# Lawyers For The Talent

by

Richard Dooling

## First Amendment - Violence

If speech is just too "sexy," it can be banned. If it's indecent, it can be regulated. But what if speech is just too violent or unreasonably dangerous? What if a rap star's lyrics "inspire" or "cause" somebody to shoot a cop?

What if a journalist writes a lurid men's magazine article about autoerotic asphyxiation and arguably "causes" teenagers to try such deviant behavior for themselves, accidentally hanging themselves? What if, at trial, the victim's family argues that the journalist's lurid article was really just a how-to for teenage thrill-seekers? We sympathize with the parents when they sue the magazine for publishing a glossy magazine article that arguably tempted their adolescent son to experiment, with fatal consequences.

What if the recording of a heavy metal hit contains subliminal lyrics that arguably encourage somebody to commit suicide or kill police officers? What if a programmer creates a violent video game that arguably "causes" or "inspires" a school shooting?

Should the family members of these victims be allowed to sue magazine publishers, record companies and rappers for indirectly "causing" the death of their loved ones?

What about violent movies? Fourteen different murderers have said that Oliver Stone's *Natural Born Killers* inspired them to go on crime sprees of their own.

What if somebody hires a videographer to make a documentary about the production and sale of so-called "crush videos" wherein animals are brutally tortured and killed? Do these cruel and sometimes deadly side effects of violent "speech" suggest that extreme violence should be banned or regulated, the way obscenity is banned and indecency is regulated?

### A *Miller* Test For Violence?

Do we need a *Miller* test for violence? If regulation is required, who should regulate? The government? Industry groups, like the Motion Picture Association of America (MPAA) or the Entertainment Software Ratings Board (ESRB)? Or shall we allow civil liability in the form of lawsuits against content providers who publish material that arguably amounts to incitement to violence?

In *Ginsberg v. New York* (discussed below), the Supreme Court upheld a New York statute that regulated obscenity-for-minors, prohibiting the sale of *sexual* material that, while not obscene to adults, would be obscene from the perspective of a child.

Using some of the same language, California passed a law banning the sale of violent video games to minors. It was immediately challenged in court by a consortium of video game and software companies, who eventually took their case all the way to the United States Supreme Court.

## *Brown v. Entertainment Merchants*

U.S. Supreme Court (2011)

- case at Google Scholar
- how cited at Google Scholar
- case at Westlaw
- case at Wikipedia.

Justice SCALIA delivered the opinion of the Court.

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment.

### I

[A California statute] prohibits the sale or rental of "violent video games" to minors, and requires their packaging to be labeled "18." The Act covers games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that:

> "a reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."

Violation of the Act is punishable by a civil fine of up to $1,000.

Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act in the United States District Court for the Northern District of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. *Video Software Dealers Assn. v. Schwarzenegger* … The Court of Appeals affirmed, *Video Software Dealers Assn. v. Schwarzenegger,* (9th Cir. 2009), and we granted certiorari …

**II**

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters v. New York,* (S.Ct. 1948). Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, "aesthetic and moral judgments about art and literature … are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entertainment Group, Inc.,* (S.Ct. 2000). And whatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication appears. *Joseph Burstyn, Inc. v. Wilson,* (S.Ct. 1952).

The most basic of those principles is this: "As a general matter … government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union,* (S.Ct. 2002). There are of course exceptions. " 'From 1791 to the present' … the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'included a freedom to disregard these traditional limitations.' " *United States v. Stevens,* (S.Ct. 2010) (quoting *R.A.V. v. St. Paul,* (S.Ct. 1992)). These limited areas—such as obscenity, *Roth v. United States,* (S.Ct. 1957), incitement, *Brandenburg v. Ohio,* (S.Ct. 1969) *(per curiam)*, and fighting words, *Chaplinsky v. New Hampshire,* S.Ct. 1942)—represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional

problem."

Last term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty … The statute covered depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if that harm to the animal was illegal where the "the creation, sale, or possession took place," § 48(c)(1). A saving clause largely borrowed from our obscenity jurisprudence, see *Miller v. California,* (Sct. 1973), exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value," § 48(b). We held that statute to be an impermissible content-based restriction on speech. There was no American tradition of forbidding the *depiction of* animal cruelty—though States have long had laws against *committing* it.

The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test. *Stevens, supra*. We emphatically rejected that "startling and dangerous" proposition. "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law." … But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment of the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs."

That holding controls this case. As in *Stevens,* California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct," *Miller, supra,*. See also *Cohen v. California,* (S.Ct. 1971); *Roth, supra,* at 487.

*Stevens* was not the first time we have encountered and rejected a State's attempt to shoehorn speech about violence into obscenity. In *Winters,* we considered a New York criminal statute "forbidding the massing of stories of bloodshed and lust in such a way as to incite to crime against the person," *Winters*. The New York Court of Appeals upheld the provision as a law against obscenity. "There can be no more precise test of written indecency or obscenity," it said, "than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order." … That is, of course, the same

expansive view of governmental power to abridge the freedom of speech based on interest-balancing that we rejected in *Stevens*. Our opinion in *Winters*, which concluded that the New York statute failed a heightened vagueness standard applicable to restrictions upon speech entitled to First Amendment protection. *Winters* made clear that violence is not part of the obscenity that the Constitution permits to be regulated. The speech reached by the statute contained "no indecency or obscenity in any sense heretofore known to the law."

Because speech about violence is not obscene, it is of no consequence that California's statute mimics the New York statute regulating obscenity-for-minors that we upheld in *Ginsberg v. New York*, (S.Ct. 1968)). That case approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child. We held that the legislature could "adjust the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests' of minors." *Ginsberg*.... And because "obscenity is not protected expression," the New York statute could be sustained so long as the legislature's judgment that the proscribed materials were harmful to children "was not irrational." *Ginsberg*.

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. California does not argue that it is empowered to prohibit selling offensively violent works *to adults*—and it is wise not to, since that is but a hair's breadth from the argument rejected in *Stevens*. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. "Minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. Jacksonville*,. No doubt a State possesses legitimate power to protect children from harm, *Ginsberg, supra*,; *Prince v. Massachusetts*, (S.Ct. 1944), but that does not include a free-floating power to restrict the ideas to which children may be exposed. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik, supra*,.

California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none. Certainly the *books* we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm's Fairy Tales, for example, are grim indeed. As her just desserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till

she fell dead on the floor, a sad example of envy and jealousy." Cinderella's evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake … ("Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar. And the breath of the flame singed his eyelids and brows all about, as the ball of the eye burnt away, and the roots thereof crackled in the flame"). In the Inferno, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. And Golding's Lord of the Flies recounts how a schoolboy called Piggy is savagely murdered *by other children* while marooned on an island.

This is not to say that minors' consumption of violent entertainment has never encountered resistance. In the 1800's, dime novels depicting crime and "penny dreadfuls" (named for their price and content) were blamed in some quarters for juvenile delinquency. When motion pictures came along, they became the villains instead.

"The days when the police looked upon dime novels as the most dangerous of textbooks in the school for crime are drawing to a close … They say that the moving picture machine … tends even more than did the dime novel to turn the thoughts of the easily influenced to paths which sometimes lead to prison." Moving Pictures as Helps to Crime, N.Y. Times, Feb. 21, 1909, quoted in Brief for Cato Institute, at 8. For a time, our Court did permit broad censorship of movies because of their capacity to be "used for evil," see *Mutual Film Corp. v. Industrial Comm'n of Ohio,* (S.Ct. 1915), but we eventually reversed course, *Joseph Burstyn, Inc.*,; see also *Erznoznik, supra,* (invalidating a drive-in movies restriction designed to protect children). Radio dramas were next, and then came comic books. Many in the late 1940's and early 1950's blamed comic books for fostering a "preoccupation with violence and horror" among the young, leading to a rising juvenile crime rate. See Note, Regulation of Comic Books, 68 Harv. L. Rev. 489, 490 (1955). But efforts to convince Congress to restrict comic books failed. And, of course, after comic books came television and music lyrics.

California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of The Adventures of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to … As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed,

all literature is interactive:

> The better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own."

*American Amusement Machine Assn. v. Kendrick,* (7th Cir. 2001) (striking down a similar restriction on violent video games).

Justice ALITO has done considerable independent research to identify … video games in which "the violence is astounding. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces … Blood gushes, splatters, and pools." Justice ALITO recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice ALITO's description of those video games he has discovered that have a racial or ethnic motive for their violence—"ethnic cleansing' [of] … African Americans, Latinos, or Jews." To what end does he relate this? Does it somehow increase the "aggressiveness" that California wishes to suppress? Who knows? But it does arouse the reader's ire, and the reader's desire to put an end to this horrible message. Thus, ironically, Justice ALITO's argument highlights the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

**III**

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. *R.A.V.* The State must specifically identify an "actual problem" in need of solving, *Playboy,* and the curtailment of free speech must be actually necessary to the solution, see *R.A.V., supra,* That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy, supra,* at 818.

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. Rather, relying upon our decision in *Turner Broadcasting System, Inc. v. FCC,* (S.Ct. 1994), the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral

regulation … California's burden is much higher, and because it bears the risk of uncertainty, see *Playboy, supra,* ambiguous proof will not suffice.

The State's evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). Instead, "nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Video Software Dealers Assn.*. They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.

Even taking for granted Dr. Anderson's conclusions that violent video games produce some effect on children's feelings of aggression, those effects are both small and indistinguishable from effects produced by other media. In his testimony in a similar lawsuit, Dr. Anderson admitted that the "effect sizes" of children's exposure to violent video games are "about the same" as that produced by their exposure to violence on television. And he admits that the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated "E" (appropriate for all ages), or even when they "view a picture of a gun."

Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. See *City of Ladue v. Gilleo,* (S.Ct. 1994); *Florida Star v. B.J.F.,* (S.Ct. 1989). Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently, the child's or putative

parent's, aunt's, or uncle's say-so suffices. That is not how one addresses a serious social problem.

California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. At the outset, we note our doubts that punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority. Accepting that position would largely vitiate the rule that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]." *Erznoznik*.

But leaving that aside, California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. The video-game industry has put in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early Childhood); E (Everyone); E10 + (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). App. 86. The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-only games to minors; and to rent or sell "M" rated games to minors only with parental consent. In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, "the video game industry outpaces the movie and music industries" in "(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-rated products at retail." … This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest.

And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires.…

California's effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors. While

we have pointed out above that some of the evidence brought forward to support the harmfulness of video games is unpersuasive, we do not mean to demean or disparage the concerns that underlie the attempt to regulate them—concerns that may and doubtless do prompt a good deal of parental oversight. We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a "well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky,* (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply.

California's legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive, nor seriously overinclusive. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* (S.Ct. 1993). As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents, it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

We affirm the judgment below.

*It is so ordered.*

[Justice ALITO and Chief Justice ROBERTS concurred; Justice THOMAS dissented.]

