supervisor for the City and County of San Francisco, smuggled a handgun into city hall and killed two people, including the mayor.[286] White's murder convictions were reduced to manslaughter when he relied on the so-called "Twinkie defense," arguing that his consumption of junk food had diminished his mental capacity.[287] Another offbeat excuse for murder was "television intoxication." On June 4, 1977, fifteen-year-old Ronny Zamora and a friend were looking for money and broke into the home of an elderly neighbor.[288] When the neighbor returned, the boys held her at gunpoint and Zamora eventually shot and killed her.[289] At trial, Zamora relied on the defense of "involuntary subliminal television intoxication," arguing that he was legally insane.[290] The trial court rejected the defense,[291] but the unusual defense has stirred some controversy.[292] Zamora also brought an action against three broadcasting companies, alleging that his exposure to television desensitized him to violence and caused him to develop a sociopathic personality.[293] The district court ultimately determined that Zamora failed to state a cause of action.[294] The "television intoxication" theory, however, represents the gradual erosion of the principle of personal responsibility. A future school shooter could foreseeably claim "video game intoxication" as a defense to murder. In light of this possibility, the imposition of tort liability on video game publishers would have serious consequences in the criminal arena. This erosion of personal responsibility would probably encourage, rather than deter, future incidents of youth violence.

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284. Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 669 (2000).

285. *See id.* ("Expanding the list of defendants in a tort action diffuses moral responsibility for criminal behavior rather than focusing on the individual who is primarily responsible.").

286. People v. White, 172 Cal. Rptr. 612, 613–14 (Cal. Ct. App. 1981).

287. Carolyn B. Ramsey, *California's Sexually Violent Predator Act: The Role of Psychiatrists, Courts, and Medical Determinations in Confining Sex Offenders*, 26 HASTINGS CONST. L.Q. 469, 497 (1999).

288. Zamora v. Wainwright, 637 F. Supp. 439, 440 (S.D. Fla. 1986).

289. *Id.*

290. Zamora v. State, 361 So. 2d 776, 779 (Fla. Dist. Ct. App. 1978).

291. *Id.*

292. *See, e.g.*, Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996).

293. Zamora v. CBS, 480 F. Supp. 199, 200 (S.D. Fla. 1979).

294. *Id.* at 207.

V. A CONSTITUTIONALLY PERMISSIBLE REGULATORY ALTERNATIVE TO TORT LITIGATION

As demonstrated above, the imposition of tort liability on video game publishers would have serious chilling effects on the creative range of video games. The plaintiffs in *James* and *Sanders* clearly intended to target the creative phase of the publication process by naming game publishers as defendants, such as Capcom and id Software.[295] These plaintiffs, however, were apparently indifferent to the retailers who may have sold violent video games to Carneal, Harris, and Klebold. These plaintiffs were more interested in shutting down the video game industry than in restricting the access of minors to violent games.[296] While tort liability is a broadsword that would eviscerate the publishers of violent video games, this Part proposes a regulatory scheme that would operate more like a scalpel.

This proposed regulatory scheme would focus on the retailers of violent video games instead of the publishers of such games. Regulating video games at the retail level would avoid chilling effects on constitutionally protected speech because such a restriction would not impact the game publishers who occupy the creative level of the production process. If compliance with a regulation would constitute such a disincentive that a particular retailer would refuse to stock a violent video game, adult gamers would still be free to purchase the same game from another store. The imposition of tort liability on video game publishers, on the other hand, would create a disincentive to produce a certain type of game in the first place.

Under the proposed regulation, states may enact statutes, or municipalities may enact ordinances, that require retailers to verify the age of minors who seek to purchase or rent violent video games, preferably by checking their identification. This scheme would prohibit retailers from selling or renting M- or Mature-rated games to minors who cannot prove that they are seventeen or older.[297] A minor would be able to override this prohibition with consent from a parent or guardian. Finally, this regulatory scheme would not provide for tort causes of action because it should be designed as a prophylactic measure, not as a remedy for injury. This regulatory scheme would be enforced through fines

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295. James v. Meow Media, Inc., 90 F. Supp. 2d 798, 801 n.2 (W.D. Ky. 2000); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1268–69 (D. Colo. 2002).

