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1-1-2003

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Recommended Citation

Clay Calvert, *Media Liability for Violent Conduct: One Year Later—2002 Symposium Update*, 23 Loy. L.A. Ent. L. Rev. 247 (2003).
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2002 SYMPOSIUM UPDATE

MEDIA LIABILITY FOR VIOLENT CONDUCT: ONE YEAR LATER

*Clay Calvert**

I. INTRODUCTION

A major subject of debate in February 2002 at the Fourth Annual Entertainment Law Symposium—"Tune In, Turn On, Cop Out?: The Media and Social Responsibility"—was the media's liability for violent audience behavior.[1] A number of high-profile cases in which media products were blamed for causing violence—among them songs by the metal group Slayer[2] and the late rapper Tupac Shakur,[3] a movie produced

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1. *See* Rex S. Heinke, *A Hypothetical: Potential Liability Arising from the Dissemination of Violent Music*, 22 LOY. L.A. ENT. L. REV. 233 (2002); F. Jay Dougherty et al., *A Panel Discussion: Potential Liability Arising from the Dissemination of Violent Music*, 22 LOY. L.A. ENT. L. REV. 237 (2002); Rodney A. Smolla, *From* Hit Man *to* Encyclopedia of Jihad*: How to Distinguish Freedom of Speech from Terrorist Training*, 22 LOY. L.A. ENT. L. REV. 479 (2002).

2. Pahler v. Slayer, 29 Media L. Rep. 2627 (Cal. Super. Ct. 2001). *See Slayer Ruled Not Liable in Slaying*, CHI. SUN-TIMES, Nov. 1, 2001, Features at 44 (describing a California Superior Court judge's finding that the band Slayer could not be held civilly liable for the murder of a 15-year-old girl, Elyse Pahler, by three boys who listened to the band's music and claimed it instructed them to kill her as a virgin sacrifice). *See generally* Clay Calvert, *Framing and Blaming in the Culture Wars: Marketing Murder or Selling Speech?*, 3 VAND. J. ENT. L. & PRAC. 128 (2001) (analyzing *Pahler* and a previous trial court ruling in it).

According to one article published after the October 2001 ruling in favor of Slayer, the then-recently released *God Hates Us All* still contains "chilling images" and is "harder and thicker," despite the lawsuit that was filed against it. Joe Ehrbar, *Gentle Killer-Metal Show Is Still a Slayer*, SEATTLE POST-INTELLIGENCER, Nov. 30, 2001, at 7.

3. *See* Davidson v. Time Warner, 25 Media L. Rep. 1705 (S.D. Tex. 1997).

by Oliver Stone,[4] and a book describing how to be a hit man[5]—provided ample legal fodder, along with a hypothetical drafted by media defense attorney Rex Heinke,[6] for that discourse.[7]

One year now has passed since that discussion, but the topic clearly has not faded from either the public view or the legal limelight. Violent video games, in fact, were initially a focus of blame in the series of sniper shootings that left ten people dead[8] in Maryland and Virginia in October 2002.[9] Wal-Mart stores actually removed sniper video games from their shelves.[10] Newspapers ran feature stories on the possible connection between video games and violence.[11] The shootings thus once again, as with other recent incidents of violence,[12] turned the journalistic spotlight on media products as a source of blame for societal violence.[13]

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4. *See* Byers v. Edmondson, 712 So. 2d 681 (La. Ct. App. 1998).

5. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

6. Heinke, *supra* note 1.

7. *See* Dougherty, *supra* note 1, at 243–56 (addressing each of these cases in the context of a panel discussion that featured attorneys Rex S. Heinke, Frank J. Janacek, Jr., and Zazi Pope, and Professors F. Jay Dougherty, Loyola Law School, and Rodney A. Smolla, University of Richmond, T.C. Williams School of Law).

8. *See generally* Francis X. Clines, *End to 3 Weeks of Terror for the Capital*, N.Y. TIMES, Oct. 25, 2002, at A1 (describing the "harrowing, three-week ordeal" in the "Washington metropolitan region").

