Shall the Sins of the Son be Visited upon the Father--Video Game Manufacturer Liability for Violent Video Games

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by

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To what youth whom you had ensnared by the allurements of your seduction have you not furnished a weapon for his crimes or a torch to kindle his lust?
—Marcus Tullius Cicero, 106 B.C.–43 B.C.¹

Introduction

April 20, 1999, a recurring school scene: fifteen dead, bloody kids, two teens accused of murder, and the question why. Students packed the small cafeteria for their typical Tuesday lunch, milk, and gossip. Soon thereafter, two boys, Dylan Klebold and Eric Harris, entered Columbine High School in Littleton, Colorado, and unleashed their evil upon the unsuspecting teenagers. Moments later, thirteen students and one teacher lay dead while twenty-three others were horribly wounded. Their shooting rampage also claimed their own lives, as they turned the guns on themselves. On a home video found after the slayings, Dylan Klebold emphatically stated his grisly intentions: “I hope we kill 250 of you.” Eric Harris ensures that

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there is no mistake: The massacre is going to be "like f__ing Doom" and their "shotgun is straight out of Doom!"  

In the aftermath of the perverse pattern of horrifying schoolyard shootings, the video game industry has attracted significant attention for manufacturing and distributing violent video games to minors. In fact, Congress and some state legislatures have proposed rating games or prohibiting the distribution of violent video games to minors. In addition, eight days before the Columbine massacre, the parents of Jessica James, Kayce Steger, and Nicole Hadley filed a $180 million lawsuit against Sega of America Inc., id Software, and other video game manufacturers for negligently manufacturing and distributing eleven violent video games to Michael Carneal, the fourteen-year-old freshman who opened fire with a .22 caliber pistol on a student prayer circle. The games included "Quake," "Doom," and "Mortal Kombat." The plaintiffs alleged that the video games "made the violence pleasurable and attractive, and disconnected the violence from the natural consequences thereof, thereby causing Michael Carneal to act out the violence." Further, the plaintiffs alleged that the games "trained Carneal how to point and shoot a gun in a fashion making him an extraordinary killer without teaching him any of the constraints or responsibilities needed to inhibit such a killing capacity." This lawsuit is believed to be the first filed against a video game manufacturer for allegedly manufacturing a game that caused the player to injure a third party.

However, this is not the first case against a media defendant alleging that the defendant's media works caused a person to injure
the plaintiff. The courts have typically barred recovery in those cases, on the grounds that the expression conveyed by the music, literature, or movies did not fall within one of the traditionally excepted categories of speech: fighting words, obscenity, commercial speech, or child pornography. Moreover, most of these courts, applying the *Brandenburg* incitement test, held that the media works at issue did not direct the incitement of imminent lawless activity, and thus constituted a protected form of speech. This raises questions whether the video game manufacturers can be held liable for the deaths or injuries of the students and teachers in Littleton or Paducah under traditional First Amendment jurisprudence.

The First Amendment implications arising from imposing liability on video game manufacturers is an important issue to video game manufacturers who intend to create and distribute violent video games; to legislatures who want to curb juvenile violence and who are searching for answers to mollify enraged and scared parents; to First Amendment scholars who might see a dangerous opportunity for legislatures and courts to infringe on First Amendment rights, as both institutions search for a culprit or a scapegoat for the recent pattern of schoolyard killings; and finally, to the parents who struggle to comprehend the violence. This dialogue takes on new urgency following the recently published FTC report, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries.* In that report, the FTC found that of the 118 games with a Mature rating for violence, 70% targeted children under 17.

First Amendment scholars have offered little input on the problems raised by violent video games, and aside from a few student notes and a short article on the topic, little dialogue addresses the issue.

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12. *Id.* at iv; see also *id.* at 36-51.

This Note explores the ostensibly insurmountable First Amendment barrier facing a plaintiff, injured by a minor who was allegedly induced by a violent video game to commit a violent act, in bringing a suit against the video game industry. For the purposes of this analysis, it will be assumed that the plaintiff has proven all the elements of tort including actual and proximate causation. Part I argues that violent video games are a form of expression entitled to some level of First Amendment protection. Part II discusses the likelihood of a plaintiff succeeding in bringing a negligence action against a video game manufacturer for producing and distributing violent video games that allegedly caused foreseeable harm to third parties under current First Amendment jurisprudence. First, this Part surveys the relevant Supreme Court First Amendment case law. Second, the lower court decisions applying Supreme Court precedent are discussed, as well as the relevant limitations they pose to potential plaintiffs. Finally, this Part discusses other lower courts that have abandoned the strictures of Brandenburg. Part III argues that the lower courts have erroneously applied the Brandenburg incitement test in cases involving a media defendant and proposes a new standard that should apply in the video game manufacturer tort liability context, one that will allow a plaintiff to proceed on its tort claims.

I. Video Games Are Entitled to Limited First Amendment Protection

The First Amendment provides in pertinent part: "Congress shall make no law... abridging the freedom of speech...." 14 Comparing the First Amendment to other Amendments in the Bill of Rights, it is one of the few stated in absolute terms. 15 However, the Supreme Court has never interpreted the First Amendment as providing absolute protection to all forms of speech or expression. For example, the First Amendment does not provide protection to the following four categories of speech: obscenity, 16 child pornography, 17 fighting words, 18 and speech that directs the incitement of imminent unlawful activity and is likely to result in that

15. U.S. CONST. amend. I-VIII.
activity. Furthermore, commercial speech and nude dancing have been extended only marginal protection. In addition, although the media—meaning the press, the broadcast media, and other commercial disseminators of information—have First Amendment rights to communicate information and ideas to the public, not all forms of media are provided commensurate protection. The broadcast media, for example, receives only the most limited protection because of the scarcity of bandwidths, its established pervasiveness in American lives, and its accessibility to children.

Notwithstanding, the Supreme Court has held that the First Amendment protects "[e]ntertainment, as well as political and ideological speech." Thus, motion pictures, programs broadcast by radio and television, live entertainment, musical and dramatic works, music, and non-verbal entertainment such as live nude dancing fall within the Constitutional umbrella of protection. Even with this abundance of case law, the Supreme Court has not articulated constitutional standards that courts can use to ascertain when expression falls within the protected category of entertainment.

25. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (stating that motion pictures are a significant medium of expression and function as an organ of public opinion).
27. See Schad, 452 U.S. at 61.
29. See Schacht v. United States, 398 U.S. 58, 63 (1970) (“An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance.”).
32. See Kaye v. Planning & Zoning Comm’n, 472 A.2d 809, 810 (Conn. Super. Ct. 1983) (stating that the Supreme Court has not articulated any precise test for determining the level of protection afforded to entertainment, and, in particular, video games). Note,
A. Lower Courts' Application of the First Amendment to Video Games

Despite the Supreme Court's failure to prescribe constitutional norms defining the "entertainment" category of speech, federal and state courts have almost uniformly held that for entertainment to be entitled to protected status, it must be designed to communicate or express some idea or information. Finding that video games fail to communicate ideas or information and are designed principally for recreational purposes, these courts have concluded that video games do not fall within the "entertainment" category. The seminal case involving video games is the federal district court case America's Best Family Showplace Corp. v. The City of New York, where the Department of Buildings of the City of New York denied the plaintiff permission to install more than the four video game limit imposed by the city code. In response, the plaintiff brought an action in federal district court contending that video games were a protected form of speech and that the city code, therefore, unconstitutionally restricted his First Amendment right to display video games.

First, the court interpreted the Supreme Court's entertainment jurisprudence as requiring a showing of a communicative or informative element in order to be entitled to protection. According to the court, video games are not designed to inform and, although video games may be copyrighted, "they 'contain so little in the way of particularized form of expression' that video games cannot however, that the court disingenuously argues that in order for entertainment to be afforded protection it must be designed to communicate or inform. See id. After stating this "test," the court contends that the Supreme Court has not articulated a test.

36. See id. at 171.
37. See id. at 173.
38. See id. (stating that "before entertainment is accorded First Amendment protection there must be some element of information or some idea being communicated").
be fairly characterized as a form of speech."\textsuperscript{39} Furthermore, the plaintiff's arguments that video games are like motion pictures was summarily rejected, for video games are no different from pinball, chess, and baseball: games that constitute "pure entertainment with no informational element."\textsuperscript{40} Finally, the mere fact that video games talked to the participant, played music, or had written instructions did not render the game informational.\textsuperscript{41} The court also distinguished the case from \textit{Joseph Burstyn, Inc. v. Wilson},\textsuperscript{42} where the Supreme Court extended First Amendment protection to motion pictures, stating, "In no sense can it be said that video games are meant to inform. . . . Accordingly, there is no need to draw that 'elusive' line 'between the informing and the entertaining.'"\textsuperscript{43}

Other federal and state courts have likewise ruled that video games are not protected forms of expression.\textsuperscript{44} These courts similarly ruled that because video games lack an informational or communicative element, they are unprotected. For example, the Massachusetts Supreme Court in \textit{Caswell} held that video games are not cognizable speech or expression because (1) any communication or information disseminated while playing a video game is inconsequential and (2) video games are merely technologically advanced games of pinball or chess, and that technological advancement alone does not entitle First Amendment status to an otherwise unprotected game.\textsuperscript{45} The court also rejected plaintiff's arguments that video games are sufficiently analogous to motion pictures in that they represent the video game designer's expression of an idea or fantasy and that this idea is transmitted to its audience via audio and visual effects.\textsuperscript{46}

Admittedly, some lower courts have rejected the rationale and holding of \textit{America's Best} and its progeny. These cases provide

\textsuperscript{39} Id. at 174 (quoting Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 857 (2d Cir. 1982) (holding that video games could be copyrighted by likening video games to motion pictures)).

\textsuperscript{40} Id.

\textsuperscript{41} See id.

\textsuperscript{42} 343 U.S. 495 (1952) (extending First Amendment protection to motion pictures).

\textsuperscript{43} \textit{America's Best Family Showplace Corp.}, 536 F. Supp. at 174. The Supreme Court recognized the "elusive line" in \textit{Winters v. New York}, 333 U.S. 507 (1948), where the court argued that the line between entertaining and informing was too "elusive" for the court to ascertain. Accordingly, the court extended First Amendment protection to magazines of bloodlust and crime, even though the court conceded that it found no value in the magazines. See \textit{id.}, at 510.

\textsuperscript{44} See supra note 33.


