Denver Law Review

Volume 77
Issue 4 *Symposium - Law and Policy on Youth Violence*

Article 8

January 2021

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BASKETBALL DIARIES, NATURAL BORN KILLERS AND SCHOOL SHOOTINGS: SHOULD THERE BE LIMITS ON SPEECH WHICH TRIGGERS COPYCAT VIOLENCE?

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I. INTRODUCTION

During the past five years, parents who send their children to school in the morning have had to face the grim possibility, however remote, that their children might be shot and killed by a classmate during the school day. ABC News provides a list of school shootings between 1996 and the present[1], which is as follows:

> February 19, 1997: 16 year-old Evan Ramsey opens fire with a shotgun in a common area at the Bethel, Alaska, high school, killing the principal and a student and wounding two others. He is sentenced to two 99-year terms.
>
> October 1, 1997: A 16 year-old boy in Pearl, Mississippi is accused of killing his mother, then going to Pearl High School, killing two students including his ex-girlfriend and wounding seven others. He is sentenced to life in prison.
>
> December 1, 1997: 14 year-old Michael Carneal kills three girls and wounds five others as they take part in a prayer circle in a hallway at Heath High School in West Paducah, Kentucky. Carneal pleads guilty but is mentally ill and is serving life in prison. One of the wounded girls is left paralyzed.
>
> March 24, 1998: Four girls and a teacher are shot to death and 10 others wounded during a false fire alarm at Westside Middle School in Jonesboro, Arkansas when two boys, ages 11 and 13, open fire from the woods. Both will be held in juvenile facilities while under age 21.
>
> April 24, 1998: A 14 year-old student at James W. Parker Middle School in Edinboro, Pennsylvania shoots a science teacher to death at a graduation dance.

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* The author gratefully acknowledges the assistance of Colby Rosenberg in providing many of the background materials for this article. The author would also like to thank Denver University professors Joyce Sterling and Nancy Reichman and Law Review editors Kristin Angus, Kelley Southerland, David Becker and Sumaya Vanderhorst for their many, many hours spent in organizing the March 2000 symposium on youth violence and also in editing this article.

1. *See* ABC News, *available at* http://more.abcnews.go.com/sections/us/DailyNews/schoolshootings990420.html (last visited Nov. 13, 2000).

April 28, 1998: A 14 year-old boy kills two classmates and wounds a third on the basketball court at an elementary school in Pomona, California.

May 19, 1998: An 18 year-old honor student kills a classmate who was dating his ex-girlfriend at Lincoln County High School in Fayetteville, Tennessee.

May 21, 1998: 15 year-old Kip Kinkle kills both his parents with a gun his father had bought for him; he then drives to school and opens fire in the cafeteria, killing two classmates.

April 20, 1999. Eric Harris and Dylan Klebold, wearing long black trench coats, open fire at Columbine High School in Littleton, Colorado, killing 12 students and a teacher. They then kill themselves.

November 19, 1999: A 12 year-old boy fires a .22-caliber handgun and kills a girl in his class outside a middle school in Deming, New Mexico.

December 6, 1999: 13 year-old Seth Trickey, in Fort Gibson, Oklahoma, opens fire on his classmates with his father's 9 mm semi-automatic handgun, injuring four children.[2]

February 29, 2000: A 6 year-old boy, the son of Dedric Owens, uses a .32 semi-automatic weapon to kill his classmate Kayla Rolland in front of the first-grade class in Mount Morris Township, Michigan.[3]

Following the 1997 killing spree involving Michael Carneal's shooting of three girls in West Paducah, Kentucky, the parents of the three murdered girls filed suit against the producers of the movie *The Basketball Diaries* and also against the manufacturers of a number of violent video games.[4] The parents charged the violent media content instigated copycat violence causing the murders of their daughters.[5] Although legal precedent might predict that plaintiffs who file suit against the media for violent content will not prevail because such suits are generally barred by the First Amendment, Americans who file lawsuits perhaps do so as an expression of outrage. Even though plaintiffs may realize that their chances of prevailing in court are slim, it is possible that they pursue litigation to further public discussion of causes and prevention of youth violence. This may be especially true when considering the

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2. ABC News, *available at* http://more.abcnews.gp.com/sections/us/DailyNews/schoolshootings990420.html (last visited Nov. 13, 2000).

3. ABC News, *available at* http://more.abcnews.go.com/sections/us/DailyNews/schoolshooting000303.html (last visited Nov. 13, 2000).

4. *See* Complaint, James v. Meow Media, Inc., Civil Action No. 5:99CV-0096 (U.S.D., Western Dist. Ky., Paducah Division, filed April 12, 1999.