296. *See* Ausness, *supra* note 284, at 668 (quoting Jack Thompson, attorney for the plaintiffs in *James*, as saying, "We intend to hurt Hollywood. We intend to hurt the video game industry. We intend to hurt sex porn sites on the Internet.").

297. *See* Interactive Digital Software Ass'n v. St. Louis County, Mo., 200 F. Supp. 2d 1126, 1130–31 (E.D. Mo. 2002) (summarizing the ESRB rating system). The proposed regulation could also prevent minors under eighteen years of age from purchasing AO- or "Adults Only" rated games but this Note will address a provision directed at M-rated games only because very few AO-rated games have been published. A search on the search engine of the ESRB website turned up a total of fifteen AO-rated games, none of them for the PlayStation 2, GameCube, or Xbox, the three consoles on the market today. *See* ENTERTAINMENT SOFTWARE RATING BOARD, ESRB—POWER SEARCH, *at* http://www.esrb.org/power_search.asp?type=game (last visited Mar. 10, 2003) (on file with author).

imposed on non-compliant retailers. The fines should be substantial enough to serve deterrent purposes but not so excessive as to constitute a punitive measure. Many retailers have already adopted a policy of refusing to sell or rent M-rated games to minors,[298] but a Federal Trade Commission study released in December 2001 indicated that retailers allowed 78% of unaccompanied underage shoppers, including 66% of their thirteen-year-old customers, to purchase M-rated games.[299]

This regulatory scheme would obviously constitute a content-specific regulation of speech.[300] The U.S. Supreme Court has stated that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[301] A statute or regulation is content neutral only if it is both subject matter neutral and viewpoint neutral.[302] The proposed regulation of video games would not be content neutral because it would regulate an entire category of speech, namely video games that depict violence.[303] A content-based restriction is presumed to be invalid unless the regulation passes strict scrutiny.[304] To pass strict scrutiny, the regulation must be narrowly tailored to serve a compelling governmental interest.[305]

A regulation of video games that requires age verification or parental consent will withstand strict scrutiny if a state or municipality demonstrates that the regulation is narrowly tailored to serve a compelling governmental interest. Here, the compelling state interest would be the restriction of minors' access to violent materials. The U.S. Supreme Court has held that a state may have a compelling interest in "the physical and psychological well-being of minors."[306] While the Court has generally focused on a state's interest in protecting minors

298. *See* FTC, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN 56 n.145 (Dec. 2001), *available at* http://www.ftc.gov/os/2001/12/violencereport1.pdf (on file with author) (stating that retailers like Toys 'R' Us, Kmart, Wal-Mart, Target, Circuit City, Staples, and CompUSA had adopted programs designed to restrict children's access to M-rated games).

299. *See id.* at 33.

300. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.").

301. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

302. *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000).

303. *See* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic . . . .").

304. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002).

305. *See* Republican Party v. White, 122 S. Ct. 2528, 2534 (2002) (outlining the two-part strict scrutiny test that applies to content-based regulations of speech).

306. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); *see also* Ginsberg v. New York, 390 U.S. 629, 639 (1968).

from sexually explicit materials[307] or profanity,[308] there likely is another compelling interest in protecting minors from gratuitous violence. The governmental interest should be focused on controlling any "secondary effects" that may occur from playing violent video games, such as violence that may be committed in real life, and not on proscribing video games simply on the basis of violent content.[309] To this end, state legislatures and local governments should gather evidence that is "reasonably believed to be relevant" to demonstrating a correlation between violent video games and possible secondary effects.[310] For example, organizations like the American Medical Association and the American Psychiatric Association have conducted studies that purportedly show that violence in video games is harmful to minors.[311] This type of evidence may support a conclusion that the proposed regulation is justified by a compelling state interest.

