Entertainment Law

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Law & Business For Artists

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? What if a rapstar'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, rock starts for indirectly "causing" the death of their loved ones?

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 what might be called obscenity-lite, or 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
- 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.

[The video and software companies challenged the law and took their case, first to the Ninth Circuit Court of Appeals, where they won. Then the State of California appealed, and the case went to the United States Supreme Court, where the videogame and software industries barely beat back the government's attempt to regulate the content of their products.]

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.... 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, "esthetic 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."

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.... 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 ... These limited areas—such as obscenity, incitement, and fighting words, 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 t[ook] place."

A saving clause largely borrowed from our obscenity jurisprudence . . . exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value" . . . 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. . . . 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" . . .

Stevens was not the first time we have encountered and rejected a State's attempt to shoehorn speech about violence into obscenity. . . . 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.. . . 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 "adjus[t] 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." . . . 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." . . .

The California Act is something else entirely. It does not adjust the bound-

aries 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. "[M]inors 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." ... No doubt a State possesses legitimate power to protect children from harm ... 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."

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. The Odyssey of Homer, Book IX, p. 125 (S. Butcher & A. Lang transls. 1909) ("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.. . .

For a time, our Court did permit broad censorship of movies because of their capacity to be "used for evil," but we eventually reversed course. . . .

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. . . . 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.. . .

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. … The State must specifically identify an "actual problem" in need of solving … and the curtailment of free speech must be actually necessary to the solution … That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible."

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 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 … California's burden is much higher, and because it bears the risk of uncertainty … 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, "[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." …

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.. . .

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 . . . 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]." . . .

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).

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 class of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," (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. ... 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?

- 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."

Civil Liability For Inciting Violence?

So much for government as censor of violence, 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, what about suing the manufacturers of such products after the fact? But here too, the First Amendment, as well as 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. . . . 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 fkin mop,
The more I shot, the more mothafka'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
- 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 ... sites with sexually-suggestive material. ...

[The parents of Carneal sued the companies that produce or maintain the above-mentioned movie, video games, and internet sites. James said that the companies were negligent because 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 district court dismissed the claims of the family members and they appealed the case.]

Excerpts from the *James* Opinion

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:

1. that the defendant owed a duty of care to the plaintiff,
2. that the defendant breached that duty of care, and
3. that the *defendant's breach* was the proximate cause of the plaintiff's damages.

A. The Existence of a Duty of Care

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." ...

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....

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."...

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." 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 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

First, courts have held that, except under extraordinary circumstances, individuals are generally entitled to assume that third parties will not commit intentional criminal acts . . .

The second reason is structural. The system of criminal liability has concentrated responsibility for an intentional criminal act in the primary actor, his accomplices, and his co-conspirators. By imposing liability on those who did not endeavor to accomplish the intentional criminal undertaking, tort liability would diminish the responsibility placed on the criminal defendant. The normative message of tort law in these situations would be that the defendant is not entirely responsible for his intentional criminal act.. . .

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." . . . 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 . . . or firearms.. . . 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.. . . 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.]. . .

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." . . . 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.

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.. . .

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."

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.. . .

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.")

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.

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.

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
- 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 prac-

tice. 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 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.. . .

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

[In the parts of the opinion omitted, the plaintiffs made many of the same arguments the families made in the video game cases. I include this case here mainly for what follows: An excellent DISSENTING opinion from Judge Edith Grossman, a really smart judge and also a great writer.]

Concurrence & Dissent Excerpts

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

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 com-

plicated 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 non-sequitur 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*.. . . 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 . . . 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.. . .

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.... 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.

Referenced Cases

- *U.S. v. Stevens*.
- *Weirum v. RKO*.
- Wikipedia list of copycat crimes committed by individuals allegedly influenced by the 1994 film *Natural Born Killers*.
- *Davidson v. Time Warner,*.
- Trailer for *This Film Is Not Yet Rated*.

Recommended

- *The People v. Larry Flynt*.