5. Complaint, *James* (No. 5:99CV-0096).

perspective of a grieving parent who is trying to understand the loss of a cherished son or daughter.

II. DEGREE OF FIRST AMENDMENT PROTECTION

In response to lawsuits alleging copycat violence, U.S. courts have struggled to bridge two trends in law during the past two decades: 1) the expansion of the First Amendment's protection of freedom of speech; courts have more frequently intervened to prevent juries from deciding genuine issues of free speech; and 2) the liberalization of tort law in the direction of strict liability, characterized "by the gradual erosion, if not elimination, of legislative and judicial impediments to recovery for dangerously defective products."[6]

During the past two decades, a number of plaintiffs have filed negligence suits against film producers or other media. For example, plaintiffs have claimed personal injury or that a family member was injured or killed in an incident instigated by a particular Hollywood film, magazine advertisement, a rap artist's lyrics, etc. In nearly all of these cases the courts have refused to consider whether the media were "negligent," ruling instead that unless the media were guilty of "incitement" as defined by First Amendment law, the media could not be held liable for the harm or injury despite the fact that the harm mimics the medium's content. The courts have almost always concluded that to find the media negligent for allegedly inducing people to harm themselves or others would set a dangerous precedent whereby more and more people would attempt to recover damages from media outlets, claiming that they had hurt themselves or had been hurt as the result of an idea or image portrayed in the media.

In arriving at their decisions, judges have looked to various Supreme Court decisions suggesting that not all First Amendment rights are created equal; rather, there is a "hierarchy" in which some types of speech receive a greater degree of protection than others. Highest on the hierarchy is "pure" or "core" speech, involving the expression of ideas. This includes even the most inane or vulgar television program, film or rap lyrics, provided that the only purpose is entertainment or artistic expression.

Lower on the hierarchy is speech consisting of highly technical information; for example, publishers have been found liable for negligence in cases involving fatal plane crashes where the pilots had relied on inaccurate or defective aviation charts.[7] Due to the fact that aviation charts contain purely technical information, and because lives depend on their

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6. Jonathan M. Hoffman, *From Random House to Mickey Mouse: Liability for Negligent Publishing and Broadcasting*, 21 TORT & INS. L.J. 65, 77 (1985).

7. *See*, Brocklesby v. United States, 753 F.2d 794 (9th Cir. 1985), *withdrawn and amended*, 767 F.2d 1288 (9th Cir. 1985), *and cert. denied*, 474 U.S. 1101 (1986).

accuracy, courts have ruled that such charts have the legal status of a navigation tool such as a compass. In other words, courts have shown little concern for protecting the publishers' freedom of speech or freedom to err in publishing faulty aviation charts.[8] Lower courts have disagreed, however, about whether publishers of science textbooks, cookbooks, "how-to" books, informational brochures, mushroom encyclopedias or chemical encyclopedias should be liable if plaintiffs have been injured while trying to follow the instructions.[9] The most recent case involving a "how-to" book is *Rice v. Paladin Enterprises, Inc.*,[10] which involved a book instructing hitmen on how to commit murder-for-hire without getting caught.[11] A hitman followed the book's step-by-step instructions to kill two women and a child.[12] Because these technical information or "how-to" cases pose slightly different legal questions, they will not be the focus of the current discussion; rather will focus solely on "pure" or "core" speech involving media entertainment, and upon commercial speech.

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8. *See, e.g., Brocklesby*, 753 F.2d at 794, *withdrawn and amended*, 767 F.2d 1288 (9th Cir. 1985), *and cert. denied*, 474 U.S. 1101 (1986); Saloomey v. Jeppesen & Co., 707 F.2d 671 (2nd Cir. 1983); Aetna Cas. & Sur. Co. v. Jeppesen & Co., 642 F.2d 339 (9th Cir. 1981); Reminga v. United States, 631 F.2d 449 (6th Cir. 1980); Times Mirror Co. v. Sisk, 593 P.2d 924 (Ariz. Ct. App. 1978); Fluor Corp. v. Jeppesen Co., 216 Cal. Rptr. 68 (Cal. Ct. App. 1985).