### *Brown* Could Have Gone The Other Way?

Slate Blog: The Supreme Court Came Alarmingly Close to Allowing Video Game Censorship, by Mark Joseph Stern.

> It could have been very, very different. On Monday, Ars Technica unearthed remarks by Justice Elena Kagan at a Princeton forum in November. When asked about the toughest case she'd yet decided,

> Kagan cited EMA, noting that "I kept on going back and forth and back and forth." Her intuition, Kagan said, told her that California's law "was OK," but free-speech principles required her to invalidate the law. "That is the one case," Kagan added, "where I kind of think I just don't know. I just don't know if that's right."

## True Threats

So violent entertainment, at least to Justice Scalia and a majority of the United States Supreme Court, is an entirely different matter than obscene entertainment.

What about entertainment products that arguably threaten others or possibly incite others to commit acts of violence?

## *Elonis v. United States*

United States Supreme Court (2015)

- case on Google Scholar
- case on Westlaw
- The Atlantic Monthly: Does a True Threat Require a Guilty Mind? by Garret Epps

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

ALITO, J., filed an opinion concurring in part and dissenting in part.

THOMAS, J.,filed a dissenting opinion.

CHIEF JUSTICE ROBERTS, delivered the opinion of the Court.

Federal law makes it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC §875(c). Elonis was convicted of violating this provision under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.

**I**

**A**

Anthony Douglas Elonis was an active user of the social networking Web site Facebook… In May 2010, Elonis's wife of nearly seven years left him, taking

with her their two young children. Elonis began "listening to more violent music" and posting self-styled "rap" lyrics inspired by the music.

Eventually, Elonis changed the user name on his Facebook page from his actual name to a rap-style nom de plume, "Tone Dougie," to distinguish himself from his "on-line persona."

The lyrics Elonis posted as "Tone Dougie" included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were "fictitious," with no intentional "resemblance to real persons."

Elonis posted an explanation to another Facebook user that "I'm doing this for me. My writing is therapeutic" (testifying that it "helps me to deal with the pain").

Elonis's co-workers and friends viewed the posts in a different light. Around Halloween of 2010, Elonis posted a photograph of himself and a co-worker at a "Halloween Haunt" event at the amusement park where they worked. In the photograph, Elonis was holding a toy knife against his co-worker's neck, and in the caption Elonis wrote, "I wish." Elonis was not Facebook friends with the co-worker and did not "tag" her, a Facebook feature that would have alerted her to the posting. But the chief of park security was a Facebook "friend" of Elonis, saw the photograph, and fired him.

In response, Elonis posted a new entry on his Facebook page:

> "Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the fuckin' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so fuckin' scary?"

This post became the basis for Count One of Elonis's subsequent indictment, threatening park patrons and employees.

Elonis's posts frequently included crude, degrading, and violent material about his soon-to-be ex-wife. Shortly after he was fired, Elonis posted an adaptation of a satirical sketch that he and his wife had watched together. In the actual sketch, called "It's Illegal to Say …" a comedian explains that it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal for him to say that. When Elonis posted the script of the sketch, however, he substituted his wife for the President. The posting was part of the basis for Count Two of the indictment, threatening his wife:

> "Hi, I'm Tone Elonis.
>
> Did you know that it's illegal for me to say I want to kill my wife? It's one of the only sentences that I'm not allowed to say. Now it was

> okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. But not illegal to say with a mortar launcher. Because that's its own sentence. I also found out that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.
>
> Yet even more illegal to show an illustrated diagram.

The details about the home were accurate. At the bottom of the post, Elonis included a link to the video of the original skit, and wrote, "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?"

After viewing some of Elonis's posts, his wife felt "extremely afraid for her life." A state court granted her a three-year protection-from-abuse order against Elonis (essentially, a restraining order). Elonis referred to the order in another post on his "Tone Dougie" page, also included in Count Two of the indictment:

> Fold up your protection-from-abuse order and put it in your pocket. Is it thick enough to stop a bullet? Try to enforce an Order that was improperly granted in the first place. Me thinks the Judge needs an education on true threat jurisprudence. And prison time'll add zeros to my settlement . . . And if worse comes to worse I've got enough explosives to take care of the State Police and the Sheriff's Department.

At the bottom of this post was a link to the Wikipedia article on "Freedom of speech" Elonis's reference to the police was the basis for Count Three of his indictment, threatening law enforcement officers.

That same month, interspersed with posts about a movie Elonis liked and observations on a comedian's social commentary, Elonis posted an entry that gave rise to Count Four of his indictment:

> "That's it, I've had about enough. I'm checking out and making a name for myself. Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined. And hell hath no fury like a crazy man in a Kindergarten class. The only question is … which one?"

Meanwhile, park security had informed both local police and the Federal Bureau of Investigation about Elonis's posts, and FBI Agent Denise Stevens had

created a Facebook account to monitor his online activity. After the post about a school shooting, Agent Stevens and her partner visited Elonis at his house. Following their visit, during which Elonis was polite but uncooperative, Elonis posted another entry on his Facebook page, called "Little Agent Lady," which led to Count Five:

> "You know your shit's ridiculous when you have the FBI knockin' at yo' door. Little Agent lady stood so close. Took all the strength I had not to turn the bitch ghost. Pull my knife, flick my wrist, and slit her throat. Leave her bleedin' from her jugular in the arms of her partner. [laughter] So the next time you knock, you best be serving a warrant And bring yo' SWAT and an explosives expert while you're at it Cause little did y'all know, I was strapped wit' a bomb. Why do you think it took me so long to get dressed with no shoes on? I was jus' waitin' for y'all to handcuff me and pat me down Touch the detonator in my pocket and we're all goin' BOOM!
>
> Are all the pieces comin' together?
>
> Shit, I'm just a crazy sociopath that gets off playin' you stupid fucks like a fiddle. And if y'all didn't hear, I'm gonna be famous Cause I'm just an aspiring rapper who likes the attention who happens to be under investigation for terrorism cause y'all think I'm ready to turn the Valley into Fallujah
>
> But I ain't gonna tell you which bridge is gonna fall into which river or road. > And if you really believe this shit. I'll have some bridge rubble to sell you tomorrow.
>
> BOOM! BOOM! BOOM!

**B**

A grand jury indicted Elonis for making threats to injure patrons and employees of the park, his estranged wife, police officers, a kindergarten class, and an FBI agent, all in violation of 18 USC §875(c).

In the District Court, Elonis moved to dismiss the indictment for failing to allege that he had intended to threaten anyone. The District Court denied the motion, holding that Third Circuit precedent required only that Elonis "intentionally made the communication, not that he intended to make a threat."

At trial, Elonis testified that his posts emulated the rap lyrics of the well-known performer Eminem, some of which involve fantasies about killing his

ex-wife. In view, he had posted "nothing … that hasn't been said already." The Government presented as witnesses Elonis's wife and co-workers, all of whom said they felt afraid and viewed Elonis's posts as serious threats.

Elonis requested a jury instruction that "the government must prove that he intended to communicate a true threat." The District Court denied that request. The jury instructions instead informed the jury that

> "A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual."

The Government's closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats—"it doesn't matter what he thinks." A jury convicted Elonis on four of the five counts against him, acquitting only on the charge of threatening park patrons and employees. Elonis was sentenced to three years, eight months' imprisonment and three years' supervised release.

Elonis renewed his challenge to the jury instructions in the Court of Appeals, contending that the jury should have been required to find that he intended his posts to be threats. The Court of Appeals disagreed, holding that the intent required by Section 875(c) is only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

We granted certiorari.

**II**

**A**

An individual who "transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another" is guilty of a felony and faces up to five years' imprisonment. 18 USC §875(c). This statute requires that a communication be transmitted and that the communication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat.

Elonis argues that the word "threat" itself in Section 875(c) imposes such a requirement. According to Elonis, every definition of "threat" or "threaten"

conveys the notion of an intent to inflict harm. See *United States v. Jeffries,* (CA6 2012).

*E.g.,* Oxford English Dictionary (1933) ("to declare (usually conditionally) one's intention of inflicting injury upon"); Webster's New International Dictionary ("*Law,* specif., an expression of an intention to inflict loss or harm on another by illegal means"); Black's Law Dictionary 1519 (8th ed. 2004) ("A communicated intent to inflict harm or loss on another").

These definitions, however, speak to what the statement conveys—not to the mental state of the author. For example, an anonymous letter that says "I'm going to kill you" is "an expression of an intention to inflict loss or harm" regardless of the author's intent. A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.

For its part, the Government argues that Section 875(c) should be read in light of its neighboring provisions, Sections 875(b) and 875(d). Those provisions also prohibit certain types of threats, but expressly include a mental state requirement of an "intent to extort." See 18 U. S. C. §875(b) (proscribing threats to injure or kidnap made "with intent to extort"); §875(d) (proscribing threats to property or reputation made "with intent to extort"). According to the Government, the express "intent to extort" requirements in Sections 875(b) and (d) should preclude courts from implying an unexpressed "intent to threaten" requirement in Section 875(c). See *Russello* v. *United States* (S.Ct. 1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Government takes this *expressio unius est exclusio alterius* canon too far. The fact that Congress excluded the requirement of an "intent to extort" from Section 875(c) is strong evidence that Congress did not mean to confine Section 875(c) to crimes of extortion. But that does not suggest that Congress, at the same time, also meant to exclude a requirement that a defendant act with a certain mental state in communicating a threat. The most we can conclude from the language of Section 875(c) and its neighboring provisions is that Congress meant to proscribe a broad class of threats in Section 875(c), but did not identify what mental state, if any, a defendant must have to be convicted.

In sum, neither Elonis nor the Government has identified any indication of a particular mental state requirement in the text of Section 875(c).

**B**

The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere

omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." *Morissette United States* (S.Ct. 1952). This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal."…

Although there are exceptions, the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." We therefore generally "interpret criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States* v. *X-Citement Video, Inc.*, (S.Ct. 1994).

This is not to say that a defendant must know that his conduct is illegal before he may be found guilty. The familiar maxim "ignorance of the law is no excuse" typically holds true. Instead, our cases have explained that a defendant generally must "know the facts that make his conduct fit the definition of the offense," *Staples v. United States* (S.Ct. 1994), even if he does not know that those facts give rise to a crime.

* * *

When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States* (2000) (quoting *X-Citement Video*). In some cases, a general requirement that a defendant *act* knowingly is itself an adequate safeguard. For example, in *Carter,* we considered whether a conviction under 18 USC §2113(a), for taking "by force and violence" items of value belonging to or in the care of a bank, requires that a defendant have the intent to steal. 530 US at 261. We held that once the Government proves the defendant forcibly took the money, "the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of . . . 'otherwise innocent'" conduct. In other instances, however, requiring only that the defendant act knowingly "would fail to protect the innocent actor." A statute similar to Section 2113(a) that did not require a forcible taking or the intent to steal "would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his." In such a case, the Court explained, the statute "would need to be read to require … that the defendant take the money with 'intent to steal or purloin.'"