9. Derrick Bartlett, president of the American Sniper Association, said the killers could have learned their skills from "any video arcade," adding that some of the games "could desensitize you to the idea of killing a human being." Darragh Johnson & Michael E. Ruane, *Residents' Theories Run Gamut; Video Game Devotee, Terrorist Among Guesses*, WASH. POST, Oct. 9, 2002, at A15. *See* Howard Kurtz, *The Case with No Easy Answers*, WASH. POST, Oct. 14, 2002, at C1 (noting how one private investigator made the rounds of several networks speculating that the perpetrators were "most likely short men in their twenties who like to play 'stupid video games.'").

Video game enthusiasts, in contrast, "were despairing of yet another rush to blame violent games for actual violence, saying many dispute any link between games like Sniper and actual snipers." Kate Zernike, *Experts Debate the Sniper's Links to Popular Culture*, N.Y. TIMES, Oct. 11, 2002, at A26.

10. Leslie Gray Streeter, *Running Scared*, PALM BEACH POST, Oct. 23, 2002, at 1D.

11. *See generally* Chip Carter, *Vice, Violence & Video Games*, ST. PETERSBURG TIMES, Oct. 14, 2002, at 11E (discussing, during the time period when the sniper shootings were taking place, the connection between video games and real-life violence); Marlon Manuel, *As D.C. Toll Mounts, Criticism of Sniper Games Rises*, ATLANTA J. & CONST., Oct. 21, 2002, at 1C (describing various "first-person shooting" video games and noting that psychologists and others are "speculating about a possible connection between video games and school shootings").

12. *See generally* Clay Calvert & Robert D. Richards, *The Irony of News Coverage: How the Media Harm Their Own First Amendment Rights*, 24 HASTINGS COMM. & ENT. L.J. 215, 226 (2002) (describing "the news media's focus after Columbine on media products as a source of blame for such schoolhouse violence").

13. *See generally* Bob Herbert, *Saturated with Violence*, N.Y. TIMES, Oct. 28, 2002, at A31

While video games did not always fare well in the courts since the February 2002 symposium against local ordinances designed to restrict minors' access to them—a federal district court in Missouri held in April 2002 that video games are *not* a form of expression protected by the First Amendment[14] guarantee of free speech[15]—the tide of judicial opinions in the past year has risen up *against* holding the media civilly liable for real-life violence caused by a slew of products, including video games, movies, television talk shows, and Internet Web sites.[16] These cases are described briefly in the next part of this article.

II. THE CASES

Four pro-media, pro-First Amendment opinions issued subsequent to last year's symposium are illustrative of the tide of cases mentioned above. They are, in chronological order:

1. The March 4, 2002 ruling by a federal district court in Colorado dismissing negligence and products liability claims filed by the widow and stepchildren of a teacher killed at Columbine High School in April 1999.

(writing about the sniper shootings and observing that "[i]n the popular culture of movies, television and video games, murder is such a staple we seldom give it a second thought"); Tatsha Robertson, *Sniper Attacks Bring Scrutiny to Pursuit of Marksmanship*, BOSTON GLOBE, Oct. 28, 2002, at A1 (citing "critics" who "say the glorification of powerful military weapons and rock star-like admiration of military snipers, *as well as video games and movies* about lonesome but brilliant long-range killers, all lead to the possibility of more incidents like that in Washington and the chilling shootings at Columbine High School") (emphasis added).

14. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment's Due Process Clause to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

15. Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1135 (E.D. Mo. 2002) (upholding a St. Louis, Missouri County ordinance restricting minors' access to the sale, rental, and use of violent video games, and finding that "the plaintiffs failed to meet their burden of showing that video games are a protected form of speech under the First Amendment"). Judge Stephen Limbaugh later affirmed his initial opinion in June 2002. Interactive Digital Software Ass'n v. St. Louis County, 2002 U.S. Dist. LEXIS 13600 (E.D. Mo. June 14, 2002). *See* Peter Shinkle & Phil Sutin, *Ruling Clears Way for Law Requiring Parental Consent for Some Video Games*, ST. LOUIS POST-DISPATCH, June 18, 2002, at B1 (describing the St. Louis County ordinance and the legal battle surrounding it).

Judge Limbaugh's decisions, however, contrast starkly with the Seventh Circuit Court of Appeals' ruling in March 2001 that struck down a similar Indianapolis, Indiana ordinance. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 578 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001). *See generally* Clay Calvert, *Violence, Video Games and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1 (2002) (praising the Seventh Circuit Court of Appeals' opinion in *Kendrick*).