\textsuperscript{46} See \textit{id.} at 926.
dubious precedent, for they have either stated conclusively that since nude dancing is protected, video games are surely protected,⁴⁷ or they analogize video games to motion pictures and contend that video games are sufficiently similar without providing a scintilla of analysis.⁴⁸

B. Video Games Should Be Afforded Constitutional Protection

In direct contrast with the America's Best line of cases, Senior District Judge Johnstone in the Michael Carneal case⁴⁹ indicated that the First Amendment prevents the parents of the three teenage girls killed in the school shooting from holding the manufacturers of the violent video games liable, although in dicta. The lawsuit arose out of the events that transpired on December 1, 1997, when Michael Carneal fired upon a school prayer group, killing three teenage girls.⁵⁰ After dismissing the plaintiff's tort claims on Kentucky common law grounds—finding no duty or proximate causation—Judge Johnstone stated that "it is clear that this case raises various constitutional concerns."⁵¹ Although the court noted that it was precluded from reaching the "constitutional concerns" because "constitutional questions should be decided only where necessary,"⁵² it nevertheless unabashedly explained that had it reached this question the following principles would apply:

The theories of liability sought to be imposed upon the manufacturer of a [violent video 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

⁴⁷. See Gameways, Inc. v. McGuire, N.Y.L.J., May 27, 1982, at 6, col. 1 (N.Y. Sup. Ct. 1982) (stating that since "other forms of expression no more 'informative' than video games—viewing nude dancing through a coin operated mechanism—have been recognized as constitutionally protected... video games are a form of speech protected by the First Amendment.").
⁴⁸. See Oltmann v. Palos Hills, No. 82-3568, slip op. at 13-14 (Ill. Cir. Ct. August 20, 1982) (stating that since video games are similar to motion pictures, they are afforded protection), cited in Caswell, 444 N.E.2d at 926, and in Kaye Planning & Zoning Comm'n, 472 A.2d 809, 811 (Conn. Super. Ct. 1983).
⁵⁰. See supra notes 5-7 and accompanying text for description of the facts and allegations against the video game manufacturers.
⁵¹. James, 90 F. Supp. at 818.
⁵². Id. (quoting Watters v. TSR, Inc., 904 F.2d 378, 380 (6th Cir. 1990)).
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 first
amendment 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. In fact, Judge Johnstone explained that the specter of the First
Amendment further obligates the court to reject the plaintiff's
argument that the video game manufacturers have a legal duty owed
to the plaintiffs. Thus, Judge Johnstone made it emphatically clear
that video game manufacturers were entitled to absolute First
Amendment protection in manufacturing and distributing violent
video games.

The dicta in James is unremarkable for Senior District Judge
Johnstone also decided Watters v. TSR, Inc., the famous Dungeons
and Dragons (D&D) case. In Watters, a mother brought a wrongful
death action against TSR, the manufacturer of D&D—a role-playing
fantasy game—alleging that the game caused her son to commit
suicide. The plaintiff argued that TSR was negligent in failing to
warn "mentally fragile" persons of the potential dangerous
consequences of playing D&D. After listing quotations from
Supreme Court opinions, Judge Johnstone held that whether D&D
be characterized as literature or merely as a game, it nonetheless falls
within the category of publication afforded First Amendment
protection. However, no analysis was provided as to why D&D fell
within this category or whether a communicative element was
required; rather, the court conclusively stated that it was irrelevant
whether D&D was designed to inform or merely entertain. This
analysis is what makes both James and Watters most damaging for
plaintiffs, for the Court takes an absolutist stance towards the First
Amendment and establishes precedence that "mere games" that are
solely designed to entertain are not only a protected form of
expression but are entitled to the same level of protection as political
speech.

53. Id. at 818-19.
54. 715 F. Supp. 819 (W.D. Ky. 1989), aff'd on other grounds, 904 F.2d 378 (6th Cir.
1990).
55. See id. at 820.
56. Id.
57. See id. at 821; see also Hammerhead Enters., Inc. v. Brezenoff, 707 F.2d 33, 34-36
(2d Cir. 1983) (holding that a game satirizing public assistance programs was a protected
form of speech).
58. See Watters, 715 F. Supp. at 821.
In a subsequent case against a video game manufacturer, a court is likely to reject the *American Best* line of cases in favor of *James* and *Watters*, at least as to the issue of whether video games are a cognizable form of expression under the First Amendment. First, while intuitively it is plausible that the Supreme Court would require a showing that the entertainment in question was designed to communicate some idea or information, the Court has never explicitly stated such a requirement. In fact, the Court intimated, in *Winters v. New York*,\(^59\) that it may be impossible to determine mere entertainment from entertainment that is designed to communicate or inform: "The line between the informing and the entertaining is too elusive for the protection" of the basic right of expression, for "[e]veryone is familiar with instances of propaganda through fiction." More surprisingly, the Court stated that although it could find no value to society in magazines that were devoted to criminal news and stories of bloodshed, they were as entitled to First Amendment protection as the best of *literature*.\(^60\) As Justice Reed so eloquently stated: "What is one man's amusement, teaches another's doctrine."\(^61\) The *America's Best* line of cases directly conflicts with this principle. Under the *America's Best* reasoning, a court would act essentially as a review board, or more likely a censorship board, and decide whether a particular piece of fiction was propaganda or mere entertainment. *Winters*, however, precludes a court from serving such a function.

Moreover, in *Barnes v. Glen Theatre, Inc.*,\(^62\) the Court extended First Amendment protection to live nude dancing without a showing that the dance was designed to communicate ideas or to inform the audience. It merely stated that in previous decisions nude dancing had been recognized as expressive conduct. Finally, and more damaging to a plaintiff bringing suit against a video game manufacturer, is the Supreme Court's extension of First Amendment protection to motion pictures.\(^63\) The Court explained that motion pictures are a "significant medium for the communication of ideas."\(^64\) They affect public attitudes and behavior by directly communicating political or social doctrine, or by the "subtle shaping of thought which

\(^{59}\) 333 U.S. 507, 510 (1948).

\(^{60}\) *See id.*

\(^{61}\) *Id.*

\(^{62}\) 501 U.S. 560, 565 (1991); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (holding that music was a protected form of expression under the First Amendment and reasoning that music has a capacity to appeal to the "intellect and to the emotions").

\(^{63}\) *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

\(^{64}\) *Id.* at 501.
characterizes all artistic expression." Moreover, the significance of motion pictures as "an organ of public opinion" is not made any less by the fact that they are designed to entertain as well as inform. For further support, the Court then quoted the Winter's "elusive line" statement, and stated that the mere fact that motion pictures are produced, distributed, and exhibited for a profit is irrelevant for First Amendment purposes. According to the Court, the basic principles of the First Amendment make freedom of expression the rule, and no reasons were present to abdicate that rule.

Reading the three cases together provides broad protection to all forms of entertainment. In light of the Court's statements that freedom of expression is the rule, that it is not willing to demarcate the elusive line between entertaining and informing, and the Court's perfunctory analysis in Barnes and Ward, there is a strong presumption that video games are a protected form of entertainment, unless reasons are present that justify not extending protection. Note, however, that the Supreme Court did not articulate nor even allude to what possible reasons could exist to justify not extending protection. The Court's statement regarding justifications appears to be surplus language; therefore, a proper reading of the Court's entertainment jurisprudence is that any form of entertainment, whether it be a novel, painting, motion picture, or video game, is protected, because a court should not act as a censorship or review board. Hence, although a court may not find any social value in a video game, the First Amendment provides some level of protection. Finally, the Supreme Court has never explicitly stated, as it did in United States v. O'Brien and Texas v. Johnson, that a particularized message must be apparent in order to extend First Amendment protection to the speech at issue. On the contrary, it appears that the Court was stating just the opposite, that no particular message is required when dealing with art and entertainment.

Second, America's Best and its progeny, aside from the perfunctory analysis in Caswell, also ignored the artistic expression that can be embodied in video games. Recently, in fact, the Seventh

65. Id.
66. Id.
67. See id. at 501-02.
68. See id. at 503. Note that the court fails to explain this naked assertion; thus, it is unclear what "reasons" the court was contemplating.
69. 391 U.S. 367 (1968) (stating the test to determine whether conduct is sufficiently expressive to be entitled First Amendment protection).
Circuit court of Appeals, in Rothner v. City of Chicago, recognized the myopic holdings of those decisions and stated that it could not hold that all video games were per se unprotected. The court explained that some games may be "more sophisticated presentations involving storyline and plot that convey to the user a significant artistic message," and that they may be considered works of art. The court emphatically stated that a contrary conclusion would probably be at odds with reality. However, even the Rothner court focused too much upon the communication of ideas rather than upon the artistic expression embodied in video games. The production of video games involves a complex, creative process, where the video game designer chooses the storyline, plot, audio background, and the animation to express his ideas on the screen. The video game, therefore, represents the video game designer's expression of ideas and fantasy transmitted to its audience via technologically sophisticated electronic audio and visual display, just as the canvas provides the medium of expression for the painter's ideas and fantasy, and the motion picture represents the screenwriter's expression of ideas and fantasy. It would be a bitter pill to swallow that First Amendment protection depends solely upon the medium an artist chooses. Imagine if the Court were to hold that a Jackson Pollock painting is protected if on canvas but not on notebook paper because the latter is not sufficiently expressive.

Moreover, America's Best and its progeny were decided during the embryonic stages of video game development, when "PacMan," "Donkey Kong," and "Asteroids" were at issue. The Video games of today are far more sophisticated than the games of the early 1980's. Designers today rely on full-motion video, detailed animation, and stereo surround sound to bring their storyline, plots, and characters to life. Today's games are able to simulate real-world environments in games like "Postal" or "Kingpin," and vivid fantasy worlds in games like "Doom II," "Time Splitters," and "Mortal Kombat IV."

Third, the function that video games serve in promoting First Amendment principles was never broached by those cases. Rather, America's Best and its progeny applied Supreme Court precedent

71. See Rothner v. City of Chicago, 929 F.2d 297, 303 (7th Cir. 1991).
72. Id.
73. See id.
formalistically without any analysis as to the social value of video games. For example, video games arguably shape and develop the electorate who will one day be called upon to vote, by the "subtle shaping of thought which characterizes all artistic expression." Since the voter derives his knowledge and intelligence from the full range of human communications in all forms, video games like other forms of entertainment—novels, motion pictures, dramas, dance—should be protected in the interest of promoting self-governance. Moreover, the public has a First Amendment right to receive this information and experience. Thus, not recognizing video games as a form of protected entertainment deprives citizens access to aesthetic, political, social, moral, and other ideas and experiences that are or may be intertwined with the video game. Furthermore, because of the pervasiveness of video games in American lives, video games, like motion pictures, serve as a "significant medium" of communication of diverse ideas and experiences that shape and affect public attitudes.