9. *See, e.g.*, Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034 (9th Cir. 1991) (plaintiffs not entitled to recovery after becoming severely ill from eating mushrooms, based on information published by defendant's mushroom encyclopedia because "[t]he language of products liability law reflects its focus on tangible items"); Carter v. Rand McNally, No. 76-1864-F (D.Mass. 1980); Bertrand v. Rand McNally, No. 77-957-M (D. Mass. 1980); Jones v. J.B. Lippincott Co., 694 F.Supp. 1216, 1216-18 (D. Md. 1988) (nursing student who treated herself for constipation by taking an enema consisting of hydrogen peroxide after consulting medical textbook not entitled to recovery because publisher's conduct limited to publishing, not authoring of subject in question); Lewin v. McCreight, 655 F.Supp. 282, 283 (E.D. Mich. 1987) (publisher of "how to" book not held liable where supplied information is merely a compilation of third-party authors); Demuth Dev. Corp v. Merck & Co., 432 F.Supp. 990, 993 (E.D.N.Y. 1977) (publisher not held liable for plaintiff's loss of sales based on publisher's misstatement about a chemical plaintiff produced because no contractual relationship or other duty existed between defendant and plaintiff); Cardozo v. True, 342 So.2d 1053, 1056 (Fla. Dist. Ct. App. 1977) (liability without fault held inappropriate in an action against one passing on printed words without opportunity to investigate them), *cert. denied*, 353 So.2d 674 (Fla. 1977); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263 (Ill. App. Ct. 1985) (plaintiff injured when following instructions of "how to" had no cause of action for negligence; adverse effect of such liability upon public's access to ideas considered too high a price to pay); Walter v. Bauer, 439 N.Y.S.2d 821, 822-23 (N.Y. 1981) (defendant not held liable for production of a book describing a science experiment involving rubber bands resulting in eye injury to infant student because the plaintiff was not injured by use of the book for the reading purposes for which it was designed); Roman v. City of N.Y., 442 N.Y.S.2d 945, 948 (N.Y. 1981) ("[o]ne who publishes a text cannot be said to assume liability for all 'misstatements' . . . to a potentially unlimited public for a potentially unlimited period"); Smith v. Linn, 563 A.2d 123, 126 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991) (court rejects strict liability theory because it refuses to recognize a "book" as a product under RESTATEMENT (SECOND) OF TORTS § 402A).

10. 940 F.Supp. 836 (D. Md. 1996), *rev'd*, Rice v. Paladin Enters., 128 F.3d 233 (4th Cir. 1997), *and cert. denied*, Paladin Enters. v. Rice, 523 U.S. 1074 (1998).

11. *Rice*, 940 F.Supp. at 838-40.

12. *See id.* at 838.

Commercial speech is lower on the hierarchy than pure speech and speech involving technical information. Until recently, commercial speech was entirely unprotected by the First Amendment, and "business advertising that [did] no more than solicit a commercial transaction [could] be regulated by government on the same terms as any other aspect of the marketplace."[13]

More recently, however, the Supreme Court has recognized that the First Amendment provides a degree of protection to commercial speech,[14] but it has distinguished commercial advertisements from "core" speech in that they contain no "ideological expression" and are not "integrally related to the exposition of thought."[15] The Supreme Court has further explained that it "[has] afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."[16] Commercial speech is also given less rigorous protection because the speakers "are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity."[17]

Lowest of all on the hierarchy is obscenity, which in theory receives no First Amendment protection,[18] although it does in practice because courts find it difficult to define what is obscene. There have been a few copycat cases in which children have imitated either consensual or forced sex portrayed in "dial-a-porn" audiotapes the children listened to when dialing 900-numbers.[19] Because these cases have been analyzed elsewhere,[20] again, the current discussion will not cover technical information or obscenity cases against the media, but will focus solely on "pure" and commercial speech.

Thus, in dealing with the question of whether various media outlets have been negligent, or whether media content has incited individuals to

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13. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5 (1979).

14. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976).

15. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 779-81.

16. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

17. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 n.6 (1980) (citing Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977)).

18. *See* Miller v. California, 413 U.S. 15, 23 (1973).

19. *In re* Sean Matte, File No. 88127180 (P.Ct., Genesee, Mich., Dec. 14, 1988); *In re* Nicole Matte, File No. 88127181 (P. Ct., Genesee, Mich., Dec. 14, 1988); Brian T. v. Pacific Bell, No. CH 128655-7 (Cal. Super. Ct., S.D. Alameda County 1988); *In re* Audio Enterprises Inc., Apparent Liability for Forfeiture, Order and Consent Decree, 3 F.C.C.R. 88-389 at 7063 (1988); *In re* Intercambio, Inc., Apparent Liability for Forfeiture, Memorandum and Order, 4 F.C.C.R. FCC 89-273 at 6860 (1989).