A state interest that is based on protecting minors from the harmful effects of violence in video games seems to be inconsistent with the notion that minors are capable First Amendment actors. The Seventh Circuit has determined that minors should be entitled to the full panoply of First Amendment rights in order to participate as citizens in a democracy.[312] While this principle may hold true for high school seniors, no commentator has seriously suggested that very young children should be allowed unfettered access to violent video games. Common sense tells us that a seven-year-old child should not be playing the role of Tommy Vercetti in "Grand Theft Auto: Vice City."[313] Games like "Hitman 2: Silent Assassin"[314] and the "Soldier of Fortune" series[315] are obviously not appropriate for young children either. While minors are certainly entitled to a

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307. *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 732 (1996) (addressing a statute that regulated obscene material on cable television); *Sable Communications*, 492 U.S. at 117–18 (addressing a ban on "dial-a-porn" services); *Ginsberg*, 390 U.S. at 631–33 (addressing a statute that criminalized the sale of pornographic magazines to minors).

308. FCC v. Pacifica Found., 438 U.S. 726 (1978).

309. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (promulgating the "secondary effects" doctrine).

310. *Id.* at 51; City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002) ("The municipality's evidence must fairly support the municipality's rationale for its ordinance.").

311. Kiernan, *supra* note 64, at 244.

312. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) ("Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise. . . . People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.").

313. *See* ROCKSTAR GAMES, GRAND THEFT AUTO VICE CITY, *at* http://www.rockstargames.com/vicecity/ (last visited Mar. 10, 2003) (on file with author).

314. *See* HITMAN 2, *at* http://www.hitman2.com/front.htm (last visited Mar. 10, 2003) (on file with author).

315. *See* ACTIVISION, SOLDIER OF FORTUNE, *at* http://www.activision.com/games/soldieroffortune (last visited Apr. 1, 2003) (on file with author).

considerable measure of First Amendment rights,[316] states and municipalities may regulate their access to protected expression more stringently than with adult access.[317] The state interest behind the proposed video game regulation becomes even more compelling because the regulation would require parental participation in the event a minor wishes to purchase or rent an M-rated game. The U.S. Supreme Court has stated that a "legislature could properly conclude that parents and others . . . who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[318] The regulation would ensure that a parent or guardian becomes aware that a minor will be playing violent video games.

The proposed video game regulation is also narrowly tailored and would thus satisfy the second prong of the strict scrutiny test. In order to show that a regulation is narrowly tailored, the government must demonstrate that the statute or ordinance "does not 'unnecessarily circumscribe protected expression.'"[319] If a less restrictive alternative would serve the same purpose, a state or city must use that alternative.[320] Here, the proposed regulation would not unnecessarily regulate protected speech because the regulation would merely limit the access of minors to M-rated games only. According to the Interactive Digital Software Association, M-rated games accounted for only 9.9% of all computer and video game sales in 2001.[321] Minors would still be free to purchase or rent EC-, E-, and T-rated games without age verification or parental consent.

The proposed video game regulation also constitutes the least restrictive means available to achieving the state's interest because the regulation would not prohibit all minors from purchasing or renting M-rated games. An exception would allow a minor under seventeen to purchase or rent M-rated games with parental consent. This provision would allow parents or guardians who consider their children mature enough to handle M-rated games to bypass the age verification requirement. The requirement of parental consent would be rooted in the general notion that parents and guardians are in a better position to judge the maturity and emotional stability of minors than game publishers or retailers. The Sixth Circuit has held that the publisher of "Dungeons & Dragons" could not be held responsible for "putting its game on the market without attempting to ascertain the mental condition of each and every prospective player."[322] Furthermore, while upholding a prohibition on the sale of obscene magazines to minors, the U.S. Supreme Court commented that parents are not prohibited from purchasing the

316. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

317. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–13 (1975); Ginsberg v. New York, 390 U.S. 629, 638 (1968) ("[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults.") (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

318. *Ginsberg*, 390 U.S. at 639.

319. Republican Party v. White, 122 S. Ct. 2528, 2535 (2002) (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982)).

320. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

321. *See* Interactive Digital Software Ass'n, *supra* note 39, at 7.

322. Watters v. TSR, Inc., 904 F.2d 378, 381 (6th Cir. 1990).

magazines for their children.[323] Therefore, if an exception to the proposed regulation is going to permit access to violent video games for minors who can distinguish between reality and fantasy, then the onus of deciding who belongs in this select group should be on the minors' parents and guardians. This regulation would also serve the governmental interest in assisting parents and guardians with their responsibilities for the welfare of children.[324] With the requirement of parental consent, retailers would have opportunities to educate adults who are unfamiliar with the ESRB ratings system and content descriptors. When a parent or guardian gives consent for a minor to purchase or rent an M-rated game, the consent would presumably be informed.

The ordinance at issue in *Kendrick* involved a similar provision that prohibited arcades from allowing minors to play violent video games without a parent, guardian, or custodian present.[325] The Seventh Circuit rejected the city's argument that parental consent could mitigate the curtailment of minors' First Amendment rights.[326] The court pointed out that the ordinance did not permit parents to grant blanket consent and required them to accompany their children to an arcade.[327] Parents who were too busy would have been unable to take their children to an arcade.[328] These problems indicated that the City of Indianapolis had failed to tailor its ordinance narrowly enough, but this Note's proposed regulation can be drafted in a manner that deals with those issues. For example, parents who believe that their children are mature enough to handle M-rated games should be allowed to give blanket consent, such as by signing a form with the retailer. The regulation could also allow parents to consent telephonically so that they would not have to take time out of their busy schedules to accompany their children to the retailer. A statute or ordinance that accommodates parents and guardians as much as possible would constitute the least restrictive curtailment of the First Amendment rights of minors and should meet the "narrowly tailored" requirement of strict scrutiny.

On May 2, 2002, less than two weeks after *Interactive Digital Software* was decided, Representative Joe Baca of California introduced a bill in Congress that would criminalize the sale or rental of violent video games to minors.[329] The proposed Protect Children from Video Game Sex and Violence Act includes a laundry list of video game content that would subject retailers to criminal liability, such as "decapitation, amputation, dismemberment, or mutilation," "the killing of human beings or human-like beings by the use of an object as a lethal weapon or hand-to-hand fighting," and even "aggravated assault or battery."[330] The bill

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323. *Ginsberg*, 390 U.S. at 639.

324. *See id.*

325. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 573 (7th Cir. 2001).

326. *Id.* at 578.

327. *Id.*

328. *Id.*

329. Protect Children from Video Game Sex and Violence Act of 2002, H.R. 4645, 107th Cong. (2002); *see also* Protect Children from Video Game Sex and Violence Act of 2003, H.R. 669, 108th Cong. (1st Sess. 2003) (reintroducing Rep. Baca's bill).

330. H.R. 4645 § 3.

provides that first- and second-time offenders would be subject to fines while third-time offenders would face a fine and a maximum of ninety days of imprisonment.[331]

The proposed Protect Children from Video Game Sex and Violence Act attempts to further the same state interest that is behind this Note's proposed regulation. With its present language, however, any statute enacted from this bill would probably fail to pass constitutional muster. The bill is not narrowly tailored to serve the governmental interest in preventing minors from purchasing or renting violent video games because it does not recognize the limited First Amendment rights of minors. The bill does not provide for parental consent as an exception or affirmative defense. A retailer could conceivably be fined for selling a violent video game to a sixteen-year-old accompanied by a consenting parent. This particular feature of the bill ignores *Ginsberg*, which permits parents to override constitutionally valid limitations on the free speech rights of minors.[332] The bill also disregards *Kendrick*, which views video games as a medium capable of political speech and essential to self-governance.[333] The *Interactive Digital Software* district court decision probably inspired Representative Baca's bill, but *Kendrick*, a federal court of appeals decision, should be more persuasive.