**C**

Section 875(c), as noted, requires proof that a communication was transmitted and that it contained a threat. The "presumption in favor of a scienter requirement should apply to *each* of the statutory elements that

criminalize otherwise innocent conduct." *X-Citement Video,* (emphasis added). The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating *something* is not what makes the conduct "wrongful." Here "the crucial element separating legal innocence from wrongful conduct" is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat.

Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct— *awareness* of some wrongdoing." *Staples*. Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries* (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes." *Rogers* v. *United States,* (S.Ct. 1975) (Marshall, J., concurring); *Cochran* v. *United States* (S.Ct. 1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind"). Under these principles, "what [Elonis] thinks" does matter.

The Government is at pains to characterize its position as something other than a negligence standard, emphasizing that its approach would require proof that a defendant "comprehended [the] contents and context" of the communication. … Elonis can be convicted, the Government contends, if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard.

* * *

In light of the foregoing, Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding "took deep and early root in American soil" and Congress left it intact here: Under Section 875(c), "wrongdoing must be conscious to be criminal." *Morissette,* 342 US at 252.

There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat. In response to a question at oral argument, Elonis stated that a finding of recklessness would not be sufficient. Neither Elonis nor the Government has briefed or argued that point, and we accordingly decline to address it. See

*Department of Treasury, IRS v. FLRA* (S.Ct. 1990) (this Court is "poorly situated" to address an argument the Court of Appeals did not consider, the parties did not brief, and counsel addressed in "only the most cursory fashion at oral argument"). Given our disposition, it is not necessary to consider any First Amendment issues.

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**Dissenting & Concurring**

**JUSTICE ALITO, concurring in part and dissenting in part.**

In *Marbury v. Madison,* (1803), the Court famously proclaimed: "It is emphatically the province and duty of the judicial department to say what the law is." Today, the Court announces: It is emphatically the prerogative of this Court to say only what the law is not.…

Did the jury need to find that Elonis had the *purpose* of conveying a true threat? Was it enough if he *knew* that his words conveyed such a threat? Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess.…

**II**

There remains the question whether interpreting §875(c) to require no more than recklessness with respect to the element at issue here would violate the First Amendment. Elonis contends that it would. I would reject that argument.

It is settled that the Constitution does not protect true threats. See *Virginia v. Black* (S.Ct. 2003); *R. A. V.* v. *St. Paul* (S.Ct. 1992); *Watts*.

And there are good reasons for that rule: True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation. It is true that a communication containing a threat may include other statements that have value and are entitled to protection. But that does not justify constitutional protection for the threat itself.

Elonis argues that the First Amendment protects a threat if the person making the statement does not actually intend to cause harm. In his view, if a threat is made for a "therapeutic" purpose, "to deal with the pain … of a wrenching event," or for "cathartic" reasons, the threat is protected.

But whether or not the person making a threat intends to cause harm, the damage is the same. And the fact that making a threat may have a therapeutic or

cathartic effect for the speaker is not sufficient to justify constitutional protection. Some people may experience a therapeutic or cathartic benefit only if they know that their words will cause harm or only if they actually plan to carry out the threat, but surely the First Amendment does not protect them.

Elonis also claims his threats were constitutionally protected works of art. Words like his, he contends, are shielded by the First Amendment because they are similar to words uttered by rappers and singers in public performances and recordings. To make this point, his brief includes a lengthy excerpt from the lyrics of a rap song in which a very well-compensated rapper imagines killing his ex-wife and dumping her body in a lake. If this celebrity can utter such words, Elonis pleads, amateurs like him should be able to post similar things on social media. But context matters. "Taken in context," lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person. *Watts*. Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously. To hold otherwise would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar.

The facts of this case illustrate the point. Imagine the effect on Elonis's estranged wife when she read this:

> If I only knew then what I know now … I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek and made it look like a rape and murder.
>
> Or this:
>
> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts.
>
> Or this:
>
> Fold up your [protection from abuse order] and put it in your pocket. Is it thick enough to stop a bullet?

There was evidence that Elonis made sure his wife saw his posts. And she testified that they made her feel "extremely afraid" and "like [she] was being stalked." Considering the context, who could blame her? Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace. A fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech.

It can be argued that §875(c), if not limited to threats made with the intent to harm, will chill statements that do not qualify as true threats, *e.g.*, statements that may be literally threatening but are plainly not meant to be taken seriously. We have sometimes cautioned that it is necessary to "extend a measure of strategic protection" to otherwise unprotected false statements of fact in order to ensure enough "breathing space" for protected speech. *Gertz* v. *Robert Welch, Inc.* (S.Ct. 1974) (quoting *NAACP* v. *Button* (S.Ct. 1963)

A similar argument might be made with respect to threats. But we have also held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity. See *New York Times* (civil liability); *Garrison,* 379 U. S., at 74-75 (criminal liability). Requiring proof of recklessness is similarly sufficient here.…

**JUSTICE THOMAS, dissenting.**

We granted certiorari to resolve a conflict in the lower courts over the appropriate mental state for threat prosecutions under 18 U. S. C. §875(c). Save two, every Circuit to have considered the issue—11 in total—has held that this provision demands proof only of general intent, which here requires no more than that a defendant knew he transmitted a communication, knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context. The outliers are the Ninth and Tenth Circuits, which have concluded that proof of an intent to threaten was necessary for conviction. Adopting the minority position, Elonis urges us to hold that §875(c) and the First Amendment require proof of an intent to threaten. The Government in turn advocates a general-intent approach.

Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place. Lower courts are thus left to guess at the appropriate mental state for §875(c). All they know after today's decision is that a requirement of general intent will not do. But they can safely infer that a majority of this Court would not adopt an intent-to-threaten requirement, as the opinion carefully leaves open the possibility that recklessness may be enough.

This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty. This uncertainty could have been avoided had we simply adhered to the background rule of the common law favoring general intent. Although I am sympathetic to my colleagues' policy concerns about the risks associated with threat prosecutions, the answer to such fears is not to discard our traditional approach to state-of-mind requirements in criminal law. Because the Court of Appeals properly applied the general-intent standard, and because the communications transmitted by Elonis were "true threats" unprotected by the First Amendment, I would affirm the judgment

below.

## I

### A

Enacted in 1939, §875(c) provides:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

Because §875(c) criminalizes speech, the First Amendment requires that the term "threat" be limited to a narrow class of historically unprotected communications called "true threats." To qualify as a true threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely "political hyperbole"; "vehement, caustic, and sometimes unpleasantly sharp attacks"; or "vituperative, abusive, and inexact" statements. *Watts* v. *United States,* (S.Ct. 1969) (*per curiam*) It also cannot be determined solely by the reaction of the recipient, but must instead be "determined by the interpretation of a *reasonable* recipient familiar with the context of the communication," *United States* v. *Darby* (4th Cir. 1994) (emphasis added), lest historically protected speech be suppressed at the will of an eggshell observer, cf. *Cox* v. *Louisiana* (S.Ct. 1965)....

There is thus no dispute that, at a minimum, §875(c) requires an objective showing: The communication must be one that "a reasonable observer would construe as a true threat to another." *United States* v. *Jeffries* (6th Cir. 2012). And there is no dispute that the posts at issue here meet that objective standard.

The only dispute in this case is about the state of mind necessary to convict Elonis for making those posts....

Elonis ... suggests that an intent-to-threaten element is necessary in order to avoid the risk of punishing innocent conduct. But there is nothing absurd about punishing an individual who, with knowledge of the words he uses and their ordinary meaning in context, makes a threat. For instance, a high-school student who sends a letter to his principal stating that he will massacre his classmates with a machine gun, even if he intended the letter as a joke, cannot fairly be described as engaging in innocent conduct. But see *ante* (concluding that Elonis' conviction under §875(c) for discussing a plan to "'initiate the most heinous school shooting ever imagined"' against "'a Kindergarten class"' cannot stand without proof of some unspecified heightened mental state)....

## II

In light of my conclusion that Elonis was properly convicted under the requirements of §875(c), I must address his argument that his threatening posts were nevertheless protected by the First Amendment.

### A

Elonis does not contend that threats are constitutionally protected speech, nor could he: "From 1791 to the present … our society . . . has permitted restrictions upon the content of speech in a few limited areas," true threats being one of them. *R. A. V.* v. *St. Paul* (S.Ct. 1992) Instead, Elonis claims that only *intentional* threats fall within this particular historical exception.

If it were clear that intentional threats alone have been punished in our Nation since 1791, I would be inclined to agree. But that is the not the case. Although the Federal Government apparently did not get into the business of regulating threats until 1917, the States have been doing so since the late 18th and early 19th centuries. (Long string cite of state statutes regulating threatening speech.)

State practice thus provides at least some evidence of the original meaning of the phrase "freedom of speech" in the First Amendment. See *Roth* v. *United States* (S.Ct. 1957) (engaging in a similar inquiry with respect to obscenity)….

### B

Elonis also insists that our precedents require a mental state of intent when it comes to threat prosecutions under §875(c), primarily relying on *Watts* and *Virginia* v. *Black* (S.Ct. 2003). Neither of those decisions, however, addresses whether the First Amendment requires a particular mental state for threat prosecutions.

As Elonis admits, *Watts* expressly declined to address the mental state required under the First Amendment for a "true threat." … True, the Court in *Watts* noted "grave doubts" about *Raganksy*'s construction of "willfully" in the presidential threats statute. … But "grave doubts" do not make a holding, and that stray statement in *Watts* is entitled to no precedential force. If anything, *Watts* continued the long tradition of focusing on objective criteria in evaluating the mental requirement.

The Court's fractured opinion in *Black* likewise says little about whether an intent-to-threaten requirement is constitutionally mandated here. *Black* concerned a Virginia cross-burning law that expressly required "'an intent to intimidate a person or group of persons,"' 538 U. S., at 347 … and the Court

thus had no occasion to decide whether such an element was necessary in threat provisions silent on the matter. Moreover, the focus of the *Black* decision was on the statutory presumption that "any cross burning [w]as prima facie evidence of intent to intimidate." 538 U. S., at 347-348. A majority of the Court concluded that this presumption failed to distinguish unprotected threats from protected speech because it might allow convictions "based solely on the fact of cross burning itself," including cross burnings in a play or at a political rally.... ("The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression"). The objective standard for threats under §875(c), however, helps to avoid this problem by "forc[ing] jurors to examine the circumstances in which a statement is made." *Jeffries*.

In addition to requiring a departure from our precedents, adopting Elonis' view would make threats one of the most protected categories of unprotected speech, thereby sowing tension throughout our First Amendment doctrine. We generally have not required a heightened mental state under the First Amendment for historically unprotected categories of speech. For instance, the Court has indicated that a legislature may constitutionally prohibit "'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," *Cohen* v. *California* (S.Ct. 1971)—without proof of an intent to provoke a violent reaction. Because the definition of "fighting words" turns on how the "ordinary citizen" would react to the language, this Court has observed that a defendant may be guilty of a breach of the peace if he "makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended," and that the punishment of such statements "as a criminal act would raise no question under [the Constitution]," see also *Chaplinsky* v. *New Hampshire* (S.Ct. 1942) (rejecting a First Amendment challenge to a general-intent construction of a state statute punishing "'fighting' words")....