16. See discussion *infra* Part II.

The long list of media defendants included the producers and distributors of both a movie called *The Basketball Diaries*, as well as several video games including *Mortal Kombat* and *Doom*;[17]

2. The March 27, 2002 ruling by a federal district court in Connecticut dismissing product liability, unfair trade practices, and emotional distress claims filed by the mother of a boy who was stabbed to death with a kitchen knife by another youth who allegedly was obsessed with the video game *Mortal Kombat*;[18]

3. The August 13, 2002 opinion by the United States Court of Appeals for the Sixth Circuit upholding a district court's decision to dismiss causes of action for negligence and products liability filed against several video game, movie production, and Internet content-provider firms by the parents of children killed in a school shooting in Paducah, Kentucky, in December 1997;[19] and

4. The October 22, 2002 ruling by a Michigan appellate court reversing a $29 million jury verdict against the *Jenny Jones Show*, its producer, and its owner, in favor of the estate of Scott Amedure. Amedure was killed by a man who was allegedly humiliated on the television show by Amedure's "ambush"[20] revelation that he had a secret crush on him.[21]

Three questions readily come to mind: 1) Are there similarities and patterns, besides the obvious pro-defense outcomes, between the judicial analyses in these cases?; 2) Do the cases send a clear signal to plaintiffs' attorneys that the future of litigation against the manufacturers and producers of media products is bleak?; and 3) Were there any silver-linings for plaintiffs in any of these opinions? Each of these questions is addressed in subsequent parts of this article.

III. THE PATTERNS

With regard to the first question posed above, about the similarities in the judicial analyses, some clear patterns seem to emerge from the aforementioned quartet of cases. They are:

1. Negligence causes of action are likely to fail on the questions of

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

18. Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167 (D. Conn. 2002).

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

20. *See* CLAY CALVERT, VOYEUR NATION 65 (Herbert I. Schiller ed., 2000). "[T]he voyeurism of tell-all talk shows also plays to the 'moment of truth' attraction. A common technique that embodies this concept is the so-called ambush episode in which one guest surprises and confronts another with a startling revelation or announcement that previously had been kept secret." *Id.* (calling the Amedure incident "a classic example of the ambush technique").

21. Graves v. Warner Bros., 656 N.W.2d 195 (Mich. Ct. App. 2002).

both *duty*[22] and *causation*.[23]

2. Products liability causes of action are likely to fail on the grounds that video games, movies, and Internet sites are not "products" for purposes of strict liability.[24] As the judge in the Columbine-based lawsuit opined, "intangible thoughts, ideas, and expressive content are not 'products' as contemplated by the strict liability doctrine."[25] Unless a video cassette or video game cartridge actually were to explode and thereby injure its user, no claim for products liability would exist.[26]

3. The incitement-to-violence standard laid down by the United States Supreme Court in *Brandenburg v. Ohio*[27] more than thirty years ago still[28] provides a solid First Amendment bulwark against tort liability for

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22. *See* James v. Meow Media, 300 F.3d 683, 700 (6th Cir. 2002) (writing that "[w]e . . . have determined that the defendants did not owe a duty [of care] to protect the decedants [sic]"); Sanders v. Acclaim Entm't, 188 F. Supp. 2d 1264, 1275 (D. Colo. 2002) (holding "that the Video Game and Movie Defendants owed no duty to Plaintiffs as a matter of law"); Graves v. Warner Bros., 656 N.W.2d 195, 203 (Mich. Ct. App. 2002) (holding there was a "lack of duty, an essential element of any negligence cause of action" owed by the defendants).

23. *See James*, 300 F.3d at 699–700 (writing that "the idiosyncratic nature of Carneal's reaction to the defendants' media would likely compel us to hold that this action constitutes a superseding cause" and thus making it likely that the plaintiffs "have not alleged sufficient facts to establish the third element of a *prima facie* tort case: proximate causation"); *Sanders*, 188 F. Supp. 2d at 1276 (finding that the intentional violent acts of Eric Harris and Dylan Klebold at Columbine High School "were the superseding cause of Mr. Sanders' death" and thus the defendants "were not a proximate cause of Mr. Sanders' injuries").