In addition, freedom of expression is essential to the promotion of self-fulfillment and autonomy by protecting and encouraging the exercise of the creative capacities "central to human rationality." Thus, protecting video games fosters and protects the personal autonomy and self-fulfillment interest of the video game designers who painstakingly exercise their creative capacities in developing storylines, plots, characters, and rich animation. Furthermore, some commentators have argued that the First Amendment serves as a

78. See id.; ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 15-16, 24-27, 39 (1948).
79. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (stating that citizens have a First Amendment right to receive and have suitable access to "political, esthetic, moral, and other ideas and experiences").
checking valve against social unrest and revolution. The rationale is that the suppression of ideas and communication encourages citizens to substitute force for rational judgment; therefore, freedom of expression is essential for a society to maintain stability and ordered liberty. A video game by its very nature can be quintessentially a public safety valve: it can provide an arena for citizens to vent frustration, illegal desires, and other undesirable behavior in a fictional, controlled, safe environment. Admittedly, the application of this rationale is a bit tenuous here, because generally when we think of the First Amendment as a safety valve, we think of the speaker, not the receiver of the information—for it is the speaker that uses a pen rather than the sword. Here, however, the video game provides a safety-valve for the receiver of the information. The distinction, however, is irrelevant, for the social benefit that the video game provides as a safety-valve for political and social unrest is just as compelling.

In sum, notwithstanding the lower court decisions following America's Best, a plaintiff more likely than not will fail in an attempt to argue that the First Amendment does not protect video games. While at first blush, it would appear that video games are mere entertainment and thus should not be afforded protection, upon further examination, one uncovers the First Amendment values video games promote. Moreover, after cases like James and Watters, the word "game" is no longer a talisman for unprotected speech. The author will assume for the remainder of this Note that video games are a form of expression protected by the First Amendment. The next section will discuss the likelihood of a state permitting a plaintiff to recover civil damages as a result of suffering physical injury because the violent video game incited or induced a minor to inflict the physical injury.

II. First Amendment Limitations on the Imposition of Civil Damages

The liberty of speech and the press falls within the liberty protected by the Due Process Clause of the Fourteenth Amendment from invasion of state action. Compensating a plaintiff and imposing civil damages in a court of law is sufficient state action to

83. See id.
implicate the strictures of the First Amendment. Consequently, the First Amendment generally bars tort claims for injuries caused by speech. The Supreme Court has reasoned that imposing civil damages under a state law may be "markedly more inhibiting than the fear of prosecution under a criminal statute," and therefore may have more of a self-censoring effect on expression.

Therefore, in order to avoid a video game manufacturer's First Amendment defense, the plaintiff must show that violent video games fall within one of the excepted categories of unprotected speech or must provide some other rationale for imposing civil liability. Four categories of speech fall outside of First Amendment protection: (1) fighting words, (2) obscenity, (3) child pornography, and (4) directed incitement of imminent lawless activity that is likely to result in that activity. In addition, the Constitution provides only limited protection to defamatory speech, and commercial speech. Clearly violent video games do not fall within the commercial speech, defamatory speech, or child pornography categories.

85. See N.Y. Times v. Sullivan, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.").
86. N.Y. Times, 376 U.S. 254, 279-80 (holding that the constitution limits a states power to award civil damages in a libel action: the constitution requires that a public official seeking civil damages for defamatory falsehood show actual malice); see also Gooding v. Wilson, 405 U.S. 518, 521-22 (1972) (stating that the "constitution guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech'"); cf. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (permitting the imposition of civil liability in a defamation case where the injured plaintiff was a private citizen); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (plurality) (holding that false statements in a credit report did not constitute a matter of "public concern" and therefore the constitution did not require a showing of actual malice).
87. N.Y. Times, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.").
94. At least one commentator has argued that video games located in an arcade that require tokens to play are a form of commercial speech because their purpose is to urge a transaction on behalf of the arcade. See Edward H. Ziegler, Jr., Trouble in Outer Galactica: The Police Power, Zoning, and Coin-operated Videogames, 34 SYRACUSE L. REV. 453, 502 (1983). Under this view, however, all forms of entertainment that required payment and principally served a recreational function would be considered commercial
A. Violent Video Games Are Not Obscene: The Miller Barrier

In *Miller v. California*, the Supreme Court set forth the current test for obscenity:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.\(^9\)

No violent video game that is currently on the market is likely to fit into the court's obscenity doctrine: As apparent from the court's definition of obscenity, to fall within this category of speech, the content of the violent video games would have to include "patently offensive" sexual conduct appealing to the prurient interest.\(^9\) In fact, in *Cohen v. California*,\(^9\) the Court stated that in order to be considered obscene the "expression must be, in some significant way, erotic."

Admittedly, some commentators have argued that the obscenity doctrine should be expanded to also include ultra violent content.\(^100\) These commentators argue that violence is "at least as obscene as sex. If sexual images may go sufficiently beyond community standards for candor and offensiveness, and hence be unprotected, there is no reason why the same should not be true of violence."\(^101\) Accordingly, the *Miller* test needs only minor changes: replacing the phrase "appeals to the prurient interest" to "appeals to the prurient or morbid interest," and including "sexual or violent conduct" within the second prong of the test.\(^102\) The third element would remain the

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98. Id.
99. 403 U.S. 15, 19-20 (1971) (holding that the words "Fuck the Draft" were not obscene under *Miller*).
100. See KEVIN SAUNDERS, VIOLENCE AS OBSCENITY 3 (1996).
101. Id.
same. Consistent with this view, Missouri passed legislation that restricted a minor's access to violent materials. The Missouri statute essentially tracts the three-pronged Miller test. The Eighth Circuit court of Appeals, however, struck down the statute as unconstitutional. The court explained that obscenity encompasses expression that depicts sexual conduct, but not violence without depictions of sexual conduct. In light of Video Software Dealers Ass'n and the Supreme Court's limitations on the doctrine recognized in Cohen, it is unlikely that a court would be willing to extend the doctrine to include violent video games, especially without legislation that defines obscene violence.

B. Violent Video Games Do Not Constitute Fighting Words: The Chaplinsky Barrier

In addition, the content in violent video games is not likely to be considered "fighting words." The Supreme Court first discussed "fighting words" in Chaplinsky v. New Hampshire. Mr. Chaplinsky was convicted for breach of peace for calling a City Marshall of Rochester a "God damned racketeer and a damned fascist." The Court upheld the statute that prohibited a person from addressing another by "any offensive, derisive, or annoying word." The Court then stated the often quoted dicta: "fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace—are not constitutionally protected because their slight social value as a step to truth . . . is clearly outweighed by the social interest in order and morality." Violent video games, however, do not involve the face-to-face confrontation where epithets are hurled, which are likely to provoke an average person to retaliate and thus cause a breach of peace. Moreover, the "fighting words" doctrine is, itself, a questionable doctrine. The Supreme Court has not upheld a statute based upon the doctrine since Chaplinsky.

103. See id.
106. See Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 687-91 (8th Cir. 1992).
107. See id. at 688.
108. 315 U.S. 568 (1942).
109. See id. at 569.
110. Id.
111. Id. at 572.
Moreover, a slight majority of the court in *R.A.V. v. St. Paul*, held that some fighting words could not be proscribed with content based legislation.

C. Video Games Unlikely to Direct the Incitement of Imminent Unlawful Activity: The *Brandenburg* and Progeny Barrier

(1) *Supreme Court Jurisprudence: Brandenburg v. Ohio and Hess v. Indiana*

Most plaintiffs that have brought actions against media defendants have alleged that the media works incited unlawful activity. The modern doctrine for criminalizing incitement of unlawful activity was promulgated by the Supreme Court in *Brandenburg v. Ohio*. The state had convicted Mr. Brandenburg, a leader of a Ku Klux Klan group, under the Ohio criminal syndicalism statute that prohibited "'advocat(ing) ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.'" Mr. Brandenburg was convicted under the statute for holding a Klan rally, which was filmed by an invited news crew. The film showed twelve hooded individuals, some carrying firearms, who were gathered around a large, burning wooden cross. Mr. Brandenburg, in full Klan regalia, made a speech to the participants which, in addition to derogatory remarks about African-Americans and people of Jewish descent, included the statement: "We're not a

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112. 505 U.S. 377 (1992). In *R.A.V.*, the justices were split over the application of the doctrine. Justice Scalia, writing for the majority, stated that while the fighting words are unprotected, a state may not proscribe fighting words based upon their protected message. Thus, "fighting words" is no longer a talisman for unprotected expression.


115. *Id.* at 444-45 (quoting OHIO REV. CODE ANN. § 2923.13 (Anderson 1968)).


117. *See id.*
revengeant 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.\(^{118}\)

The Supreme Court reversed the conviction.\(^{119}\) After discussing Whitney v. California,\(^{120}\) the Court held that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."\(^{121}\) The Court explained that the "mere abstract teaching... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."\(^{122}\) Thus, a statute that fails to distinguish between "mere advocacy" and incitement to imminent lawless action does not pass constitutional muster.\(^{123}\) The Court held that the criminal syndicalism statute was unconstitutional because it punished "mere advocacy" of the use of violence to achieve political reform, and for assembling with a group to advocate such action.\(^{124}\)

The Supreme Court, therefore, forged a new bright-line rule to judge speech that advocates the use of violence and unlawful conduct to accomplish social and political ends. More important, the Court appeared to reject the "clear and present danger" balancing test, with which the Court had a long and tortured experience since 1919,\(^{125}\) with the case of Schenck v. United States.\(^{126}\) In fact, Justices Black and Douglas in their concurring opinions explicitly stated that the "clear and present danger" test had no place in constitutional jurisprudence.\(^{127}\) Finally, the Court has left open the question as to whether the outcome would have been different had violence actually followed the speech.\(^{128}\)