Finally, the proposed Protect Children from Video Game Sex and Violence Act runs the risk of unconstitutional vagueness. A law is unconstitutionally vague if a person "of common intelligence must necessarily guess at its meaning."[334] The vagueness doctrine requires that a legislature "establish minimal guidelines to govern law enforcement."[335] Along with decapitation and amputation, Representative Baca's bill would also apply to games that depict "aggravated assault or battery" or "any other violent felony."[336] What video game does not depict aggravated assaults? Aside from issues of statutory redundancy, a prohibition on selling minors games that depict aggravated assaults would cover a wide range of games that most people would not consider "violent." For example, a T-rated game like "Final Fantasy X" features numerous fights, but it is still considered appropriate for children who are at least thirteen.[337] Under the proposed Protect Children from Video Game Sex and Violence Act, minors would be unable to purchase football or boxing games because gang tackling and uppercut punches could be considered "aggravated assaults." Representative Baca's bill fails to draw a clear line between games that retailers may sell to minors and games that would subject retailers to criminal penalties.

Unlike the proposed Protect Children from Video Game Sex and Violence Act, the proposed regulatory scheme in this Note would avoid such

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331. *Id.*

332. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

333. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

334. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

335. Smith v. Goguen, 415 U.S. 566, 574 (1974).

336. H.R. 4645 § 3.

337. *See* SQUARE CO. LTD., FINAL FANTASY X, *at* http://www.squaresoft.com/playonline/FFX/ (last visited Mar. 10, 2003) (on file with author).

unconstitutional vagueness by connecting its definition of restricted games to the ESRB ratings system. The Entertainment Software Rating Board already invests its resources into evaluating video games and determining which ones are suitable for minors. The industry's M-rating is a precise divider between games that are appropriate for minors and games that should require parental approval. There is no need for a state or municipality to duplicate the ESRB's efforts. Rather than venture into arbitrary definitions of "violence" that run the risk of being unconstitutionally vague and overinclusive, this Note's proposed regulation would simply adopt the industry's own standards. Terms like "aggravated assault" and "violent felony" are more vague than a simple "M" marked on a video game's packaging. The proposed regulatory scheme would provide clear standards for retailers.

VI. CONCLUSION

This Note is not intended to minimize the tragedies that have resulted from school shootings. Rather, this article demonstrates that video games should be entitled to free speech protection because of their creative and expressive content. Video games are analogous to motion pictures, a genre that has already been construed as "speech." Within the jurisprudence of the First Amendment, there are several exceptions to protection, such as clear and present danger, fighting words, obscenity, and incitement of imminent unlawful activity. None of these exceptions, however, apply to video games. The imposition of tort liability on the publishers of these games would also have a significant "chilling" effect on the exercise of their free speech rights.

As a compromise between the First Amendment rights of video game publishers and the governmental interest in protecting minors from harm, this Note proposes a regulatory scheme that states and cities may enact. This regulatory scheme would permit retailers to sell M-rated games to minors under seventeen only with parental consent. The regulation of retailers would minimize any chilling effects on speech because it would not affect the publishers of video games. The statute or ordinance would be content-based but it should withstand strict scrutiny. A state or municipality that enacts this regulation would have to gather sound evidence of the potential harm to minors in order to demonstrate a compelling state interest. The regulation would also be narrowly tailored to serve this purpose because it would allow a minor's parent or guardian to override the prohibition by consent, thereby constituting the least restrictive means possible.

Under this proposed regulation, victims of youth violence would not have a cause of action against the publishers or retailers of violent video games because the regulation would be enforced through fines. If the victims' true aim, however, is the prevention of future violence, and not the punishment of the video game industry for the acts of unrelated third parties, then the regulation would serve this interest by restricting the access of minors who are immature or emotionally unstable from games that are not appropriate for them. The onus of this responsibility should fall on the minors' parents and guardians, the ones who are in a better position to prevent a tragedy like Columbine from happening again. Victims of violent crime should not be able to rely on tort law to hold the publishers of video games accountable for the actions of remote third parties.

Determining whether a violent video game motivated or inspired a youth to embark on a shooting rampage is akin to unbaking a cake to retrieve the eggs and flour.

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