20. *See* Juliet Dee, *"To Avoid Charges of Indecency, Please Hang Up Now:" An Analysis of Legislation and Litigation Involving Dial-a-Porn*, 16 COMM. & THE LAW 3 (1995).

commit violence against themselves or others, courts have considered the type of speech involved and its position on the "hierarchy" of protected speech.

There are numerous cases in which plaintiffs have had no trouble documenting that an act of violence was inspired by certain media content. But in order to win against media defendants in court, plaintiffs must prove that the media content "incited" the act of violence.

There are two clear conditions necessary to produce a conviction for incitement. The Supreme Court outlined these conditions in *Brandenburg v. Ohio*,[21] in which it overturned the conviction of a Ku Klux Klansman for a speech demanding "revengeance" against blacks.[22] The Court specified the conditions that must be present in tandem before an incitement conviction can be upheld: 1) the danger of lawless action must be immediate ("imminent") and likely; and 2) the speech is "directed to inciting or producing" such lawless action.[23]

Brandenburg demonstrates that the constitutional guarantees of free speech and free press do not permit States to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

The *Brandenburg* decision thus requires an analysis of every situation in which speech might be punished. It is exceedingly difficult, if not impossible, for plaintiffs to prove, however, that the media outlet intended for the violence to occur, thus resulting in a failure to meet the second part of the *Brandenburg* test and a judgment in favor of the media defendant. In a few cases, however, courts have permitted these cases to proceed to trial.

III. COMMERCIAL SPEECH

Because courts rely on precedent in arriving at their decisions, it is helpful to briefly consider previously decided cases. Because these cases have been thoroughly discussed and analyzed elsewhere,[24] the following outline simply lists the cases with a parenthetical note regarding the outcome. Our discussion begins with the commercial speech cases, which are lower on the hierarchy of protected speech than the cases involving "pure speech."

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21. 395 U.S. 444 (1969).

22. *See Brandenburg*, 395 U.S. at 446.

23. *Id.* at 447.

24. *See* Hoffman, *supra* note 3; Juliet Dee, *From "Pure Speech" to Dial-a-Porn: Negligence, First Amendment Law and the Hierarchy of Protected Speech,"* 13 COMM. & THE LAW 27 (1991).

A. *Earlier Cases Involving Commercial Speech*

The cases outlined below comprise the precedents to which courts will turn in future cases alleging media liability for commercial speech content. *Hanberry v. Hearst*;[25] *Yuhas v. Mudge*;[26] *Weirum v. RKO General*;[27] *Libertelli v. Hoffman-LaRouche*[28]; *Walters v. Seventeen Magazine*[29]; *Norwood v. Soldier of Fortune Magazine*[30]; *Eimann v. Soldier of Fortune Magazine*[31]; *Sakon v. Pepsico Inc.*;[32] and *Braun v. Soldier of Fortune Magazine*.[33]

The most recent of these cases involving commercial speech is *Way v. Boy Scouts of America*,[34] discussed in detail below.

B. *Way v. Boy Scouts of America (1993)*[35]

On November 19, 1988, 12 year-old Rocky Miller and his friends were experimenting with an old rifle that accidentally discharged and killed Rocky. His friends testified that the three of them had been reading a 16-page advertising supplement on shooting sports in the September 1988 issue of *Boys' Life* magazine published by the Boy Scouts of America; the ad supplement motivated them to experiment with the rifle

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25. 81 Cal. Rptr. 519, 521 (Cal. Ct. App. 1969) (plaintiff prevailed in negligence suit against *Good Housekeeping* magazine which had endorsed shoes alleged to be slippery and defective).

26. 322 A.2d 824, 824-25 (N.J. Super. Ct. 1974) (court granted summary judgment to publisher of *Popular Mechanics* magazine following negligence suit by father whose two sons were injured by fireworks advertised in the magazine).

27. 539 P.2d 36, 37, 40 (Cal. 1975) (radio station held liable for inciting teenagers to speed in pursuit of station's DJ who was driving Los Angeles freeways; court held KHJ liable because such injury was foreseeable; two speeding teenagers responding to radio content negligently caused death of Ronald Weirum, a separate freeway driver).

28. 7 Media L. Rptr. 1734 (S.D.N.Y. 1981) (court held that Hoffman-LaRouse had no duty of care to plaintiff who had been addicted to valium advertised in *Physician's Desk Reference*).

29. 241 Cal. Rptr. 101, 101-03. (Cal. Ct. App. 1987) (court found in favor of *Seventeen Magazine* following negligence suit by plaintiff who suffered from toxic shock after using Playtex tampons advertised in magazine).