\(^{118}\) Id. at 446.
\(^{119}\) See id. at 447-49.
\(^{120}\) 274 U.S. 357 (1927).
\(^{121}\) Brandenburg, 395 U.S. at 447.
\(^{122}\) Id. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).
\(^{123}\) See id. at 449.
\(^{124}\) See id. at 448-49.
\(^{125}\) See id. at 450-57 (Douglas, J., concurring) (discussing the court’s trouble applying the “clear and present danger test”).
\(^{126}\) 249 U.S. 47 (1919).
\(^{127}\) See Brandenburg, 395 U.S. at 449-57 (Black, J. and Douglas, J., concurring).
\(^{128}\) See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (recognizing that a “substantial question would be presented whether [the defendant] could be held liable for the consequences of that unlawful conduct” if acts of violence had followed the defendant’s speech even if the speech did not rise to the level required by Brandenburg).
Hess v. Indiana\textsuperscript{129} was the first application of the Brandenburg test by the Supreme Court. This case, although not as widely quoted as Brandenburg, may provide a more formidable hurdle for plaintiffs bringing tort actions against video game manufacturers, because the Court takes a literal and formalistic approach in applying the Brandenburg test. Mr. Hess was convicted under a disorderly conduct statute\textsuperscript{130} for shouting "we'll taking the fucking street later (or again)" during an antiwar demonstration.\textsuperscript{131} First, the Court stated that the First Amendment prohibits the "States to punish the use of words or language not within 'narrowly limited classes of speech.'"\textsuperscript{132} After the Cohen v. California\textsuperscript{133} decision, Mr. Hess's words clearly did not constitute obscenity. Furthermore, his words were not "fighting words" because they were "not directed by any person or group in particular," and a police officer at the scene did not interpret the words as a personal attack.\textsuperscript{134} The Court also held that the statement could not be considered a public nuisance because substantial privacy interests had not been invaded.\textsuperscript{135}

More importantly, the statements did not meet a strict application of Brandenburg. The Court stated that the remarks, at best, "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," and that this was insufficient to permit the state to punish Mr. Hess.\textsuperscript{136} The Court explained that since Hess' statements were not directed to any person or group of persons, it did not constitute advocacy. The Court's finding is quite remarkable when one considers the context of Hess' speech. Hess made his statement during an antiwar demonstration while police were

\textsuperscript{129} 414 U.S. 105 (1973) (per curiam).
\textsuperscript{130} See IND. CODE § 35-27-2-1 (1971); IND. CODE ANN. § 10-1510 (West Supp 1972). quoted in Hess, 414 U.S. at 106 n.1. The Hess court wrote:

\begin{verbatim}
Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction, shall be fined in any sum not exceeding five hundred dollars ($500) to which may be added imprisonment for not to exceed one hundred eighty (180) days.
\end{verbatim}

\textit{Id.}

\textsuperscript{131} Hess, 414 U.S. at 106-07.
\textsuperscript{132} Id. at 107 (quoting Gooding v. Wilson, 405 U.S. 518, 521-22 (1972)).
\textsuperscript{133} 403 U.S. 15 (1971) (requiring eroticism for obscenity).
\textsuperscript{134} Hess, 414 U.S. at 108.
\textsuperscript{135} See id.
\textsuperscript{136} Hess, 414 U.S. at 108.
attempting to regain control of the streets where approximately 100-150 demonstrators were blocking traffic.\textsuperscript{137}

Notwithstanding, the Court held that punishment was unconstitutional since there was no evidence or rational inference that his words were “intended to produce, and likely to produce, \textit{imminent} disorder,” and thus could not be punished merely because they tended to lead to violence.\textsuperscript{138} This will prove to be the most damaging language of the opinion for plaintiffs, for the court, in this several paragraph per curiam opinion, injected an intent requirement into the \textit{Brandenburg} analysis. The Court, in other words, refined \textit{Brandenburg}’s “directed to” language and created a highly speech protective rule requiring intent. This change in the \textit{Brandenburg} test may limit a sympathetic judge’s willingness to read \textit{Brandenburg} broadly in a case against a media defendant. The \textit{Hess} Court, however, did not define what level of intent was needed: whether actual purpose, knowledge, or extreme recklessness would be required.

(2) \textit{Lower Court Jurisprudence}

In the past twenty years, media defendants have increasingly been brought to court for allegedly causing physical injuries by the speech they disseminated. Most of these cases were brought under a negligence theory of tort liability, where the plaintiffs alleged that the media works caused foreseeable harm. The courts in these cases have denied recovery either because they found no duty\textsuperscript{139} or because they applied the \textit{Brandenburg} test, which has provided a safe harbor from liability for media defendants.\textsuperscript{140} Typically, under the courts’

\begin{itemize}
  \item \textsuperscript{137} \textit{Id.} at 106.
  \item \textsuperscript{138} \textit{Id.} at 108-09.
  \item \textsuperscript{139} Winter v. G.P. Putnam’s Sons, 938 F.2d 1033, 1036-37 (9th Cir. 1991) (holding that defendant had no duty to investigate the accuracy of the information published in the defendant’s books); Watters v. TSR, Inc., 904 F.2d, 378, 381-83 (6th Cir. 1990) (holding that the manufacturer of D&D had no duty to warn mentally vulnerable players); Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830, 834 (5th Cir. 1989) (holding that the defendant “owed no duty to refrain from publishing a facially innocuous classified advertisement when the ad’s context—at most—made its message ambiguous.”); Zamora v. CBS, 480 F. Supp. 199, 201-03 (S.D. Fla. 1979) (finding that television stations had no duty not to produce and air violent shows); Sakon v. Pepsico, Inc., 553 So. 2d 163, 167 (Fla. 1989) (holding that Pepsico had no duty to 14-year-old boy who was killed while attempting stunt that he had seen in a commercial for defendant’s product).
Brandenburg application, plaintiffs have been unable to show that the speech or expression at issue rose to the required level of incitement. The following cases are representative of the recent media physical injury cases and are grouped into the four following categories: (1) Motion Picture Cases, (2) Television Broadcasting Cases, (3) Music Cases, and (4) Literature Cases.

(a) Motion Picture Cases

In Yakubowicz v. Paramount Pictures Corp., the plaintiff brought a wrongful death action against the defendant Paramount for making and distributing the film "The Warriors."\(^{141}\) The film portrayed the violent adventures of a fictional juvenile gang who are chased though the subways of New York City by other youth gangs who battled with knives, guns, and other weapons.\(^{142}\) After two youths were killed near theatres showing "The Warriors," Paramount sent a telegram to theatres showing the film, urging them to increase security in response to incidents of violence at theatres.\(^{143}\) Two days later, Yakubowicz's sixteen-year-old son was knifed to death by a boy that had just come from seeing the movie.\(^{144}\) Allegedly the assailant imitated some of the scenes from the film to provoke a fight with the decedent before killing him.\(^{145}\) Among Yakubowicz's various counts, he alleged that Paramount had produced, distributed, and advertised the film "in such a way as to induce film viewers to commit violence in imitation of the violence in the film."\(^{146}\)

First, the court held that the defendant had a duty of reasonable care to Yakubowicz's son with "respect to the producing, exhibiting, and advertising of movies."\(^{147}\) The court, however, held that the defendant did not breach its duty because nothing in the film constituted incitement under Brandenburg.\(^{148}\) 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 or violent activity on the part of viewers."\(^{149}\) Moreover, the

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\(^{143}\) 536 N.E.2d at 1068.
\(^{144}\) Id. at 1069.
\(^{145}\) Id.
\(^{146}\) Id. at 1069-70.
\(^{147}\) Id. at 1070.
\(^{148}\) Id. at 1068.
\(^{149}\) Id. at 1070-71.
film was not likely to incite "'imminent lawless action,'" and did not "'purport to order or command anyone to any concrete action at any specific time, much less immediately.'"

(b) Television Broadcasting Cases

A nine-year-old plaintiff brought suit against NBC, seeking damages for physical and emotional injury inflicted by three girls and one boy who had seen a television broadcast of the made for TV movie "Born Innocent," a film depicting the harmful effects of living in a state-run home. In one scene, a young girl is "artificially raped" by four other girls with a tool called a "plumber's helper." The plaintiff was similarly "artificially raped" by the four minors with a bottle at a San Francisco beach. The assailants had allegedly seen and discussed the scene from "Born Innocent" prior to the rape. Because the plaintiffs conceded that "Born Innocent" did not "advocate or encourage violent acts" and "did not constitute incitement," the court affirmed the district court's grant of a judgment of nonsuit to defendant. Notwithstanding, the court stated that the television broadcast "did not fulfill the incitement requirements of Brandenburg," but without providing any analysis or reasoning as to why. The court also rejected the plaintiff's claims that the court should apply negligence principles because the fictional presentation of the film is distinguishable from news programs and documentaries. Finally, the court rejected extending the holdings of Gertz v. Robert Welch, Inc., and FCC v. Pacifica Foundation. Similarly, the Supreme Court of Rhode Island held that the First Amendment barred recovery where the broadcast did not constitute an incitement to produce harmful action. On NBC's "Tonight Show" with Johnny Carson, a professional stuntman "hung" Carson

150. Id. (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
151. Id. (quoting McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 193 (Ct. App. 1988)).
153. Id. at 891.
154. Id.
155. Id.
156. Id. at 892-93.
157. Id. at 893.
158. See id.
159. 418 U.S. 323 (1974) (imposing civil damages in favor of a private citizen who suffered reputational harm from defamatory remarks made by the defendant).
160. 438 U.S. 726 (1978) (holding that the FCC could constitutionally restrict indecent materials during certain times of the day).
as a stunt on the show.\textsuperscript{162} Several hours after the broadcast, the plaintiffs found their son hanging in front of the television.\textsuperscript{163} The plaintiffs brought a wrongful death action against NBC alleging that NBC was negligent in permitting the stunt to be broadcast, and alternatively that NBC broadcast the stunt with intentional reckless disregard for the welfare of the plaintiffs and their son.\textsuperscript{164} The court held that in a case where only one person allegedly emulated the stunt, it could not find that the broadcast constituted incitement.\textsuperscript{165} The court also noted that the professional stuntman warned of the dangers and discussed the self-censorship that would result if the court held NBC liable.\textsuperscript{166}

These two cases demonstrate the high hurdle \textit{Brandenburg} presents for plaintiffs bringing actions against media defendants. The theory underlying both cases is that a third party, or the victim, emulated or imitated the action depicted by the media defendant. A court is likely to view violent video games in the same light, unless the game exhorts, urges, or directs the player to commit some activity.