24. *James*, 300 F.3d at 700–01 (holding that "[t]he video game cartridges, movie cassette, and internet transmissions are not sufficiently 'tangible' to constitute products in the sense of their communicative content"); Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 174 (D. Conn. 2002) (concluding that the video game at issue in the case "cannot be a product within the ambit" of the relevant Connecticut Product Liability Act because it is not sufficiently distinguishable from motion pictures).

25. *Sanders*, 188 F. Supp. 2d at 1279.

26. *See James*, 300 F.3d at 701 (writing that "[c]ertainly 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").

27. 395 U.S. 444, 447 (1969) (holding that the government cannot forbid even the advocacy of force or illegal action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"'). *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 13–55 (1999) (providing a summary, including case excerpts, of the development of the incitement jurisprudence under the First Amendment).

28. The word "still" is used because *Brandenburg* proved an effective defense tool in cases now more than a decade old in which plaintiffs sought to impose liability on media products for allegedly causing real-life violence. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1022–23 (5th Cir. 1987) (applying the *Brandenburg* standard to preclude liability in case involving a boy who died while imitating an act described in *Hustler* magazine); Olivia N. v. NBC, 178 Cal. Rptr. 888, 892 (Cal. Ct. App. 1981) (concluding that *Brandenburg* was the correct standard to apply, rather than negligence, and holding that it precluded liability in a case involving a group of boys who allegedly imitated an act of sexual assault they saw on a television movie).

the media.[29]

While an in-depth analysis of these three patterns is beyond the scope of this update article, the first pattern regarding the failure of negligence claims bears further analysis here. In three cases involving traditional negligence theories—the Columbine school shooting case of *Sanders v. Acclaim Entertainment, Inc.*,[30] the Paducah school shooting case of *James v. Meow Media, Inc.*,[31] and the *Jenny Jones Show* case of *Graves v. Warner Bros.*[32]—the courts performed extensive duty-of-care analyses[33] before each rejected the imposition of a duty on the respective media defendants. Without a legal duty of care, of course, a claim for negligence must necessarily fail.

In *Sanders*, the district court weighed four factors in its duty analysis: "1) foreseeability of the injury or harm that occurred; 2) the social utility of Defendants' conduct; 3) the magnitude of the burden of guarding against the injury or harm; and 4) the consequences of placing the burden on the Defendants."[34] Judge Lewis T. Babcock concluded that each factor militated against finding a duty of care owed by the media defendants.

On the first factor of foreseeability, he wrote that the media defendants had no reason to suppose that the two boys who did the shootings at Columbine, Eric Harris and Dylan Klebold, "would decide to murder or injure their fellow classmates and teachers."[35] He added that while the defendants "might have speculated that their motion picture or video games had the potential to stimulate an idiosyncratic reaction in the mind of some disturbed individuals,"[36] such a speculative possibility does

29. *See James*, 300 F.3d at 698 (concluding that "[t]he violent material in the video games and *The Basketball Diaries* falls well short" of the *Brandenburg* threshold); *Sanders*, 188 F. Supp. 2d at 1281 (writing that "*Brandenburg* remains the applicable standard even where the individual allegedly incited to commit unlawful acts is a minor" and concluding that the plaintiffs in *Sanders* "cannot, as a matter of law, demonstrate that the video games and movie were 'likely' to cause any harm, let alone imminent lawless action"); *Wilson*, 198 F. Supp. 2d at 182 (writing that "[a]pplying *Brandenburg* to the facts Wilson alleges, she cannot prevail").

30. 188 F. Supp. 2d 1264 (D. Colo. 2002).

31. 300 F.3d 683 (6th Cir. 2002).

32. 656 N.W.2d 195 (Mich. Ct. App. 2002).

33. Under the Colorado law applicable in *Sanders*, a plaintiff suing for negligence "must establish: 1) *the existence of a legal duty owed to the plaintiff by the defendant*; 2) breach of the duty; 3) injury to the plaintiff; and 4) actual and proximate causation." *Sanders*, 188 F. Supp. 2d at 1271 (emphasis added). Likewise, under the Kentucky principles of negligence applicable in *James*, "the plaintiff must establish that *the defendant owed a duty of care to the plaintiff*, that the defendant breached the duty of care, and that the defendant's breach was the proximate cause of the plaintiff's damages." *James*, 300 F.3d at 689 (emphasis added).