And our precedents allow liability in tort for false statements about private persons on matters of private concern even if the speaker acted negligently with respect to the falsity of those statements. See *Philadelphia Newspapers, Inc.* v. *Hepps* (S.Ct. 1986). I see no reason why we should give threats pride of place among unprotected speech.

There is always a risk that a criminal threat statute may be deployed by the Government to suppress legitimate speech. But the proper response to that risk is to adhere to our traditional rule that only a narrow class of true threats, historically unprotected, may be constitutionally proscribed.

The solution is not to abandon a mental-state requirement compelled by text, history, and precedent. Not only does such a decision warp our traditional approach to *mens rea*, it results in an arbitrary distinction between threats and other forms of unprotected speech. Had Elonis mailed obscene materials to his

wife and a kindergarten class, he could have been prosecuted irrespective of whether he intended to offend those recipients or recklessly disregarded that possibility. Yet when he threatened to kill his wife and a kindergarten class, his intent to terrify those recipients (or reckless disregard of that risk) suddenly becomes highly relevant. That need not—and should not—be the case.

Nor should it be the case that we cast aside the mental state requirement compelled by our precedents yet offer nothing in its place. Our job is to decide questions, not create them. Given the majority's ostensible concern for protecting innocent actors, one would have expected it to announce a clear rule—any clear rule. Its failure to do so reveals the fractured foundation upon which today's decision rests.

I respectfully dissent.

## Civil Liability For Inciting Violence?

So much for government as censor of violence or of threatening speech, and so much for statutes which attempt to hitchhike on the language of the *Miller* test and create in essence a *Miller* test for violence. But is that the end of the question? Of course not.

If the First Amendment prevents states from regulating violent entertainment products, then what about suing the manufacturers of such products after the fact? But here too, the First Amendment and well-settled principles of tort law (duty, foreseeability, causation), have so far prevented victims and family members from bringing civil suits against the manufacturers of video products.

Even before the tragic shooting at Columbine High School, perpetrated by two senior students Eric Harris and Dylan Klebold, who murdered a total of 12 students and one teacher and injured 21 others, victims and the families of victims sought judgments against the manufacturers of entertainment products because those products arguably inspired or "incited" criminals to mayhem. Harris and Klebold were both fans of video games like *Doom* and *Wolfenstein 3D* and so (the argument goes) the makers of those games had a hand in "causing" the appalling violence at Columbine, which has been called the Pearl Harbor of the American culture wars.

The first lawsuit to test these claims involved the killing of a police officer at a traffic stop where the driver being questioned was listening to a bootleg copy of *2Pacalypse Now* by Tupac Shakur.

## *Davidson v. Time Warner, Inc.*

US District Court, S.D. Texas (1997)

In April of 1992, Ronald Howard ("Howard") was driving a stolen automobile through Jackson County, Texas. Officer Bill Davidson, a state trooper, stopped Howard for a possible traffic violation unrelated to the theft of the vehicle. During the traffic stop, Howard fatally shot Officer Davidson with a nine millimeter Glock handgun. At the time of the shooting, Howard was listening to an audio cassette of *2Pacalypse Now*, a recording performed by Defendant Tupac Amaru Shakur that was produced, manufactured and distributed by Defendants Interscope Records and Atlantic Records. In an attempt to avoid the death penalty, Howard claimed that listening to *2Pacalypse Now* caused him to shoot officer Davidson. The jury apparently did not believe this explanation, because it sentenced Howard to death.

The Davidsons then brought this civil action … echoing several of the arguments made by Howard during his criminal trial. First, the Davidsons claim that the album *2Pacalypse Now* does not merit First Amendment protection because it: (1) is obscene, (2) contains "fighting words," (3) defames peace officers like Officer Davidson, and (4) tends to incite imminent illegal conduct on the part of individuals like Howard. Because the recording lacks constitutional protection, the Davidsons argue that Defendants are liable for producing violent music that proximately caused the death of Officer Davidson.

The Supreme Court has narrowly defined the class of unprotected, "inciting" speech. To restrain 2Pacalypse Now in this case, the Court must find the recording (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent illegal conduct. See Hess v. Indiana (S.Ct. 1973). While the Davidsons may have shown that Shakur intended to produce imminent lawless conduct, the Davidsons cannot show that Howard's violent conduct was an imminent and likely result of listening to Shakur's songs.

The Davidsons do not allege which song Howard was listening to at the time he brutally murdered Officer Davidson. As described later, the songs of *2Pacalypse Now* vary in their content and message. However, at least one song on the recording, "Crooked Ass Nigga," describes the commission of violence against police officers:

```
Now I could be a crooked nigga too
When I'm rollin with my crew
Watch what crooked niggas do
I got a nine millimeter Glock pistol
I'm ready to get with you at the trip of the whistle
So make your move and act like you wanna flip
I fired 13 shots and popped another clip
My brain locks, my Glock's like a f-kin mop,
```

```
The more I shot, the more mothaf-ka's dropped
And even cops got shot when they rolled up.
```

In support of the first prong, the Davidsons argue that Shakur describes his music as "revolutionary" that has a purpose of angering the listener. This argument may place too much importance on Shakur's rhetoric. Calling one's music revolutionary does not, by itself, mean that Shakur intended his music to produce imminent lawless conduct. At worst, Shakur's intent was to cause violence some time after the listener considered Shakur's message. The First Amendment protects such advocacy.

In one of his interviews discussing a later recording, Shakur states:

> I think of me as fighting for the black man…. I'd rather die than go to jail.

In another interview, Shakur is more forthcoming:

> I think that my music is revolutionary because it's for soldiers. It makes you want to fight back. It makes you want to think. It makes you want to ask questions. It makes you want to struggle, and if struggling means when he swings you swing back, then hell yeah, it makes you swing back.

While *2Pacalypse Now* is both insulting and outrageous, it does not appear that Shakur intended to incite imminent illegal conduct when he recorded *2Pacalypse Now*.

The Davidsons are the first to claim that *2Pacalypse Now* caused illegal conduct, three years after the recording of *2Pacalypse Now* and after more than 400,000 sales of the album. The Davidsons argue that, because Howard shot Officer Davidson while listening to *2Pacalypse Now*, that Davidson was killed because Howard was listening to *2Pacalypse Now*. The Court will not engage in the fallacy of *post hoc ergo propter hoc*. Courts addressing similar issues have repeatedly refused to find a musical recording or broadcast incited certain conduct merely because certain acts occurred after the speech. In this case, it is far more likely that Howard, a gang member driving a stolen automobile, feared his arrest and shot officer Davidson to avoid capture. Under the circumstances, the Court cannot conclude that *2Pacalypse Now* was likely to cause imminent illegal conduct.

The Davidsons face the difficulty of arguing that *2Pacalypse Now* caused imminent violence when Howard lashed out after listening to recorded music, not a live performance. Shakur's music, however, was not overtly directed at Howard. The Davidsons argue that *2Pacalypse Now* is directed to the violent

black "gangsta" subculture in general. However, this group is necessarily too large to remove First Amendment protection from the album: to hold otherwise would remove constitutional protection from speech directed to marginalized groups.

*2Pacalypse Now* is both disgusting and offensive. That the album has sold hundreds of thousands of copies is an indication of society's aesthetic and moral decay. However, the First Amendment became part of the Constitution because the Crown sought to suppress the Framers' own rebellious, sometimes violent, views. Thus, although the Court cannot recommend *2Pacalypse Now* to anyone, it will not strip Shakur's free speech rights based on the evidence presented by the Davidsons.

25 Media L. Rep. 1705

## *James v. Meow Media, Inc*

Sixth Circuit Court of Appeals (2002)

- case at Google Scholar
- how cited at Google Scholar
- case at Westlaw
- case at Wikipedia.

**I**

On December 1, 1997, Michael Carneal brought a .22-caliber pistol and five shotguns into the lobby of Heath High School in Paducah, Kentucky. At the time, Carneal was a 14-year-old freshman student at the school. Upon his arrival, Carneal began shooting into a crowd of students, wounding five. His shots killed an additional three: Jessica James, Kayce Steger, and Nicole Hadley. Carneal was arrested and convicted of murdering James, Steger, and Hadley.

Subsequent investigations revealed that Carneal regularly played "Doom," "Quake," "Castle Wolfenstein," "Redneck Rampage," "Nightmare Creatures," "Mech Warrior," "Resident Evil," and "Final Fantasy," which are interactive computer games that, in various ways, all involve the player shooting virtual opponents. Carneal also possessed a video tape containing the movie, "The Basketball Diaries," in a few minutes of which the high-school-student protagonist dreams of killing his teacher and several of his fellow classmates. Investigators examined Carneal's computer and discovered that he had visited "www.persiankitty.com," which appears to catalogue and link to sites with sexually-suggestive material. It also appeared that through "www.adultkey.com," *www.adultkey.com,* a site operated by Network

Authentication Systems and designed to restrict access to certain websites to viewers over certain ages, Carneal was granted age verification sufficient to visit many other pornographic sites.

The parents, who also are the estate administrators, of James, Steger, and Hadley filed this action in the United States District Court for the Western District of Kentucky. James's complaint named as defendants the companies that produce or maintain the above-mentioned movie, video games, and internet sites. James stated essentially three causes of action against the defendants. First, James alleged that the defendants had been negligent in that they either knew or should have known that the distribution of their material to Carneal and other young people created an unreasonable risk of harm to others. James alleged that exposure to the defendants' material made young people insensitive to violence and more likely to commit violent acts. But for Carneal's steady diet of the defendants' material, James contended, Carneal would not have committed his violent acts.

Second, James asserted that the video game cartridges, movie cassettes, and internet transmissions that the defendants produced and distributed were "products" for purposes of Kentucky product liability law. According to James, the violent features of the movie, games, and internet sites were product defects. The defendants, as producers and distributors of the "products," are strictly liable under Kentucky law for damages caused by such product defects.

The third claim that James raised was that some of the defendants' conduct had violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*. According to James, the defendant firms that maintained internet sites engaged in a pattern of racketeering activity by distributing obscene material to minors.

The defendants moved to dismiss all of James's actions for failing to state any claim on which relief could be granted. *See* Fed.R.Civ.P. 12(b)(6). The district court granted the defendants' motion. The district court held that Carneal's actions were not sufficiently foreseeable to impose a duty of reasonable care on the defendants with regard to Carneal's victims. Alternatively, the district court held that even if such a duty existed, Carneal's actions constituted a superseding cause of the victims' injuries, defeating the element of proximate causation notwithstanding the defendants' negligence. With regard to James's second cause of action, the district court determined that the "thoughts, ideas and images" purveyed by the defendants' movie, video games, and internet sites were not "products" for purposes of Kentucky law and therefore the defendants could not be held strictly liable for any alleged defects. Finally, the district court held that James had not stated a viable RICO claim against the defendant internet firms. Among other reasons, the district court explained that James had alleged RICO predicate acts, but had failed to identify an organization that had

been corrupted, and had failed to show any injury to "business or property" as required for standing under RICO.