\textbf{(c) Music Cases}

Two teen-suicide cases have been brought alleging that Ozzy Osbourne's "Suicide Solution"—a song preaching that "suicide is the only way out"\textsuperscript{167} incited two teenage boys to commit suicide.\textsuperscript{168} Both cases relied on the \textit{Brandenburg} test refined in \textit{Hess}, and therefore required the plaintiff to show that the defendant directed or intended the imminent suicide of listeners and that it was likely that the songs would produce such a result.\textsuperscript{169} The court in \textit{Waller} held that not only was there no evidence that the music was directed toward any person or group of persons, but there was no evidence of intent to incite suicides.\textsuperscript{170} Moreover, the court contended that the lyrics could be perceived as "asserting in a philosophical sense that suicide may be a viable option one should consider in certain circumstances."\textsuperscript{171} The

\begin{itemize}
\item \textsuperscript{162} \textit{Id.} at 1037-38.
\item \textsuperscript{163} \textit{Id.} at 1038.
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.} at 1041.
\item \textsuperscript{166} \textit{Id.} at 1041-42.
\item \textsuperscript{167} McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 190 n.5 (Ct. App. 1988).
\item \textsuperscript{168} \textit{See Waller v. Osbourne, 763 F. Supp. 1144, 1146 (M.D. Ga. 1991): McCollum, 249 Cal. Rptr. at 190-91.}
\item \textsuperscript{169} \textit{See Waller, 763 F. Supp. at 1150-51; McCollum, 249 Cal. Rptr. at 193-94.}
\item \textsuperscript{170} \textit{See Waller, 763 F. Supp. at 1151.}
\item \textsuperscript{171} \textit{Id.}
McCollum court made similar findings. Moreover, the McCollum court argued that the lyrics could be "viewed as a poetic device, such as a play on words, to convey meanings entirely contrary to those asserted by plaintiffs."  

(d) Literature Cases

In Herceg v. Hustler Magazine, Inc., defendant Hustler Magazine published an article entitled "Orgasm of Death," which described in detail the process of autoerotic asphyxiation—hanging oneself during masturbation in order to diminish the supply of blood to the brain and thus heightening the physical pleasure of orgasm. The heading of the article identified it as part of a series on "discussions of sexual pleasures [that] have remained hidden for too long behind the doors of fear, ignorance, inexperience and hypocrisy." Moreover, the article explained that the content was presented to "increase [readers'] sexual knowledge, to lessen [their] inhibitions and—ultimately—to make [them] much better lover[s]." At least ten warnings were located throughout the article recommending that this method not be used unless the reader was "anxious to wind up in cold storage, with a coroner's tag on [his] big toe," and that the article was written for educational purposes.

After reading the article, Troy D., a fourteen-year-old boy, hung himself to death while attempting the practice. The jury returned a verdict under a theory of incitement in favor of Herceg for the amount of $69,000 in actual damages and $100,000 in exemplary damages. The United States Court of Appeals of the Fifth Circuit reversed the holding that the article did not rise to the level of incitement required by Brandenburg and Hess. The court explained that "no fair reading of [the article] can make its content advocacy, let alone incitement to engage in" autoerotic asphyxiation. Moreover, the court suggested that written materials could never reach the requisite level of incitement because incitement cases, including Brandenburg and Hess, typically concern "a state

172. See McCollum, 249 Cal. Rptr. at 193-94.
173. Id. at 193.
174. 814 F.2d 1017, 1018 (5th Cir. 1987).
175. Id.
176. Id.
177. Id. at 1018-19.
178. Id. at 1019.
179. Id.
180. Id. at 1023-25.
181. Id. at 1023.
effort to punish the arousal of a crowd to commit a criminal action.” This inference, of course, could doom a plaintiff’s incitement claim brought against a video game manufacturer if adopted by other courts. Finally, the court rejected the plaintiff’s attempts to distinguish Brandenburg. In reaching this conclusion, the court stated that imposing civil liability is precluded because it might be “‘markedly more inhibiting than the fear of prosecution under a criminal statute.’” Moreover, the court rejected the proposal that the incitement standard be relaxed because the speech at issue was of minimal First Amendment value.

This precedent creates an insurmountable barrier for a plaintiff suing a video game manufacturer since a plaintiff is unlikely to be able to show that violent video games meet the strict Brandenburg requirements. First, it would be nearly impossible for a plaintiff to show that a video game manufacturer intended a child to emulate the play of the game. Thus, so long as courts continue to read an intent requirement into the incitement test, a plaintiff’s suit will likely be barred. Moreover, these games do not truly advocate unlawful activity; rather, games like “Kingpin” and “Postal” merely advocate playing the game within the confines of the game. The highest hurdle to overcome, however, is the imminence requirement. Recall that Hess put teeth in the imminence requirement by protecting advocacy of illegal action at some indefinite future time. Violent video games advocate immediate action within the game, not in the outside world. Therefore, the imminence requirement is not likely to be satisfied. In light of Brandenburg and Hess, but especially in light of the lower court decisions protecting media defendants by strictly applying the Brandenburg incitement test, a plaintiff’s action will probably fail when bringing an action against a violent video game manufacturer.

(3) Lower Courts Applying Alternative Tests: Weirum and Rice

Admittedly, several courts have abandoned the Brandenburg incitement test. The most celebrated case is the California Supreme Court case Weirum v. RKO General, Inc., where the court explained that the First Amendment did not bar recovery in the Plaintiff’s tort action where it was foreseeable that the speech at issue would create

182. Id.
183. Id. (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 277 (1964)).
184. Id. at 1024.
undue risk of harm. In *Weirum*, the defendant radio station, which had a predominantly teenage audience, sponsored a promotional contest in which a disk jockey traveled from location to location, advising the audience of his intended destinations. The first listener to meet the disk jockey at each location would receive a monetary prize. Two teenagers attempting to meet the disk jockey forced a motorist into the center divide, resulting in the driver’s death. After holding that the radio station could be held liable under California tort law, the court summarily rejected defendant’s First Amendment defense. The court reasoned that “[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.”

Despite its apparent watershed status, a plaintiff suing a video game manufacturer will not receive much benefit from relying on *Weirum*. Subsequent decisions, including California Appellate courts opinions, have limited *Weirum* to its facts. These cases have held that the speech at issue in *Weirum* either falls within the category of commercial speech—the promotional event arguably urges a commercial transaction—or because the level of incitement satisfies *Brandenburg*, notwithstanding the fact that illegal activity was not advocated by the radio station. The rationale underlying the lower courts’ distinction on commercial speech grounds is that because the First Amendment only provides scant protection to commercial speech, imposing civil liability would not infringe upon any First Amendment principles.

Moreover, the level of incitement in *Weirum* appears sufficiently imminent to meet the *Brandenburg* test: The disk jockey repeatedly urged the teenage listeners to speed to announced locations while the listeners were driving on the freeway. This “real time” urging, however, is not likely to be found in a violent video game. The plaintiff’s claim in the video game case is likely to be that the player imitated the acts that he viewed and performed in the game. While it

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186. 539 P.2d 36, 40 (Cal. 1975).
187. Id. at 37-38.
188. Id.
189. Id. at 38-39.
190. Id. at 40.
191. Id.
is true that a player must react immediately to the stimulus on the screen, the player is only urged to react on screen, not on real streets as in *Weirum*. Unlike the situation in *Weirum*, when a player reacts to the urging, no one gets hurt besides an animated character in the game. These limitations should prove fatal to plaintiffs attempting to avoid *Brandenburg* by relying on *Weirum*.

Recently, the Fourth Circuit court of Appeals appears to have provided a new avenue for plaintiffs bringing physical injury cases against media defendants. In *Rice v. Paladin Enterprises, Inc.*\(^{194}\) defendant Paladin Enterprises published a book, *Hit Man: A Technical Manual for Independent Contractors*, which gives detailed instructions on how to murder and how to become a professional killer.\(^{195}\) After reading the 130 page instructional manual, James Perry meticulously followed the instructions and brutally murdered a woman and her son at the request of the woman's ex-husband.\(^{196}\) For example, Perry followed the instructions virtually verbatim on how to solicit the client and avoid the FBI and other law enforcement in the process; what to charge; where to commit the crime; the use of a rental car; the use of a motel as a base; the use of an AR-7 rifle to kill the victim; the practice of drilling out the serial numbers of the gun to avoid tracing; how to make a silencer; how to murder effectively and efficiently; how to conceal the murders; and, finally, on how to conceal the murder by disguising the scene as a burglary and disposing of evidence.\(^{197}\) Plaintiffs brought suit against Paladin for civilly aiding and abetting in the murders.\(^{198}\)

After reviewing an abundance of case law imposing criminal liability for aiding and abetting criminal acts, the court held that the First Amendment does not bar an action for civil aider and abettor liability.\(^{199}\) The court explained that "acts which the government may criminally prosecute with little or no concern for the First Amendment, the government may likewise subject to civil penalty or make subject to private causes of action."\(^{200}\) However, the court imposed two caveats to imposing aiding and abetting liability: (1) it

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194. 128 F.3d 233 (4th Cir. 1997).
195. *Id.* at 239-41.
196. *Id.* at 239.
197. *Id.* at 239-41.
198. *Id.* at 241.
199. *Id.* at 243-44 (explaining that it is well established that speech may be proscribed or punished if in its effect it is "tantamount to legitimately proscribable nonexpressive conduct"—the court called this the speech-act doctrine).
200. *Id.* at 247.
contended that the First Amendment may require a heightened intent requirement in the civil context, thus precluding the imposition of civil liability where the basis of liability is mere foreseeability or knowledge that the information may be misused.\textsuperscript{201} The court, however, did not have to discuss this caveat because for the purposes of the appeal, Paladin stipulated that it "intended and had knowledge" that "Hit Man" would be used by criminals to murder,\textsuperscript{202} and because a reasonable jury could infer intent.\textsuperscript{203} Moreover, Paladin stipulated that its marketing strategy was directed towards "criminals and would-be criminals who desire information and instructions on how to commit crimes."\textsuperscript{204} And (2), the First Amendment precludes imposing civil liability for speech that constitutes pure advocacy that does not meet the \textit{Brandenburg} requirements.\textsuperscript{205} The court, however, stated that the "step-by-step instructions for murder" were "so comprehensive and detailed" that "Hit Man" could not be reasonably characterized as abstract advocacy.\textsuperscript{206}

\textit{Rice}, like \textit{Weirum}, appears to be a watershed decision: A court held that a publisher could be held liable for the printed word that allegedly aided and abetted the crimes of the reader. However, a plaintiff bringing an action against a video game manufacturer still faces formidable obstacles. First, the facts in \textit{Rice} limit its potential precedential value: the book provided detailed step-by-step instructions for murder that Perry followed meticulously. More damaging to a plaintiff, however, are the gross stipulations of intent and knowledge that in effect create a hermetic barrier to liability. In short, a plaintiff is still faced with an onerous intent requirement established in \textit{Brandenburg} and later solidified in \textit{Hess}.