34. *Sanders*, 188 F. Supp. 2d at 1271.

35. *Id.* at 1272.

36. *Id.*

not create a legal duty of care.[37] There was, for Judge Babcock, "no basis for determining that violence would be considered the likely consequence of exposure to video games or movies."[38]

The Sixth Circuit Court of Appeals in *James* also considered foreseeability in its duty analysis and, like Judge Babcock in *Sanders*, held that this factor militated against imposing a duty of care by media defendants to prevent the school shootings carried out by then fourteen-year-old Michael Carneal.[39] The court of appeals reasoned that it was "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."[40]

And in *Graves*, the Michigan appellate court wrote that, in the context of establishing a duty to prevent criminal conduct committed by another, "[a]ny duty is limited to reasonably responding to situations occurring on the premises and pose a risk of imminent and *foreseeable* harm to identifiable invitees[.]"[41] In that case, however, the majority wrote that the defendants "had no duty to anticipate and prevent the act of murder committed by Schmitz three days after leaving defendants' studio and hundreds of miles away."[42] In brief, the act was neither imminent nor foreseeable.

Beyond failure on the question of foreseeability in the duty analysis of these courts, other factors militated against the imposition of a duty of care. The social utility factor noted above[43] weighed against finding a duty in *Sanders*. The judge in that case emphasized that "there is social utility in expressive and imaginative forms of entertainment even if they contain violence."[44] Similarly, the federal appellate court in *James* noted that "[a]ttaching tort liability to the ideas and images conveyed by the video games, the movie, and the internet sites . . . 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."[45] The

37. *Id.*
38. *Id.* at 1273.
39. *James*, 300 F.3d at 691.
40. *Id.* at 693.
41. *Graves*, 656 N.W.2d at 202 (emphasis added).
42. *Id.*
43. *Supra* note 34 and accompanying text.
44. *Sanders*, 188 F. Supp. 2d at 1274.
45. *James*, 300 F.3d at 699.

consideration of the importance of speech in a free society on the duty analysis thus is another effective line of defense against negligence theories. The same First Amendment concerns that underlie the *Brandenburg* test to preclude liability under the incitement-to-violence standard can be used to crush liability under a negligence theory on the very first element of duty.

In summary, the four cases described above collectively suggest little hope for plaintiffs on negligence and products liability theories, while indicating the continuing effectiveness of the *Brandenburg* standard for defendants. But is all hope lost for plaintiffs? The next part addresses that issue.

IV. THE MEANING OF THE CASES FOR FUTURE PLAINTIFFS

The second issue raised by these four cases, as set forth earlier, is whether they send a clear signal to plaintiffs' attorneys that the future of litigation against the manufacturers and producers of media products is bleak.[46] Parsed differently and more bluntly, Is all hope lost for plaintiffs when media products allegedly cause violent and unlawful acts?

The obvious answer is 'yes,' at least in cases involving similar factual circumstances, since the plaintiffs lost in each case, regardless of the theory under which relief was sought. Rex Heinke, a media defense attorney who participated in the 2002 Symposium, said the recent cases described in Part II collectively suggest that "these claims simply aren't going to succeed. It's hard to imagine a situation in which they would work."[47]

But there may still be hope for plaintiffs outside of traditional tort theories like negligence and strict products liability. During last year's Entertainment Law Symposium, Professor Rodney Smolla proposed and articulated a new cause of action that "is an amalgam of tort principles and First Amendment principles, but not, as you would guess, principles emanating from *Brandenburg v. Ohio*."[48] In particular, the Smolla-created cause of action borrows from the United State Supreme Court's 1964 *New York Times v. Sullivan*[49] opinion and the actual malice standard adopted therein.[50] Smolla's cause of action takes the recklessness component of

46. *Supra* note 34 and accompanying text.

47. Telephone conversation with Rex Heinke, Esq., Akin, Gump, Strauss, Hauer & Feld, LLP, Los Angeles, Cal. (Dec. 13, 2002) (notes on file with author).

48. Dougherty, *supra* note 1, at 239.

49. 376 U.S. 254 (1964).