James now appeals the district court dismissal of his negligence and product liability claims. We can discern no argument in James's brief assigning error to the district court's dismissal of his RICO claim, and therefore consider such an argument waived. Accordingly, this appeal raises questions of only Kentucky law.

[Section II setting forth the standard of review omitted.]

**III**

James contends that the defendants in this case acted negligently, perhaps in producing, but at least in distributing to young people, their materials. It was this negligence, according to James, that caused Carneal to undertake his violent actions and that thereby caused the deaths of the plaintiffs' daughters. In order to establish an actionable tort under Kentucky law, the plaintiff must establish that the defendant owed a duty of care to the plaintiff, that the defendant breached that duty of care, and that the *defendant's breach* was the proximate cause of the plaintiff's damages.

**A. The Existence of a Duty of Care**

The "existence of a duty of care" as an element of a tort cause of action is of relatively recent vintage. At early English common law, the existence of a duty of care was not considered as an element of an actionable tort. Then, tort law attached strict liability for any damages that resulted from "wrongful acts." Prosser on Torts § 53. The requirement that the plaintiff establish that he was owed a specific duty of care by the defendant came with the advent of negligence in place of strict liability. *See generally* Percy H. Winfield, *Duty in Tortious Negligence,* 34 Colum. L.Rev. 41 (1934). As a separate basis of liability, negligence was simply too broad, according to later English courts. Accordingly, the concept of limited duty disciplined the concept of negligence, requiring the plaintiff to establish a definite legal obligation.…

Thus, Kentucky courts have held that the determination of whether a duty of care exists is whether the harm to the plaintiff resulting from the defendant's negligence was "foreseeable." Foreseeability is an often invoked, but not terribly well defined, concept in the common law of tort … Kentucky's particular use of foreseeability in the duty inquiry finds its roots in perhaps the most famous application of the foreseeability principle. In *Palsgraf v. Long Island Railroad Co.,* (N.Y. 1928), then-Judge Cardozo determined that the defendant's duty is to avoid "risks reasonably to be perceived."…

Cardozo's opinion in *Palsgraf*, while cited as the cornerstone of the American doctrine of a limited duty of care, has been criticized for its conclusory reasoning regarding whether Palsgraf's harm really was sufficiently unforeseeable … Such conclusory reasoning has been endemic in the jurisprudence of determining duty by assessing foreseeability. Courts often end up merely listing factual reasons why a particular harm, although having materialized, would have appeared particularly unlikely in advance and then simply asserting that the harm was too unlikely to be foreseeable and to create a duty to exercise due care in protecting against it. What has not emerged is any clear standard regarding what makes a projected harm too improbable to be foreseeable.…

Thus, we are called, as best we can, to implement Kentucky's duty of care analysis in this case. Our inquiry is whether the deaths of James, Steger, and Hadley were the reasonably foreseeable result of the defendants' creation and distribution of their games, movie, and internet sites. Whether an event was reasonably foreseeable is not for us to determine with the assistance of hindsight … The mere fact that the risk may have materialized does little to resolve the foreseeability question.

Kentucky courts wrestling with foreseeability questions ask about the "likelihood of the injuries produced." For instance, in dram shop cases, injured plaintiffs have also sought to hold defendant dram shops liable for the actions of their overserved customers. In 1987, the Kentucky Supreme Court held that an automobile accident injuring third parties was a reasonably foreseeable result of the negligent act of serving alcohol to an intoxicated individual. But twelve years later the court held that an intoxicated patron fighting with and shooting a fellow customer was simply not a foreseeable result of continuing to serve the patron alcohol.]

Intentional violence is less likely to result from intoxication than negligent operation of a motor vehicle. Yet, the Kentucky Supreme Court never makes clear how unlikely is too unlikely for a particular type of harm to be unforeseeable. The cases do not create a principle, portable to the context of this case, for evaluating the probability of harm.

This court has encountered this foreseeability inquiry under Kentucky law before in a situation similar to this case. In *Watters v. TSR, Inc.*, (6th Cir. 1990), the mother of a suicide victim sued TSR for manufacturing the game "Dungeons and Dragons." The suicide victim regularly played the game. The mother contended that the game's violent content "desensitized" the victim to violence and caused him to undertake the violent act of shooting himself in the head. We held that the boy's suicide was simply not a reasonably foreseeable result of producing the game, notwithstanding its violent content. To have held otherwise would have been "to stretch the concepts of foreseeability and ordinary care to lengths that would deprive them of all normal meaning." *Id.* at 381.

Foreseeability, however, is a slippery concept. Indeed, it could be argued that we ourselves confused it with some concept of negligence. We noted in *Watters:* "The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player." *Ibid.* We almost appeared to say that the costs of acquiring such knowledge would so outweigh the social benefits that it would not be negligent to abstain from such an investigation. We can put the *foreseeability* point a little more precisely, however. It appears simply impossible to predict that these games, movie, and internet sites (alone, or in what combinations) would incite a young person to violence. Carneal's reaction to the games and movies at issue here, assuming that his violent actions were such a reaction, was simply too idiosyncratic to expect the defendants to have anticipated it. We find that it is simply too far a leap from shooting characters on a video screen (an activity undertaken by millions) to shooting people in a classroom (an activity undertaken by a handful, at most) for Carneal's actions to have been reasonably foreseeable to the manufacturers of the media that Carneal played and viewed.

At first glance, our conclusion also appears to be little more than an assertion. Mental health experts could quite plausibly opine about the manner in which violent movies and video games affect viewer behavior. We need not stretch to imagine some mixture of impressionability and emotional instability that might unnaturally react with the violent content of the "Basketball Diaries" or "Doom." Of course, Carneal's reaction was not a normal reaction. Indeed, Carneal is not a normal person, but it is not utter craziness to predict that someone like Carneal is out there.

We return, however, to the Kentucky court's observation that the existence of a duty of care reflects a judicial policy judgment at bottom. From the Kentucky cases on foreseeability, we can discern two relevant policies that counsel against finding that Carneal's violent actions were the reasonably foreseeable result of defendants' distribution of games, movies, and internet material.

**1. The Duty to Protect Against Intentional Criminal Actions**

* * *

Does this case involve the extraordinary circumstances under which we would require the defendants to anticipate a third party's intentional criminal act? Kentucky courts have found such circumstances when the tort defendant had previously developed "a special relationship" with the victim of a third-party intentional criminal act.…

This duty to protect can be triggered by placing the putative plaintiff in custody or by taking other affirmative steps that disable the plaintiff from

protecting himself against third-party intentional criminal acts. Of course, a special relationship can be created by a contract between the plaintiff and the defendant.

We can find nothing close to a "special relationship" in this case. The defendants did not even know James, Steger, and Hadley prior to Carneal's actions, much less take any affirmative steps that disabled them from protecting themselves.

Courts have held, under extremely limited circumstances, that individuals, notwithstanding their relationship with the victims of third-party violence, can be liable when their affirmative actions "create a high degree of risk of [the third party's] intentional misconduct." Restatement of Torts (Second) § 302B, cmt. e.H. Generally, such circumstances are limited to cases in which the defendant has given a young child access to ultra-hazardous materials such as blasting caps, *Vills v. City of Cloquet,* (MN 1912), or firearms. *Spivey v. Sheeler,* (KY 1974). Even in those cases, courts have relied on the third party's severely diminished capacity to handle the ultra-hazardous materials. With older third parties, courts have found liability only where defendants have vested a particular person, under circumstances that made his nefarious plans clear, with the tools that he then quickly used to commit the criminal act. *See Meers v. McDowell,* (KY 1901). Arguably, the defendants' games, movie, and internet sites gave Carneal the ideas and emotions, the "psychological tools," to commit three murders. However, this case lacks such crucial features of our jurisprudence in this area. First, the defendants in this case had no idea Carneal even existed, much less the particular idiosyncracies of Carneal that made their products particularly dangerous in his hands. In every case that this court has discovered in which defendants have been held liable for negligently creating an unreasonably high risk of third-party criminal conduct, the defendants have been specifically aware of the peculiar tendency of a particular person to commit a criminal act with the defendants' materials.

Second, no court has ever held that ideas and images can constitute the tools for a criminal act under this narrow exception. Beyond their intangibility, such ideas and images are at least one step removed from the implements that can be used in the criminal act itself. In the cases supporting this exception, the item that the defendant has given to the third-party criminal actor has been the direct instrument of harm.

**2. First Amendment Problems**

Moreover, we are loath to hold that ideas and images can constitute the tools for a criminal act under this exception, or even to attach tort liability to the dissemination of ideas. We agree with the district court that attaching tort

liability to the effect that such ideas have on a criminal actor would raise significant constitutional problems under the First Amendment that ought to be avoided.…

Although the plaintiffs' contentions in this case do not concern the absolute proscription of the defendants' conduct, courts have made clear that attaching tort liability to protected speech can violate the First Amendment. *See New York Times v. Sullivan,* (S.Ct. 1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.").

[The court found that movies and video games are protected speech under the First Amendment.

> Expression, to be constitutionally protected, need not constitute the reasoned discussion of the public affairs, but may also be for purposes of entertainment.]

To say that the features of the defendants' products of which the plaintiffs complain are protected by the First Amendment is not necessarily to say that attaching tort liability to those features raises significant constitutional problems. The plaintiffs' argument is more nuanced: they do not seek to hold the defendants responsible merely for distributing their materials to anyone, but to young, impressionable children or, even more specifically, to Carneal. The protections of the First Amendment have always adapted to the audience intended for the speech. Specifically, we have recognized certain speech, while fully protected when directed to adults, may be restricted when directed towards minors. *See, e.g., Sable Communications v. FCC,* (S.Ct. 1989); *Connection Distrib. Co. v. Reno,* (6th Cir. 1998). We have also required, however, that such regulations be narrowly tailored to protecting minors from speech that may improperly influence them and not effect an "unnecessarily broad suppression of speech" appropriate for adults. *Reno v. American Civil Liberties Union,* (S.Ct. 1997); *United States v. Playboy Entm't Group, Inc.,* (S.Ct. 2000); *Connection Distrib.,*.

Of course, the measure here intended to protect minors from the improper influence of otherwise protected speech is quite different from the regulations that we have countenanced in the past. Those regulations were the product of the reasoned deliberation of democratically elected legislative bodies, or at least regulatory agencies exercising authority delegated by such bodies. It was legislative bodies that had demarcated what otherwise protected speech was inappropriate for children and that had outlined in advance the measures that speakers were required to take in order to protect children from the speech.