\textbf{III. A Ray of Hope}

In the above sections, this note has argued that video games are entitled to some level of protection under the First Amendment and detailed the potential barriers facing a plaintiff due to lower courts mechanically applying \textit{Brandenburg} in the tort context. Therefore, if \textit{Brandenburg} were applied as it has been in the past to a video game

\begin{itemize}
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id. at 248.
\item \textsuperscript{203} See id. at 253-55.
\item \textsuperscript{204} Id. at 241 n.2.
\item \textsuperscript{205} Id. at 248-49.
\item \textsuperscript{206} Id. at 249.
\end{itemize}
manufacturer tort liability case, the case would likely be dismissed. However, Brandenburg was not intended to apply to the tort context and thus the lower courts have erroneously applied this highly protective test to protect negligent media defendants. Consequently, a court hearing a tort case against a video game manufacturer must weigh the First Amendment interests of the video game manufacturer against the competing interests of the injured victim, the injured player who was induced to kill or maim, and the interests of the state in compensating those injured as well as its interests in protecting its children and citizens. The need for a court to strike this balance is underscored by the recent spate of schoolyard shootings coupled with the recent FTC report finding that video game manufacturers market violent video games to minors.

A. Brandenburg Need Not Apply

The lower court cases discussed above mechanically applied the Brandenburg incitement test in contexts not contemplated by the Brandenburg court. This approach is understandable, for Brandenburg was a per curiam opinion, suggesting that the Court was providing a simple, uniform, and easily applicable test. However, any well-versed First Amendment scholar that has labored through the complicated labyrinth knows that its simplicity is illusory: Applying Brandenburg to the physical injury context warps the case beyond recognition.

First, a careful reading of Brandenburg reveals that the Court protected the mere abstract teaching and mere advocacy of the moral propriety of violence for the achievement of industrial and political reform. The Court explicitly stated that a statute that fails to distinguish between the “‘mere abstract teaching [of] the moral propriety’” of violence and “‘preparing a group for violent action and steeling it to such action’” is unconstitutional. Most of the current games on the market—"Doom II," “Duke Nukem,” “Postal,” “Mortal Kombat IV”—do not advocate nor teach the abstract teachings of the moral propriety of violence to achieve industrial and political ends. Although violent video games are a protected form of entertainment as discussed in Part I of this Note, the games do not

207. Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (striking down statute that forbade “advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.”).

208. Id. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1981)).
appear to be advocating anything. Rather, they provide a player with an arena for action and provide the artist with an arena for expression. Admittedly, there may be games such as “Kingpin” that involve detailed storylines that appear to be a part of a developed plot. Such a game may indeed be advocating the use of violence to achieve certain ends: “Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.”

As a whole, however, games such as these do not include the type of abstract advocacy for political and industrial ends that implicate the strictures of Brandenburg. For example, in “Doom II” and “TimeSplitters,” the child player walks through rooms with an array of weapons—shotgun, tommy-gun, rocket launcher, to name a few—with the goal of killing as many enemy beings as necessary to advance to the next level. Further, in “Postal,” the child player maneuvers the protagonist throughout the streets gunning down innocent people, including unarmed women and children. When the child player has failed to kill the victim with the first shot, the downed victim crawls across the screen begging for mercy. With the click of a key, the child player kills with a direct head shot.

Second, Mr. Brandenburg was arrested and convicted for giving a live speech to an assembled crowd. Thus, not only was the court protecting live speech, but also the right to associate. Rather than using a soapbox, the artists or the manufacturer (whoever the speaker is) speaks vicariously through the characters and depictions on the screen, not live to the players. Moreover, the right to associate is not implicated in the slightest. Third, Mr. Brandenburg’s principle purpose in giving the speech was not to make a commercial profit, but to achieve social and political change. In stark contrast, a video game manufacturer such as Sega, id Software, or Nintendo will be hard pressed to show that its primary purpose is not to maximize commercial profits but rather to achieve political and industrial change.

Fourth, the state convicted Mr. Brandenburg under its Criminal Syndicalism statute, which is noteworthy for two reasons. First, the statute punished individuals who posed a perceived threat by their expression—not individuals who actually caused harm. In fact, the

209. Id.
210. Id. at 444-47.
211. Note, however, that in the arcade context the right to associate is a First Amendment interest to be considered by the court.
Supreme Court in *NAACP v. Claiborne Hardware Co.* recognized that a substantial question exists whether a defendant could be held liable for the harmful consequences of his speech, where the speech did not rise to the requisite level of incitement. In the video game manufacturer tort liability context, however, physical harm or death has been sustained. Second, *Brandenburg* was a direct response to the Supreme Court's long and tortured experience with the *Schenck v. United States* and its progenies' clear and present danger test. Although the Court cited *Dennis v. United States,* in ostensible approval, it stated a new test that appeared to combine Judge Hand's highly protective rule espoused in *Masses Publishing Co. v. Patten* with Holmes' opinion in *Schenck.* In the civil damage context, neither a criminal syndicalism statute nor a sedition statute is at issue. On the contrary, the safety of the community, a person's right to bodily integrity, a state's right to protect its citizens and provide its citizens with a means of redress are at issue. Finally, and arguably most important, *Brandenburg* did not address material targeted to children. Violent video games, however, are targeted to minors and thus, as in other First Amendment contexts, require a more relaxed level of protection.

In short, the current incitement test, like the "actual malice" standard rejected in *Gertz v. Robert Welch, Inc.*, fails to strike the proper balance and thus constitutes an overprotective and insurmountable rule. Adherence to *Brandenburg* virtually provides

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215. 341 U.S. 494, 505 (1951) (applying a somewhat revised clear and present danger test).
216. 244 F. 535, 540 (S.D.N.Y. 1917).
218. See FTC REPORT, supra note 11, at iv (finding that of the 118 games with a Mature rating for violence, 70% targeted children under seventeen and a few had marketing plans targeting children as young as six).
manufacturers with a constitutional license to negligently manufacture and distribute games that cause foreseeable harm; in effect, video game manufacturers are able to shift the cost of doing business upon plaintiffs who may not have even purchased or played the game. Moreover, such a test does not consider or weigh the interests of the victim who has been severely harmed, the interests of the player-child who has been induced to kill or maim, nor the interests of the state in compensating their citizens for the harms sustained. Applying Brandenburg in this context essentially subsidizes the video game industry.

B. Balancing the Competing Interests and a Call for a Negligence Standard

A court rejecting Brandenburg will have to strike a new balance in order to determine the level of protection that should apply in the video game manufacturer tort context, for, as discussed in the above sections, one searching through the complex maze of First Amendment law will not find a settled norm that sufficiently applies to this context. Thus, a court must carefully balance the First Amendment interests of the video game manufacturers against the interests sought to be protected by the plaintiff and the state. In short, the determination will be whether a fault-based standard or a higher standard such as the New York Times "actual malice" requirement\textsuperscript{221} accommodates the competing interests.\textsuperscript{222}

In Gertz v. Robert Welch, Inc., where the reconciliation of First Amendment and tort law is most pronounced, the Supreme Court explicitly weighed the First Amendment interests of the public in avoiding self-censorship by the news media and in the need for a vigorous and uninhibited press against redressing wrongful injury—Mr. Gertz’s reputation interest.\textsuperscript{223} The Court recognized that absolute protection of the news media would require a “total sacrifice” of the competing interest of the private individual’s reputational interest coupled with the state’s legitimate interest in compensating individuals for harm.\textsuperscript{224} According to the Court, “the individual’s right to the protection of his own good name ‘reflects no more than our basic concept of the essential dignity and worth of

\textsuperscript{222} Gertz, 418 U.S. at 349 (“Where state laws burden the exercise of free speech, this court has stressed that judges must attempt to reconcile the state law with competing interests grounded in the First Amendment.”).
\textsuperscript{223} 418 U.S. at 340-42.
\textsuperscript{224} Id. at 341.
every human being—a concept at the root of any decent system of ordered liberty." 225

The Court held that Mr. Gertz's private reputational interest outweighed the First Amendment interest in protecting the media from liability and self-censorship. 226 Rejecting the New York Times actual malice standard, the Court held that so long as states "do not impose liability without fault, the States may define for themselves the appropriate standard of liability... of defamatory falsehood injurious to a private individual." 227 In short, the Supreme Court allows a lower culpability standard in cases of defamatory speech against private parties.

(1) The First Amendment side of the balance

In a case involving a plaintiff suing a video game manufacturer, the court would weigh the First Amendment interests of the video game manufacturer to manufacture and distribute violent video games, the public's right to receive such information, the need for preventing self-censorship of the video game industry, and the need for a vigorous and uninhibited exposition of ideas against the interests sought to be protected by the plaintiff and the state. In determining the weight to be afforded the First Amendment side of the scale, a court should consider (1) the unique characteristics of violent video games and (2) what impact imposing civil damages will have on the industry. 228

Even though video games are presumably a protected form of entertainment, 229 this does not end the inquiry. Video games are also a form of media—they serve as a conduit through which ideas and information are disseminated to the public. The differences in the characteristics of video games as a form of new media from traditional forms of media may justify tipping the scale in favor of the First Amendment or in favor of compensation. 230 For example, the

225. Id. (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion)).
226. Id. at 343-52.
227. Id. at 347.
228. This Note assumes that a test fashioned by a court hearing this matter as a matter of first impression would limit its reach to the video game industry and to violent video games in particular that are targeted to minors.
229. See supra Part I.B.
First Amendment only provides the most limited protection to the broadcast media because of several unique characteristics. First, the number of bandwidths upon which speech may be broadcast is finite and thus scarce.\textsuperscript{231} As a result, the broadcast media holds a unique position in that they have direct control over what information the public receives. The Supreme Court, however, has explained that the right of the public to receive information and ideas is paramount to the First Amendment rights of the broadcast media.\textsuperscript{232} Therefore, the Federal Communication Commission (FCC) may require broadcast media to cover public issues including competing views under the "fairness doctrine" and to provide air time to the public where a prior broadcast involved personal attacks or political editorials.\textsuperscript{233}

Second, broadcast media is afforded the "most limited" protection because it has established a "uniquely pervasive presence in the lives of all Americans," and third, it is "uniquely accessible to children, even those too young to read."\textsuperscript{234} Because of the latter two characteristics, the FCC may punish a media defendant for the broadcast of indecent materials—materials defined as "nonconformance with accepted standards of morality"\textsuperscript{235}—over the air waves under certain circumstances, even though such language does not constitute obscenity or fighting words.\textsuperscript{236}

Violent video games present special and unique problems that are more extreme than those presented by traditional forms of media, and therefore should be entitled to the most limited protection. First, violent video games, in general, are directed towards minors between the ages eight and twelve.\textsuperscript{237} To reach this audience, manufacturers increasingly market the most violent video games to younger audiences.\textsuperscript{238} In response to a request from President Clinton on June 1, 1999, and similar requests from Congress, to discover whether the

\textsuperscript{231} Red Lion Broad. Co., 395 U.S. at 375-77.