50. *Id.* at 279–80 (defining "actual malice" as meaning made "with knowledge that it was false or with reckless disregard of whether it was false or not.").

actual malice to fashion a theory that takes an intermediate-level approach between the high standard of *Brandenburg* and the "low-level negligence"[51] standard. Under this theory, the issue becomes whether the defendants "acted with reckless indifference to human life."[52]

Although it is still inchoate, perhaps it is now time for plaintiffs' attorneys to develop and try out a new theory of liability that borrows from the one proposed at last year's symposium by Professor Smolla. Given both Smolla's success with an alternative theory—aiding and abetting, in *Rice v. Paladin Enterprises, Inc.*[53]—and the negative results for plaintiffs in each of the four recent cases described in this article, it certainly is worth a shot.

V. PLAINTIFFS AND THE SEARCH FOR SILVER LININGS

From a plaintiff's perspective, there may be one silver lining found among the analyses of the cases set forth above in Parts II and III. It is that there may be some video games that are *not* protected by the First Amendment-based *Brandenburg v. Ohio*[54] standard because those games lack a necessary speech component. In particular, in *Wilson v. Midway Games, Inc.*, [55] Judge Janet Bond Atherton wrote that "the label 'video game' is not talismanic, automatically making the object to which it is applied either speech or not speech."[56] She reasoned that "video games that are merely digitized pinball machines are not protected speech."[57] And in *James v. Meow Media, Inc.*,[58] the Sixth Circuit Court of Appeals wrote that its "decision here today should *not* be interpreted as a broad holding on the protected status of video games."[59]

Couple these statements from *Wilson* and *James* with Judge Posner's dictum a year earlier in *American Amusement Machine Ass'n v. Kendrick*[60] that regulations on video games might be permissible "if the games lacked any story line and were merely animated shooting galleries,"[61] and Federal Judge Stephen Limbaugh's opinion in April 2002 that video games are not

51. Dougherty, *supra* note 1, at 240.
52. *Id.* at 239.
53. 128 F.3d 233 (4th Cir. 1997).
54. 395 U.S. 444 (1969).
55. 198 F. Supp. 2d 167 (D. Conn. 2002).
56. *Id.* at 181.
57. *Id.*
58. 300 F.3d 683 (6th Cir. 2002).
59. *Id.* at 696 (emphasis added).
60. 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).
61. *Id.* at 579.

a form of speech protected by the First Amendment,[62] and it becomes evident that lawsuits against the manufacturers of at least *some* video games may still be viable.

To squeeze through this apparent hole in the wall of First Amendment protection, plaintiffs' attorneys would need to launch a successful argument that the particular video game at issue in a particular case, but not all video games generally, lacks a plot, storyline, or otherwise identifiable speech component. Arguments that video games as a general category or form of media product lack First Amendment protection will not suffice.

VI. CONCLUSION

Setting aside the rigid application of the tort standards of negligence and strict products liability, as well as the First Amendment's incitement-to–violence test, Could there be other more subtle societal forces at work that helped direct the courts to the results in this quartet of cases? Could it be that since the terrorist attacks on the United States on September 11, 2001, there is recognition that the forces that cause violence are far more complex than any message a movie, video game, or Web site could ever convey? Or could it be that the tragedy simply points out the reality that controlling violent forces through the regulation of media products is a futile endeavor?

The journalistic reaction to these decisions, not surprisingly, was decidedly upbeat. The *Denver Post*, lauding Judge Babcock's decision to dismiss the case in the Columbine shootings, wrote an editorial that could have been drawn from the closing argument of a media defense attorney.[63] "Judge Babcock has sealed the lid on a can of worms that shouldn't be opened, however great the grief of Columbine families may be," the newspaper opined.[64] An alternative ruling, the paper argued with a classic floodgates and parade-of-horrors logic, "would have opened the door to claiming that almost any created work that contains violence can cause criminal acts by third parties."[65]

The *Post* certainly has it right, at least from the perspective of the producers and distributors of media products. And the growing weight of judicial authority from the four cases set forth in Part II would concur. Plaintiffs will need to test new theories of liability—perhaps variations and

62. Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1135 (E.D. Mo. 2002).

63. *Editorial: Ending the Blame Game*, DENVER POST, Mar. 6, 2002, at B6.

64. *Id.*

65. *Id.*

versions of the one proposed by Professor Smolla at the 2002 Entertainment Law Symposium[66]—if they want success in the future.

66. *Supra* notes 48–52 and accompanying text.