In contrast, the question before us is whether to permit tort liability for protected speech that was not sufficiently prevented from reaching minors. At trial, the plaintiff would undoubtedly argue about the efficient measures that the defendants should have taken to protect the children. But at the end of this process, it would be impossible for reviewing courts to evaluate whether the proposed protective measures would be narrowly tailored regulations. Who would know what omission the jury relied upon to find the defendants negligent? Moreover, under the concept of negligence, there is no room for evaluating the value of the speech itself. The question before a jury evaluating James's claim of negligence would ask whether the defendants took efficient precautions, in keeping their material from Carneal, that would be less expensive than the amount of the loss, the three deaths.

We cannot adequately exercise our responsibilities to evaluate regulations of protected speech, even those designed for the protection of children, that are imposed pursuant to a trial for tort liability. Crucial to the safeguard of strict scrutiny is that we have a clear limitation, articulated in the legislative statute or an administrative regulation, to evaluate. "Whither our children,"as Appellant's brief states at 3, is an important question, but their guidance through the regulation of protected speech should be directed in the first instance to the legislative and executive branches of state and federal governments, not the courts.

Our concerns about adequately evaluating the narrow tailoring of regulations wane if the underlying expression is completely unprotected. Whether certain speech is not protected at all is a question that courts are regularly called upon to answer. James argues that to the extent that the content distributed by the defendants is at all expressive, it constitutes obscene material that is unprotected by the First Amendment. *See Paris Adult Theatre I v. Slaton,* (S.Ct. 1973). It would be novel to argue that the video games and *The Basketball Diaries* are obscene. As we understand James's complaint, he complains that the video games and the movie are excessively violent — yet we have generally applied our obscenity jurisprudence only to material of a sexual nature, appealing only to prurient interest and lacking any other socially redeeming value. *See Miller v. California,* (S.Ct. 1973) ("We now confine the scope of [obscene material] to works which depict or describe sexual conduct."); *United States v. Thoma,* (7th Cir. 1984) (holding that because depictions of violence are not sexual, obscenity jurisprudence does not apply).

With the sexually-oriented internet defendants, James has an arguable basis to allege that the material is unprotected speech under our conventional obscenity jurisprudence. Nevertheless, where the First Amendment concerns wane the most with the possibility of obscenity, the foreseeability problems loom the largest. In his complaint, James contends that the sexual content displayed by

the internet sites made "virtual sex pleasurable and attractive" for Carneal and caused him to undertake his violent actions. To us, however, James's allegations regarding his exposure to violence seem much closer to the mark. After all, James does not seek to hold the internet defendants responsible for a sexual crime: Carneal never endeavored sexually to abuse his victims, just to kill them.

With the movie and video game defendants, James contends that their material is excessively violent and constitutes obscene, non-protected speech. We decline to extend our obscenity jurisprudence to violent, instead of sexually explicit, material. Even if we were to consider such an expansion, James's arguments are not conceptually linked to our obscenity jurisprudence. The concept of obscenity was designed to permit the regulation of "offensive" material, that is, material that people find "disgusting" or "degrading." *See American Amusement Mach. Ass'n v. Kendrick,* (7th Cir. 2001). James's argument, on the other hand, is that the violent content of these video games and the movie shapes behavior and causes its consumers to commit violent acts. This is a different claim than the obscenity doctrine, which is a limit on the extent to which the community's sensibilities can be shocked by speech, not a protection against the behavior that the speech creates. *Id.* at 574-75 (holding that the law of obscenity does not apply to the argument that violence in video games causes players to commit violent acts).

This is not to say that protecting people from the violence that speech might incite is a completely impermissible purpose for regulating speech. However, we have generally handled that endeavor under a different category of our First Amendment jurisprudence, excluding from constitutional protection those communicated ideas and images that incite others to violence. Speech that falls within this category of incitement is not entitled to First Amendment protection. *See R.A.V. v. City of St. Paul,* (S.Ct. 1992). The Court firmly set out the test for whether speech constitutes unprotected incitement to violence in *Brandenburg v. Ohio,* (S.Ct. 1969). In protecting against the propensity of expression to cause violence, states may only regulate that speech which is "*directed to* inciting or producing *imminent* lawless action and *is likely to incite* or produce such action." *Id.* at 447 (emphasis added).

The violent material in the video games and *The Basketball Diaries* falls well short of this threshold. First, while the defendants in this case may not have exercised exquisite care regarding the persuasive power of the violent material that they disseminated, they certainly did not "intend" to produce violent actions by the consumers, as is required by the *Brandenburg* test. *Hess v. Indiana,* (requiring evidence that the speaker "intended" his words to produce violent conduct under the *Brandenburg* test). Second, the threat of a person like Carneal reacting to the violent content of the defendants' media was not "imminent." Even the theory of causation in this case is that persistent exposure to the

defendants' media gradually undermined Carneal's moral discomfort with violence to the point that he solved his social disputes with a gun. This glacial process of personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test. *Ashcroft v. Free Speech Coalition,* ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct."); *McCoy v. Stewart,* (9th Cir. 2002) (holding that incitement is not imminent if it risks third-party violence at some "indefinite future time"). Third, it is a long leap from the proposition that Carneal's actions were foreseeable to the *Brandenburg* requirement that the violent content was "likely" to cause Carneal to behave this way.

James contends that the *Brandenburg* test for speech inciting violence does not apply to depictions of violence, but instead only to political discourse advocating imminent violence. James suggests that the suppression of expression that is not advocacy, but does tend to inspire violence in its viewers or consumers, is governed by a less stringent standard. Federal courts, however, have generally demanded that all expression, advocacy or not, meet the *Brandenburg* test before its regulation for its tendency to incite violence is permitted. *See Dworkin v. Hustler Magazine, Inc.,* (9th Cir. 1989) (applying the *Brandenburg* test to arguments that pornography causes viewers to engage in conduct that is violent and degrading to women); *Herceg v. Hustler Magazine, Inc.,* (5th Cir. 1987) (rejecting suggestion "that a less stringent standard than the *Brandenburg* test be applied in cases involving non-political speech that has actually produced harm.").

Like the district court, we withhold resolution of these constitutional questions given the adequacy of the state law grounds for upholding the dismissal. Attaching such tort liability to the ideas and images conveyed by the video games, the movie, and the internet sites, however, raises grave constitutional concerns that provide yet an additional policy reason not to impose a duty of care between the defendants and the victims in this case.

[The court's discussion of proximate causation omitted.]

**IV**

James also contends that the district court erred in dismissing his products liability claims. In his complaint, James alleged that the defendants' video games, movie, and internet transmissions constitute "products," and their violent content "product defects." Under Kentucky law, manufacturers, distributors, and retailers of "products" are strictly liable for damages caused by "defects" in those products. *Clark v. Hauck Mfg. Co.,* (KY 1995); Restatement (Second) of Torts § 402A. If this theory of liability were to apply, James's failure to establish

a duty to exercise ordinary care to prevent the victims' injuries (See Part III.A) would be irrelevant. Under strict liability, James would only be required to establish causation.

James's theory of product liability in this case is deeply flawed. First, and something none of the parties have mentioned, the "consumers or ultimate users" of the alleged products are not the ones claiming physical harm in this case. Restatement (Second) of Torts § 402A. Carneal was the person who "consumed" or "used" the video games, movie, and internet sites. Allegedly because of Carneal's consumption of the products, he killed the victims in this case. In early products liability law, courts had required privity between the final retailer of the product and the injured plaintiff for strict liability to attach. Eventually, courts broadened the class of plaintiffs who could avail themselves of strict liability to include those who consumed or ultimately used the product. Kentucky courts, but certainly not all courts, have extended the protection of products liability to "bystanders" who are injured by the product, but are not "using" or "consuming" the product. *Embs v. Pepsi-Cola Bottling Co. of Lexington,* (KY 1975) (holding that bystander could recover on strict liability basis for injuries caused by exploding soda bottle); Restatement (Second) of Torts § 402A, n.1 (noting the split in authority regarding whether bystanders may recover on a strict liability basis). Imposing strict liability for the injuries suffered in this case would be an extension of Kentucky's bystander jurisprudence, as the decedents were not directly injured by the products themselves, but by Carneal's reaction to the products.

We place this open question of Kentucky law aside as the parties apparently have. James has failed to demonstrate a prior requirement, that the video games, movies, and internet sites are "products" for purposes of strict liability…

This court has already substantially resolved the question of Kentucky law presented. In *Watters v. TSR,* (6th Cir. 1990), this court held that "words and pictures" contained in a board game could not constitute "products" for purposes of maintaining a strict liability action. We cannot find any intervening Kentucky authority that persuades us that *Watters* no longer correctly states Kentucky law. James's theory of liability, that the ideas conveyed by the video games, movie cassettes and internet transmissions, caused Carneal to kill his victims, attempts to attach product liability in a nearly identical way.

James argues that, at least in this case, we are not just dealing with "words and pictures." Carneal, of course, had video game cartridges and movie cassettes. James argues that the test for determining whether an item is a product for purposes of Kentucky law is whether it is "tangible," and that the cartridges and cassettes are "tangible." As for the internet sites, James points us to a court that has held that "electricity" is a "product" for purposes of strict liability under Kentucky law. *See C.G. Bryant v. Tri-County Elec. Membership Corp.,*

(WD KY 1994). Internet sites are nothing more than communicative electrical pulses, James contends. James argues that there is no relevant difference between the internet transmissions and the electricity.

And of course James is partially correct. Certainly if a video cassette exploded and injured its user, we would hold it a "product" and its producer strictly liable for the user's physical damages. In this case, however, James is arguing that the words and images purveyed on the tangible cassettes, cartridges, and perhaps even the electrical pulses through the internet, caused Carneal to snap and to effect the deaths of the victims. When dealing with ideas and images, courts have been willing to separate the sense in which the tangible containers of those ideas are products from their communicative element for purposes of strict liability.…

[*See, e.g.*, *Winter v. G.P. Putnam's Sons*, (9th Cir. 1991)(publisher owed no duty of care to mushroom enthusiasts who relied on misinformation contained in *The Encyclopedia of Mushrooms*); *Jones v. J.B. Lippincott Co.*, (D. MD 1988)(publisher of medical text not liable for injuries suffered by nursing student who treated herself for constipation after consulting the text and suffered injury).]

We find these decisions well reasoned. The video game cartridges, movie cassette, and internet transmissions are not sufficiently "tangible" to constitute products in the sense of their communicative content.

V

For all the foregoing reasons, we AFFIRM the district court's dismissal of all James's claims.

## *Herceg v. Hustler Magazine, Inc.*

Fifth Circuit Court of Appeals (1987)

- case at Google Scholar
- case at Westlaw
- Erotic asphyxiation at Wikipedia.

An adolescent read a magazine article that prompted him to commit an act that proved fatal. The issue is whether the publisher of the magazine may be held liable for civil damages.