\textsuperscript{232} Id. at 388 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); see also id. at 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

\textsuperscript{233} Id. at 386-401.


\textsuperscript{235} Id. at 740 (quoting Webster's Third New International Dictionary (1966)).

\textsuperscript{236} Id. at 750 (upholding FCC's ban on the broadcast of indecent monologue during the afternoon hours when accessibility to children was high).

\textsuperscript{237} Leslie Helm, Making A Killing; Violence Sells in Video Games, Which Is Why Manufacturers Are Marketing Ever-Bloodier Products to Ever-Younger Audiences, L.A. TIMES, Jan. 26, 1998, at D1; see also FTC REPORT, supra note 11, at iv, 36-51.

\textsuperscript{238} See supra note 236.
video gaming industry markets products that they know warrant parental warnings to children, the Federal Trade Commission recently reported that of the 118 games with a Mature rating for violence, 70% targeted children under 17. In fact, 51% had at least one marketing plan that expressly included children under 17 in their target audience; more perverse, was the finding that a few of the marketing plans target children as young as six. For example, most of the video game manufacturers studied intended to place ads for M-rated games in magazines “which have a majority (from 54% to 68%) of readers or subscribers age 17 or under.” Thus, through an aggressive marketing machine, video game manufacturers are able to place these games into the hands of minors notwithstanding parental warnings and voluntary ratings. In fact, parental warning labels are likely to increase sales and enhance the marketing of the violent video game because such warnings tend to “attract adolescents eager for a look at the ‘forbidden fruit.’” The most disturbing element about the video game industry’s marketing campaign is its statements to allure buyers: “Kill your friends guilt free,” “More fun than shooting your neighbor’s cat,” “We took what was killer, and made it mass murder,” “Destroying your enemies is not enough . . . you must devour their souls,” “Gratuitous violence is 200 times faster with a D-Link Network.” And if these marketing statements are not convincing, visit the “Running with Scissors” web-site where the manufacturer of “Postal” posts player reviews to market the game. One review chosen to market the game stated the following: “[Y]our postal games are so bad ass. I love this mindless killing. . . . [L]ately I’ve been getting sick of hearing about this Columbine High School crap (in [C]olorado). But I think it would be so kick ass to see a postal level having a scene similar to the [C]olumbine scene!!”

239. FTC REPORT, supra note 11, at 45.
240. Id.
241. M-rated or Mature rated games are by definition unsuitable for persons under seventeen. Id. at 38.
242. Id. at 47.
245. Running with Scissors, at http://www.runningwithscissors.com/. “Running with Scissors” is the creator of “Postal.”
246. Patrick G., Player Review, Dec. 1, 1999 at http://www.runningwithscissors.com/reviews.html. This was one of many disturbing and unsettling reviews used to market “Postal.”
Second, minors have easy access to violent video games. One reason is that graphics-intensive games like “Doom II,” “Postal,” and “Kingpin” are now more affordable to minors.247 Moreover, retailers as a whole do not impose restrictions on who can purchase games despite parental warnings; thus, the FTC found that “children under 17 can easily buy M-rated games.”248 Indeed, “[u]naccompanied children ages 13-16 were able to purchase these games at 85% of the 380 stores visited.”249 Further, in the age of unmonitored internet sales, minors may easily access the video game market by downloading games without parental supervision.250 In addition, with the proliferation of video games, minors may find access by being introduced and playing such games at other children’s houses. Because of the magnitude of accessibility, video games, like broadcast media, have become pervasive in American lives. Both of these elements—the predominantly adolescent audience and the accessibility to minors—are critical in the analysis because of society’s compelling interest to protect the psychological and physical “well-being of its youth.”251

Third, as in the broadcast context, “prior warnings cannot completely protect” the player from the unexpected graphic content of the video game.252 Thus, unwitting minors are exposed to extreme depictions of graphic violence repeatedly without adequate warnings.253 For instance, when one starts the game “Postal,” the player is confronted with a scene of a man holding a shotgun in his yard. The player maneuvers the protagonist outside of his yard where he proceeds to gun down innocent individuals: police officers, little

247. See Helm, supra note 237, at D1 (stating that game prices have plunged to a level within the budgets of most teenagers). The author, in fact, only paid $7.95 for “Postal” online.

248. FTC REPORT, supra note 11, at 52.

249. Id.

250. See id. Despite retail bans of “Postal,” 100,000 copies of “Postal” were sold from their website. Multimedia Notes, 7 CONSUMER MULTIMEDIA REP., Mar. 23, 1998, available at 1998 WL 11069150. Consider the following anecdote: On January 6, 2000, I went online to the Yahoo website. I searched for “violent video games” and found the ultra-graphic, ultra-violent game “Postal.” I then placed the game in my shopping cart and used my wife’s credit card to buy the game. The website never asked me for information to ensure that I was not a minor or to determine my identity. When I received the game, the packaging lacked any parental warnings concerning the content of the game even though the game is not sold in stores because of its graphic nature.

251. See supra note 218.

252. Pacifica Found., 438 U.S. at 748.

253. Id. at 748-49 (stating that “To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”).
children, and unarmed men and women. Blood splatters across the screen as the people are shot. No one can prepare the player for the horrible screams, moans, and indignity. Victims, in fact, who were not "fortunate" enough to be killed on the first hit, slowly crawl across the ground begging to be put to death. The player can then move in close and shoot the begging victim at close range in the head to put the victim out of her misery. The most disturbing scene in "Postal," aside from the massacring of children who are merely walking by, is where the player hits a button and, as a result, the protagonist turns the gun on himself, states "I regret nothing," and pulls the trigger, after which his brains are spread across the screen.

Fourth, and most alarming, violent video games potentially teach, train, and instruct minors in the art of killing. At the outset, it should be recognized that the American Medical Association (AMA), the American Psychiatric Association (APA), the National Institute of Mental Health (NIMH), the American Academy of Mental Health (AAMH), and the Surgeon General have all made definitive statements that violent video games are harmful to minors. Studies have shown that viewers of violent video media "acquire new means of harming others not previously present" in their prior behavior and become increasingly desensitized to violence and thus "show little, if any, emotional arousal in response to such stimuli" as their "inhibitions against aggressive behavior are weakened." Violent video games go beyond this. Unlike motion pictures or television, entertainment that involves passive

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254. See GROSSMAN & DEGAETANO, supra note 80, at 65-81; Debra Buchman & Jeanne Funk, Video and Computer Games in the 90's, 24 CHILDREN TODAY, AT 12 (Summer-Fall 1996) (claiming that "Violence is primarily a learned behavior, [and] the powerful combination of demonstration, reward, and practice, inherent in electronic game playing creates an ideal instructional environment.").

255. Grossman, supra note 244.

256. COMM'N ON VIOLENCE & YOUTH, AM. PSYCHOLOGY ASS'N, PSYCHOLOGY RESPONSE 33 (2000) (stating that "There is absolutely no doubt that higher levels of viewing violence on television are correlated with increased acceptance of aggressive attitudes and increased aggressive behavior."); THE SCIENTIFIC ADVISORY COMM. ON TELEVISION AND SOC. BEHAVIOR, SURGEON GENERAL'S REPORT: TELEVISION AND GROWING UP: THE IMPACT OF TELEVISION VIOLENCE 122-25 (1972) (providing empirical data showing that children often mimic violence portrayed on television); HAROLD I. KAPLAN, M.D. ET AL., KAPLAN AND SADOCK'S SYNOPSIS OF PSYCHIATRY 175 (7th ed. 1994); Benjamin Spock, M.D., How On-Screen Violence Hurts Your Kids, REDBOOK, Nov. 1987, at 26 (explaining that children who see violence regularly accept it as standard human behavior); see also Ginsberg, 390 U.S. at 641-43 (noting that the fact that a causal link between children viewing pornography and children acting out pornographic scenes had not been disproved was sufficient reason to uphold a New York statute which criminalized the sale of pornographic magazines to minors).
participation where the receiver of the information merely views the 
violent depictions, violent video games involve an interactive 
experience: the player, often an unwitting child, pulls the trigger, 
inflicts the harm, and moves in for the kill. The games use real video 
clips, richly detailed animation, and stereo sound effects to simulate 
real-world environments. The minor is placed in a virtual reality—in 
a three-dimensional field of experience. This allows players to sense 
and manipulate virtual stimuli as they would in the real world, thus 
providing them with a feeling of being completely immersed in the 
simulated world.

Moreover, this interactive process may teach and condition 
players to kill through a process known as operant conditioning.257 
The player is presented repeatedly with substantially the same stimuli 
and circumstances to elicit a certain response. The player's behavior 
is then reinforced by rewarding that behavior, through points and 
level advancement. As a result, when confronted with similar 
circumstances, the player "reacts from a conditioned response rather 
than making a cerebral decision."258 We are all familiar with this type 
of instruction: small children are taught by "Smokey the Bear" to 
stop, drop, and roll; football coaches have their players hit a pad at 
the same angle at each blow of the whistle; airline pilots are put in 
simulators and are confronted with the same stimulus requiring the 
same response; and soldiers are taught to aim, shoot, and fire without 
contemplating. This mode of instruction is so effective that violent 
video games are used as "killing simulators" to teach and condition 
marines and police officers to kill.259 The game ensures that marines 
and officers will not freeze when confronted with certain situations, 
and will, rather, react immediately with their weapons.260 Thus, the 
player does not learn how to resolve conflicts through compromise, 
negotiation, or more speech, but is conditioned to react with force 
and violence. Even though some games may be played with a 
keyboard such as "Postal," the space bar is still an efficient combat 
simulator; for example, marines use a modified version of Doom 
called "Marine Doom" to teach new recruits how to kill. In "Marine 
Doom," the players use the button on the mouse to kill rather than a 
plastic gun.261 The games available to the domestic population are

257. See GROSSMAN & DEGAETANO, supra note 80, at 73; see also KAPLAN ET AL., 
supra note 256, at 166.
258. GROSSMAN & DEGAETANO, supra note 80, at 73.
259. Id.
260. See id. at 73-74.
261. See id. at 77.
seemingly indistinct from the ones used by the armed forces. For example, the United States Army uses a device known as the Multipurpose Arcade Combat Simulator (MACS) for extensive marksmanship training.\textsuperscript{262} The MACS is a converted Super Nintendo, replacing the plastic gun with a plastic M-16.\textsuperscript{263} One need only walk through the local arcade to witness the disturbing realistic detail of the artificial weapons being used by children to kill on screen. Moreover, in "Kingpin: Life of Crime," the animated figures are separated into fifteen body parts, requiring the player to be more accurate since the areas of target are smaller. Of course, the player is still rewarded with more points for head shots and blowing off a limb. In addition, the player is able to see how injured the victim is by distinguishing between a victim who is merely bleeding from one who has a cracked skull.

Furthermore, violent video games may be addictive.\textsuperscript{264} Some have argued that video games are so addictive to young people that they may be socially isolating.\textsuperscript{265} Children play these games obsessively, day after day, without interruption.\textsuperscript{266} Finally, video games, while serving several First Amendment functions, arguably do not hold as high of a position as does the press, at issue in \textit{New York Times} and \textit{Gertz}, or the political speech in \textit{Brandenburg}. In other words, a court should consider the fact that the primary function of video games is recreation when determining the weight to be given the First Amendment side of the balance. In short, violent video games should be afforded limited protection because they are directed to children; children have unique access to them; warnings are insufficient protections; the primary function of video games is recreation; and violent video games are potential "killing simulators" in the hands of impressionable children and thus might train and condition minors to react with force and violence rather than with negotiation and compromise.

However, in weighing the First Amendment interests, a court must consider the chilling effect that imposing civil damages will have

\textsuperscript{262} See Grossman, \textit{supra} note 244.

\textsuperscript{263} See id.

\textsuperscript{264} See JANE M. HEALEY, PH.D., \textit{ENDANGERED MINDS: WHY KIDS DON'T THINK AND WHAT TO DO ABOUT IT} (1991), for a comprehensive discussion about why video games are addictive.


\textsuperscript{266} See GROSSMAN & DEGAETANO, \textit{supra} note 80, at 68.

\textsuperscript{267} 376 U.S. 254 (1964).

\textsuperscript{268} 418 U.S. 323 (1974).
upon the violent video game industry in manufacturing games that fall outside of this category. The effect should be minimal. Compensatory damages in this context are mere economic externalities that would be internalized by the video game manufacturers as a commercial cost of doing business. Imposing damages would thus guarantee that those who profit from the commercial transaction—video game manufacturers and the consumers who buy the games—bear the cost of that transaction—the civil liability due to the distribution of the game. However, in light of video game sales in this country, if no limits were placed upon which plaintiffs could sue and against whom they could sue, there could be a drastic chilling effect due to a considerably large class of potential plaintiffs, but, as discussed below, a fault standard should dispel such fears.

(2) The plaintiff’s side of the balance

On the other side of the balance are the substantial social costs exacted by protecting the distribution of such products. First, the victim has compelling bodily integrity and emotional interests: The victim has either sustained horrible physical injury or, as in the Carneal case, has died. Second, the court must weigh in the psychological well-being of the player-child who has been induced to kill or maim. And finally, the state’s interest in compensating the injured plaintiff and in protecting its citizens and its children must be considered. These interests clearly outweigh the moral interests which the Court held trumped the First Amendment values in distributing obscene materials in Miller. Consider the scenario where obscene material is placed in a video game targeted to children. In such a case, the First Amendment would not bar legislatures from prohibiting the distribution because of the potential harmful effects that the obscene material will have on the child players. It is hard to

269. See Shapely, supra note 80 (stating that there are twenty-seven million casual gamers in the country); 1999 Year in Review: Video Game Violence Back in the Spotlight, MULTIMEDIA WIRE, Dec. 22, 1999, available at 1999 WL 6703643 (stating that gaming industry closing in on the $7 billion mark); GROSSMAN & DEGAETANO, supra note 80, at 65-66 (discussing the pervasiveness of video games and stating that video game sales in the U.S. exceed $10 billion annually).

270. The Court has traditionally applied different First Amendment principles and, in fact, less protection when children are at issue. See supra note 218.


272. The interest in protecting children is also at issue because a state has a compelling interest in preventing the development of killing automatons. Recall that for purposes of this Note, it is presumed that all of the tort elements have been established, including actual and proximate causation.
imagine a rationale that bars this type of video game distribution but allows the distribution of games that are filled with extreme violence that actually and proximately caused physical injury. These interests also clearly outweigh the reputational interests at issue in *Gertz* which were protected by the Court at the expense of the First Amendment.

Some critics may argue that *Gertz* is a defamation case and thus should not apply to this context. First, the balancing test used in *Gertz* is not unique to defamation, but rather underlies all of the First Amendment cases: the Court, in developing rules and principles, balances the First Amendment values against the societal costs of protecting those values. Second, violent video games are directed at children and thus should be entitled to less protection than those targeted to adults. Finally, it would be hardly defensible and nearly impossible to reconcile a contrary outcome. Once one juxtaposes *Gertz* with the dicta in *James*, the perversity becomes disturbingly apparent. On the one hand, a private citizen who suffers reputational harms is entitled to his day in court. At the same time, a victim who has sustained severe physical injury or even death, as in *James*, has her case dismissed out of hand. The First Amendment should not be a constitutional straightjacket, paralyzing individuals from realizing their civil liberties in favor of those who have intruded upon those liberties.

Therefore, a court carefully balancing the competing interests should conclude that a fault standard similar to that recognized in *Gertz* applies in the video game manufacturer tort liability context. Applying a negligence standard produces an equitable boundary between the First Amendment interests and the countervailing concerns. Such a rule gives the manufacturer no more than a responsible citizen is entitled, gives the individual victim no more than what he is entitled to—actual damages—and at the same time maintains judicial integrity. Unlike mechanically applying the *Brandenburg* incitement test, the proposed standard recognizes the

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273. See, e.g., New York v. Ferber, 458 U.S. 747 (1982) (balancing the First Amendment interests against the state's interests in protecting the well-being of its children and holding that the state could prohibit the distribution of child pornography); Miller v. California, 413 U.S. 15 (1973) (balancing the First Amendment interests against the social costs of viewing obscene materials and thus creating the three-pronged obscenity test); *Brandenburg* v. Ohio, 395 U.S. 444 (1969) (per curiam) (balancing the First Amendment interests in free speech against the societal interests in preventing potential harm and thus establishing the incitement test). Cases such as *Brandenburg* have created categorical rules that are a product of carefully balancing the values of protecting speech against the conflicting societal values of preventing threatened or actual harm associated with such speech.
compelling interest of the plaintiff who has suffered physical injury and the state’s legitimate interest in providing compensation and protecting its citizens. Moreover, a negligence standard will insulate the court from becoming partners in corporate malfeasance: these corporations should not profit from lawless behavior, nor should the court place its imprimatur on such profits.

At the same time, the video game manufacturers are provided with sufficient First Amendment protection. First, a plaintiff may not bring a case based upon strict products liability. Rather, under a negligence theory, the video game manufacturer must be at fault: A plaintiff will be required to show that the video game manufacturer caused foreseeable harm by negligently manufacturing and distributing a violent video game that was the actual and proximate cause of the plaintiff’s injuries. The *James* case is instructive. In dismissing the plaintiff’s negligence claims, Judge Johnstone first held that the video game manufacturers did not have a legal duty because it is “clearly unreasonable to expect Defendants to have foreseen Plaintiffs’ injuries from Michael Carneal’s actions.” Relying on the Sixth Circuit rationale in *Watters*, he explained that the defendants could not be expected to ascertain the mental state of every potential player. Second, Judge Johnstone held that as a matter of law Michael Carneal’s actions were a sufficient “superceding cause,” thus breaking the causal link. He explained that Michael Carneal’s acts were so “highly extraordinary in nature” and ‘unforeseeable in character,’ that they operate to ‘relieve [Defendants] of liability.’

In sum, traditional common law tort principles will bar most actions against a video game manufacturer defendant and thus will sufficiently protect their First Amendment interests; however, once a prima facie tort case is established, the First Amendment should not bar such a claim to proceed.

**Conclusion**

A plaintiff suing a video game manufacturer for negligently producing and distributing a violent video game that caused foreseeable harm to the plaintiff is faced with several obstacles. First, the plaintiff will have to show that the video game manufacturer was

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277. *Id.* at 808 (quoting *Montgomery Elevator v. McCullough*, 676 S.W.2d 776, 780 (Ken. 1984)).
negligent: it created an undue risk of harm by distributing a violent video game that caused actual and foreseeable harm to the plaintiff. Perhaps the greatest obstacle to a plaintiff, however, is the First Amendment. Admittedly, the classic First Amendment rationales offered by John Stewart Mill, Judge Learned Hand, Justice Oliver W. Holmes, and Justice William Brandeis—those who believed that freedom of speech was indispensable to the search for truth, a well informed electorate, and an ordered society—do not appear to apply to violent video games. However, with the complex plots, rich animation, and virtual stimuli represented in the violent video games of today, coupled with First Amendment values revealed in this Note, a court is likely to find that violent video games are entitled to some level of protection.

The plaintiffs will also have to contend with the *Brandenburg* incitement test and the lower courts that have mechanically applied that test in cases involving media defendants. *Brandenburg* administers an extremely high barrier to self-censorship of media and it correspondingly exacts a high price from the victims of physical injury. Admittedly, the preservation of First Amendment principles demands patience on the part of those who might like to see the manufacturers held accountable. Thus, this is a time for judicial restraint in order not to provide a knee-jerk reaction that would likely produce an unprincipled decision. This Note, however, provides an analytical framework resulting in a principled decision that will sufficiently protect the First Amendment interests at stake while at the same time accommodate the competing interests of the victims and of the state.

Therefore, this Note proposes disposing with the mechanical and erroneous application of *Brandenburg* and insists that a court permit a negligence theory to proceed. Such a standard strikes the proper balance between the First Amendment interests in preventing the self-censorship of the violent video gaming industry and the plaintiff's bodily integrity interests, the psychological well-being of the player-child, and the state's interest in compensating individuals who suffer harm. The goal of this Note, however, is neither to advocate nor encourage potential plaintiffs to bring suits against video game manufacturers for manufacturing and distributing violent video games; rather, this Note contends that the First Amendment does not preclude such an action. An injured plaintiff should be compensated

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for the video game industry's unreasonable behavior that caused the
plaintiff's harm: "The very essence of civil liberty certainly consists in
the right of every individual to claim the protection of the laws,
whenever he receives an injury," the First Amendment should not
be a license for unreasonable behavior, whoever the actor.