In its August 1981 issue, as part of a series about the pleasures — and dangers — of unusual and taboo sexual practices, *Hustler Magazine* printed "Orgasm of Death," an article discussing the practice of autoerotic asphyxia. This practice entails masturbation while "hanging" oneself in order to

temporarily cut off the blood supply to the brain at the moment of orgasm. The article included details about how the act is performed and the kind of physical pleasure those who engage in it seek to achieve. The heading identified "Orgasm of Death" as part of a series on "Sexplay," discussions of "sexual pleasures [that] have remained hidden for too long behind the doors of fear, ignorance, inexperience and hypocrisy" and are presented "to increase [readers'] sexual knowledge, to lessen [their] inhibitions and — ultimately — to make [them] much better lover[s]."

An editor's note, positioned on the page so that it is likely to be the first text the reader will read, states: "Hustler emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia,' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose."

The article begins by presenting a vivid description of the tragic results the practice may create. It describes the death of one victim and discusses research indicating that such deaths are alarmingly common: as many as 1,000 United States teenagers die in this manner each year. Although it describes the sexual "high" and "thrill" those who engage in the practice seek to achieve, the article repeatedly warns that the procedure is "neither healthy nor harmless," "it is a serious — and often-fatal — mistake to believe that asphyxia can be controlled," and "beyond a doubt — auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe." The two-page article warns readers at least ten different times that the practice is dangerous, self-destructive and deadly. It states that persons who successfully perform the technique can achieve intense physical pleasure, but the attendant risk is that the person may lose consciousness and die of strangulation.

Tragically, a copy of this issue of Hustler came into the possession of Troy D., a fourteen-year-old adolescent, who read the article and attempted the practice. The next morning, Troy's nude body was found, hanging by its neck in his closet, by one of Troy's closest friends, Andy V. A copy of *Hustler Magazine,* opened to the article about the "Orgasm of Death," was found near his feet.

[Troy's mother, Diane Herceg, and Troy's friend (Andy V.) sued Hustler to recover damages for emotional and psychological harms they suffered as a result of Troy's death and for exemplary damages, alleging negligence, products liability, dangerous instrumentality, and attractive nuisance, and incitement. In response, Hustler filed a motion to dismiss the complaint for failure to state a claim. The district dismissed all claims, save the incitement claim and the case was allowed to go to the jury on incitement alone.

The jury returned a verdict in favor of the plaintiffs awarding Diane Herceg $69,000 in actual damages and $100,000 exemplary damages and awarding Andy V. $3,000 for the pain and mental suffering he endured as the bystander

who discovered Troy's body and $10,000 exemplary damages.]

**Incitement**

Although we are doubtful that a magazine article that is no more direct than "Orgasm of Death" can ever constitute an incitement in the sense in which the Supreme Court — in cases we discuss below — has employed that term to identify unprotected speech the states may punish without violating the first amendment, we first analyze the evidence on the theory that it might satisfy doctrinal tests relating to incitement, for that was the theory under which the case was tried and submitted. Substituting our judgment for the jury's, as we must, we hold that liability cannot be imposed on Hustler on the basis that the article was an incitement to attempt a potentially fatal act without impermissebly infringing upon freedom of speech.

The word incitement, like many of the words in our complex language, can carry different meanings. It is properly used to refer to encouragement of conduct that might harm the public such as the violation of law or the use of force. But when the word is used in that context, the state may not punish such an inducement unless the speech involved is, as the Supreme Court held in *Brandenburg v. Ohio*, "directed to inciting or producing *imminent* lawless action and … *likely* to incite or produce such action."

Brandenburg, a Ku Klux Klan leader garbed in Klan regalia, had delivered a speech threatening that, "if our President, our Congress, our Supreme Court, continues to supress the white, caucasion race, it is posible that there might have to be some revengence (sic) taken." He challenged his conviction under an Ohio statute that punished "advocacy of the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." The Supreme Court reversed his conviction because neither the statute nor the state court's jury instruction distinguished between advocacy and incitement to imminent lawless action, and only the latter might constitutionally be forbidden.

Hustler argues that *Brandenburg* provides the controlling principle, and the plaintiffs assume that it may. If that were so, it would be necessary for the plaintiffs to have proved that:

1. Autoerotic asphyxiation is a lawless act.
2. Hustler advocated this act.
3. Hustler's publication went even beyond "mere advocacy" and amounted to incitement.
4. The incitement was directed to imminent action.

The *Brandenburg* focus is repeated in subsequent Supreme Court decisions. Thus, in *Hess v. Indiana,* the Court held provocative remarks by a demonstrator to the police could not be punished on the basis that they had a tendency to lead to violence because there was no evidence that, or rational inference from, the import of the language that "[the] words [used] were intended to produce, and likely to produce, *imminent* disorder."

The crucial element to lowering the first amendment shield is the imminence of the threatened evil. In *Hess,* the Court was faced with the question of whether an antiwar demonstrator could be punished under Indiana's disorderly conduct statute for loudly shouting, "We'll take the fucking street later," as police attempted to move the crowd of demonstrators off the street so that vehicles could pass. The Court noted that, viewed most favorably to the speaker, "the statement could be taken as counsel for moderation" and, at worst, as "advocacy of illegal action at some indefinite future time." The Court reasoned that, "[s]ince the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished … on the ground that they had 'a tendency to lead to violence.' "

We need not decide whether Texas law made autoerotic asphyxiation illegal or whether *Brandenburg* is restricted to the advocacy of criminal conduct. Even if the article paints in glowing terms the pleasures supposedly achieved by the practice it describes, as the plaintiffs contend, no fair reading of it can make its content advocacy, let alone incitement to engage in the practice.…

**Civil Liability?**

Herceg and Andy V. contend that, while the first amendment might prevent the state from punishing publication of such articles as criminal, it does not foreclose imposing civil liability for damages that result from publication. In *New York Times v. Sullivan,* the Supreme Court held, "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," because the fear of civil liberty might be "markedly more inhibiting than the fear of prosecution under a criminal statute." The same rationale forbids the state to impose damages for publication of "Orgasm of Death" if it could not constitutionally make the publication of that article a crime.

One state Supreme Court decision, however, may be read to imply that the state may impose civil liability in such a situation. In *Weirum v. RKO General, Inc.,* the Supreme Court of California held that a radio station catering primarily

to teenagers could be held liable for wrongful death damages arising from an accident caused when two youths who listened to a promotional broadcast engaged in a street race in order to be the first to reach the site at which the station had announced prize money would be given away. Most of the opinion dealt with whether the radio station owed a duty of care to the killed non-listener, and the first amendment defense was summarily rejected because "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."

As the California court itself noted, "virtually every act involves some conceivable danger." The analysis employed by the California Supreme Court, however, provides no guidance for distinguishing between protected speech containing — or implying — dangerous ideas and speech so clearly and immediately dangerous and "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." Because the speech challenged was merely a promotional device to encourage listeners to continue listening to the radio station, it may have been entitled only to limited first amendment protection. The broadcast announcements included light-hearted warnings that listeners should "get your kids out of the street" because of the reckless driving that the announcement might incite, and no warning of any kind was given to urge listeners who sought to win the prizes to use discretion in driving. In contrast, the Hustler article, while published in a magazine published for profit, was not an effort to achieve a commercial result and, at least in the explicit meaning of the words employed, attempts to dissuade its readers from conducting the dangerous activity it describes.…

In the alternative, Herceg and Andy suggest that a less stringent standard than the *Brandenburg* test be applied in cases involving non-political speech that has actually produced harm. Although political speech is at "the core of the First Amendment," the Supreme Court generally has not attempted to differentiate between different categories of protected speech for the purposes of deciding how much constitutional protection is required. Such an endeavor would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality. If the shield of the first amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as "bad," all free speech becomes threatened. An article discussing the nature and danger of "crack" usage — or of hang-gliding — might lead to liability just as easily. As is made clear in the Supreme Court's decision in *Hess,* the "tendency to lead to violence" is not enough. Mere negligence, therefore, cannot form the basis of liability under the incitement doctrine any more than it

can under libel doctrine.…

For the reasons stated above, the judgment of the district court is REVERSED.

**Concurrence & Dissent**

EDITH H. JONES, Circuit Judge, Concurring and Dissenting:

I concur in the result in this case only because I am persuaded that plaintiffs had an obligation to cross-appeal the court's dismissal of their claims based on negligence, attractive nuisance, and strict liability or dangerous instrumentality. The majority correctly reason that Hustler should have had an opportunity to prepare a defense specifically tailored against any of these theories. Although I believe a tort claim is here defensible, the undeniable novelty of plaintiff's "incitement" theory does not permit us fairly to support the judgment below.

What disturbs me to the point of despair is the majority's broad reasoning which appears to foreclose the possibility that any state might choose to temper the excesses of the pornography business by imposing civil liability for harms it directly causes. Consonant with the first amendment, the state can protect its citizens against the moral evil of obscenity, the threat of civil disorder or injury posed by lawless mobs and fighting words, and the damage to reputation from libel or defamation, to say nothing of the myriad dangers lurking in "commercial speech." Why cannot the state then fashion a remedy to protect its children's lives when they are endangered by suicidal pornography? To deny this possibility, I believe, is to degrade the free market of ideas to a level with the black market for heroin. Despite the grand flourishes of rhetoric in many first amendment decisions concerning the sanctity of "dangerous" ideas, no federal court has held that death is a legitimate price to pay for freedom of speech.

In less emotional terms, I believe the majority has critically erred in its analysis of this case under existing first amendment law. The majority decide at the outset that Hustler's "Orgasm of Death" does not embody child pornography, fighting words, incitement to lawless conduct, libel, defamation or fraud, or obscenity, all of which categories of speech are entirely unprotected by the first amendment. Nor do they find in the article "an effort to achieve a commercial result," which would afford it modified first amendment protection. Comforted by the inapplicability of these labels, they then accord this article full first amendment protection, holding that in the balance struck between society's interest in Troy's life and the chilling effect on the "right of the public to receive … ideas," Troy loses. Any effort to find a happier medium, they conclude, would not only be hopelessly complicated but would raise substantial concerns that the worthiness of speech might be judged by "majoritarian notions of political and social propriety and morality." I agree that "Orgasm of Death" does not

conveniently match the current categories of speech defined for first amendment purposes. Limiting its constitutional protection does not, however, disserve any of these categories and is more appropriate to furthering the "majoritarian" notion of protecting the sanctity of human life. Finally, the "slippery slope" argument that if Hustler is held liable here, *Ladies Home Journal* or the publisher of an article on hang-gliding will next be a casualty of philistine justice simply proves too much: *This* case is not a difficult one in which to vindicate Troy's loss of life.

**I.**

Proper analysis must begin with an examination of *Hustler* generally and this article in particular. *Hustler* is not a bona fide competitor in the "marketplace of ideas." It is largely pornographic, whether or not technically obscene. One need not be male to recognize that the principal function of this magazine is to create sexual arousal. Consumers of this material so partake for its known physical effects much as they would use tobacco, alcohol or drugs for their effects. By definition, pornography's appeal is therefore non-cognitive and unrelated to, in fact exactly the opposite of, the transmission of ideas.

Not only is Hustler's appeal noncognitive, but the magazine derives its profit from that fact. If Hustler stopped being pornographic, its readership would vanish.

According to the trial court record, pornography appeals to pubescent males. Moreover, although sold in the "adults only" section of newsstands, a significant portion of its readers are adolescent. Hustler knows this. Such readers are particularly vulnerable to thrillseeking, recklessness, and mimickry. Hustler should know this. Hustler should understand that to such a mentality the warnings "no" or "caution" may be treated as invitations rather than taboos.

"Orgasm of Death" provides a detailed description how to accomplish autoerotic asphyxiation. The article appears in the "Sexplay" section of the magazine which, among other things, purports to advise its readers on "how to make you a much better lover." The warnings and cautionary comments in the article could be seen by a jury to conflict with both the explicit and subliminal message of Hustler, which is to tear down custom, explode myths and banish taboos about sexual matters. The article trades on the symbiotic connection between sex and violence. In sum, as Hustler knew, the article is dangerously explicit, lethal, and likely to be distributed to those members of society who are most vulnerable to its message. "Orgasm of Death," in the circumstances of its publication and dissemination, is not unlike a dangerous nuisance or a stick of dynamite in the hands of a child. Hustler's publication of this particular article bears the seeds of tort liability although, as I shall explain, the theory on which

the case was tried is incorrect.

**II.**

First amendment analysis is an exercise in line-drawing between the legitimate interests of society to regulate itself and the paramount necessity of encouraging the robust and uninhibited flow of debate which is the life-blood of government by the people. That some of the lines are blurred or irregular does not, however, prove the majority's proposition that it would be hopelessly complicated to delineate between protected and unprotected speech in this case. Such a formulation in fact begs the critical question in two ways. First, a hierarchy of first amendment speech classifications has in fact developed largely in the last few years, and there is no reason to assume the hierarchy is ineluctable. Second, the essence of the judicial function is to judge. If it is impossible to judge, there is no reason for judges to pretend to perform their role, and it is a nonsequitur for them to conclude that society's or a state's judgment is "wrong." Hence, in novel cases like this one, the reasons for protecting speech under the first amendment must be closely examined to properly evaluate Hustler's claim to unlimited constitutional protection.…

The interest in protecting life is recognized specifically for first amendment purposes and, analytically, can be no less important than the interest in reputation. The state's interest in this case is to protect the lives of adolescents who might be encouraged by pornographic publications and specifically instructed how to attempt life-threatening activities. In *NAACP v. Claiborne Hardware Company,* (S.Ct. 1982), the Supreme Court assumed that if violence had broken out as a result of Charles Evers' incendiary speech, both the mob and the speaker could have been subjected to damage claims by the victims. For similar reasons, "fighting words" have long been outside the sphere of first amendment protection. *See Chaplinsky v. New Hampshire,* (S.Ct. 1942). The Supreme Court has also dealt favorably with state regulations designed to protect minors from performing sexual acts by prohibiting distribution of films containing such acts. *New York v. Ferber,* (S.Ct. 1982). There the Court found it "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological wellbeing of a minor' is 'compelling'." *Ferber* (quoting *Globe Newspaper Co. v. Superior Court,* (S.Ct. 1982)). The Court has even gone so far as to uphold an FCC regulation banning "indecent" speech from the airwaves at the times when children would be in the audience. *F.C.C. v. Pacifica Foundation,* (S.Ct. 1978). States already regulate the distribution of pornography to minors, *see* Schauer, *supra* n. 9, at 196-97, and a remedy for the collateral consequences of unauthorized distribution, by way of a civil action for damages, would only serve to reinforce that regulation.

Permitting recovery of damages in defamation cases offers an analogous framework. Balanced against the state interest, the Court held in *Dun & Bradstreet* that the first amendment interest at stake was less important than the one weighed in *Gertz*. While *Gertz* involved a libelous publication on a matter of public concern, the false information in *Dun & Bradstreet* was contained in a credit report distributed to merchants. The Court employed the test of content, form and context, best articulated in *Connick v. Myers,* (S.Ct. 1983), to analyze whether the credit report was a matter of "public concern." Speech on matters of "private concern," the Court found, while not wholly unprotected, is not as substantial relative to important state interests. Thus, the credit report was prepared solely for the individual interest of the speaker and a specific business, it was false and clearly damaging, and, like advertising, it represents a form of speech unlikely to be deterred by incidental state regulation: The credit report involved a matter of "private concern."

Measured by this standard, both *Hustler* in general and "Orgasm of Death" in particular deserve limited only first amendment protection. *Hustler* is a profitable commercial enterprise trading on its prurient appeal to a small portion of the population. It deliberately borders on technical obscenity, which would be wholly unprotected, to achieve its purposes, and its appeal is not based on cognitive or intellectual appreciation. Because of the solely commercial and pandering nature of the magazine, neither *Hustler* nor any other pornographic publication is likely to be deterred by incidental state regulation. No sensitive first amendment genius is required to see that, as the Court concluded in *Dun & Bradstreet,* "[t]here is simply no credible argument that this type of [speech] requires special protection to insure that 'debate on public issues [will] be uninhibited, robust, and wide-open.' " *Dun & Bradstreet* quoting *New York Times v. Sullivan,* (1967).

To place *Hustler* effectively on a par with *Dun & Bradstreet*'s "private speech" or with commercial speech, for purposes of permitting tort lawsuits against it hardly portends the end of participatory democracy, as some might contend. First, any given issue of Hustler may be found legally obscene and therefore entitled to no first amendment protection. Second, tort liability would result after-the-fact, not as a prior restraint, and would be based on harm directly caused by the publication in issue. *See NAACP v. Claiborne Hardware Co.,*. Third, to the extent any chilling effect existed from the exposure to tort liability, this would, in my view, protect society from loss of life and limb, a legitimate, indeed compelling, state interest. Fourth, obscenity has been widely regulated by prior restraints for over a century. Before *Roth v. United States,* (S.Ct. 1957), there was no *Hustler* magazine and it would probably have been banned. Despite such regulation, it does not appear that the pre-*Roth* era was a political dark age. Conversely, increasing leniency on pornography in the past three

decades has allowed pornography to flourish, but it does not seem to have corresponded with an increased quality of debate on "public" issues. These observations imply that pornography bears little connection to the core values of the first amendment and that political democracy has endured previously in the face of "majoritarian notions of social propriety."

Rendering accountable the more vicious excesses of pornography by allowing damage recovery for tort victims imposes on its purveyors a responsibility which is insurable, much like a manufacturer's responsibility to warn against careless use of its products. A tort remedy which compensates death or abuse of youthful victims clearly caused by a specific pornographic publication would be unlikely to "chill" the pornography industry any more than unfavorable zoning ordinances or the threat of obscenity prosecution has done. The reasonableness of allowing a tort remedy in cases like this is reinforced by the fact that only one lawsuit was filed in regard to "Orgasm of Death." The analogy with regulations on commercial speech is not inappropriate: pornography should assume a lower value on the scale of constitutional protection; and the state regulation by means of tort recovery for injury directly caused by pornography is appropriate when tailored to specific harm and not broader than necessary to accomplish its purpose.

The foregoing analysis immediately differentiates this case from *Brandenburg v. Ohio*, which addressed prior restraints on public advocacy of controversial political ideas. Placing *Hustler* on the same analytical plane with *Brandenburg* represents an unwarranted extension of that holding, which, unlike *Dun & Bradstreet* and the commercial speech cases, rests in the core values protected by the first amendment. Even *Brandenburg*, however, recognized that the state's regulatory interest legitimately extends to protecting the lives of its citizens from violence induced by speech. Moreover, *Brandenburg* is intertwined with the context of the speech as well as its content — advocacy of inciteful ideas would thus be differently regarded in a collection of speeches by Tom Paine than it is among a crowd of armed vigilantes who proceed to riot. The *Brandenburg* test, implicitly rejected by the majority, is simply inappropriate to define the limits of constitutional protection afforded in this case. Viewed in the overall context of first amendment jurisprudence, moreover, *Brandenburg* does not exclude the possibility of state regulation.

**III.**

Texas courts have never been called upon to assess a claim like this one. Since there is no cross-appeal, we should not speculate on the precise nature of the theory of liability a Texas court might accept, although negligence and attractive nuisance seem theoretically appropriate. Texas law supplies no reason to

conclude, as the district court did, that *Brandenburg v. Ohio,* representing a federal constitutional limitation on a state's restraints on speech, could be turned into an affirmative theory of tort law. I believe this use of *Brandenburg* is wrong, insofar as it suggests that federal constitutional law rather than state law governs the first issue in this case, which is the nature of the tort committed by Hustler.

Eliminating the *Brandenburg* incitement theory as a basis for recovery would have been sufficient to reverse the jury award here. The majority go much further, however, and afford *Hustler* virtually complete protection from tort liability under the first amendment. I vigorously oppose their unnecessary elaboration on first amendment law, which, I believe, will undercut the ability of the states to protect their youth against a reckless and sometimes dangerous business which masquerades as a beneficiary of the first amendment.

End of excerpts from Judge Edith Grossman's concurring & dissenting opinion.

**Note on *Weirum v. RKO***

In *Weirum v. RKO,* (CA 1975), the Supreme Court of California held a radio station liable for broadcasting a promotional event which caused the teenage listeners to participate in a high-speed chase in the Los Angeles freeways, killing a motorist. There was a direct connection between the station's broadcast and the fatal accident. In *Hyde v. Missouri,* (Mo. Ct. App. 1982) the court held a newspaper and other defendants liable for publishing the name of a victim of a sexual assault while her attacker was still at large. The causal connection between the published information and the attacker's continued threats to the victim was again straightforward.

**Note on *Rice v. Paladin,***

Fourth Circuit (1997)

- Reason Magazine: The Day They Came To Sue The Book
- Case at Google Scholar
- Case at Westlaw.
- Case at Wikipedia.
- *Hit Man: A Technical Manual For Independent Contractors* - complete text

**Referenced Cases**

- *U.S. v. Stevens*, 130 S.Ct. 1577 (2010). Wikipedia.
- *Weirum v. RKO*, 539 P.2d 36 (1975). Wikipedia.

- *Byers v. Edmundson*, 826 So.2d 551 (1st Cir. 2002). Wikipedia list of copycat crimes committed by individuals allegedly influenced by the 1994 film *Natural Born Killers*.
- *Davidson v. Time Warner,* 1997 WL 405907 (S.D.Tx 1997). Case note on *Davidson v. Time-Warner*.
- *Miramax Films v. MPAA*, 560 N.Y.S.2d 730 (1990).
- Trailer for *This Film Is Not Yet Rated*.

**Recommended**

- *The People v. Larry Flynt*.
- An eighth-grade teacher who writes fiction under a nom de plume is ordered to undergo an "emergency medical evaluation" for his novel about a school shooting".
- Trailer for *This Film Is Not Yet Rated*.