30. 651 F. Supp 1397, 1397-98, 1403 (W.D. Ark. 1987) (court reversed defendant's previous summary judgment victory finding that defendant's advertisements had a substantial probability of causing harm to an individual; plaintiff filed negligence suit against *Soldier of Fortune* magazine after he survived shooting by a hitman hired through the magazine's classified ads).

31. 880 F.2d 830 (5th Cir. 1989) (Fifth Circuit found in favor of *Soldier of Fortune Magazine* following claim of negligence by survivors of woman whose husband had responded to classified ad in magazine to hire hitman to kill her; Court held that burden on publishers to investigate all classified ads would be too great).

32. 17 Media L. Rptr. 1277 (Fla. Sup. Ct. 1989) (court found in favor of Pepsico following negligence suit by fourteen-year-old boy who broke his neck while imitating bicycle jump in Mountain Dew television commercial).

33. 749 F. Supp. 1083 (M.D. Ala. 1990), *aff'd*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1028 (1993) (jury found *Soldier of Fortune Magazine* negligent for publishing classified ad which led conspirators to a hitman who murdered Richard Braun; U.S. Court of Appeals for the Eleventh Circuit affirmed; U.S. Supreme Court declined to review case).

34. 856 S.W.2d 230; 21 Media L. Rptr. 1684 (Tex. App. 1993).

35. *Id.*

that killed Rocky. Rocky's mother filed charges of negligence against the Boy Scouts, the National Shooting Sports Foundation that sponsored the ad supplement, and Remington Arms Company, which had placed an ad in the supplement. Her attorney Windle Turley charged that *Boys' Life* had breached a special duty to minors and was negligent per se because the ad supplement constituted an illegal offer to sell firearms to minors in violation of the Texas Penal Code. Turley also pursued a product liability argument, charging that the ad supplement was a defective product without proper warnings.[36]

The defendants argued that the ad supplement was protected by the First Amendment and moved for summary judgment.[37]In response, Turley argued that the gun supplement created a "foreseeable risk of harm" and "incited" Rocky Miller to action.[38] Turley pointed out that *Boys' Life*, whose subscribers range in age from nine to fourteen, had received complaints from parents over the years regarding the Shooting Sports supplement; furthermore, the Boy Scouts do not allow ads for alcohol, judo, karate, tobacco, handguns or movies other than those with "G" ratings in *Boys' Life* because "they reasonably foresee the danger [such ads] would pose to impressionable young boys . . . . Clearly, if the Boy Scouts foresaw [these dangers], they should have reasonably foreseen that promoting guns to minors might present a risk of harm."[39] Turley rejected the First Amendment defense, insisting: "Neither commercial free speech, nor any other principal of statutory, common or moral law gives a right to immunity if you peddle guns to kids . . . . It is unlawful to even offer to sell guns to children as the defendant . . . has done."[40]

Repeating their request for a summary judgment, the defendants cited *Herceg v. Hustler*,[41] *Eimann v. Soldier of Fortune Magazine*,[42] *Walters v. Seventeen Magazine*,[43] *Yuhas v. Mudge*,[44] *Sakon v. Pepsico*,[45] and other cases in which courts held that the contested speech was protected by the First Amendment.[46] The defendants argued that the ad supplement constituted pure speech rather than commercial speech because the supplement contained "articles" on how to get started in the shooting

36. *See id.* at 232

37. Defendant Boy Scouts of America's Motion for Summary Judgment, Way v. Boy Scouts of America, 856 S.W.2d 230 (Tex. App. 1993) (No. 90-12265).

38. Plaintiff's Response and Brief in Support to Defendant Boy Scouts of America's Motion for Summary Judgment at 7-8, Way v. Boy Scouts of America, 856 S.W.2d 230 (Tex. App. 1993) (No. 90-12265-B).

39. *Id.* at 27-29.

40. *Id.* at 28-29.

41. 814 F.2d 1017 (5th Cir. 1987).

42. 880 F.2d 830 (5th Cir. 1989).

43. 241 Cal. Rptr. 101 (Cal. Ct. App. 1987).

44. 322 A.2d 824 (N.J. Super. Ct. 1974).

45. 553 So.2d 163 (Fla. 1989).

46. Defendant Boy Scouts of America's Brief in Support of Its Motion for Summary Judgment at 3-9, Way v. Boy Scouts of America, 856 S.W.2d 230 (Tex. App. 1993) (No. 90-12265).

sports.[47] However, earlier the defendants had admitted that the supplement was an advertisement; the words "advertisement" are written in 6-point type on the "editorial" portions of the supplement but not on the ads themselves, which comprise 10 of the supplement's 16 pages. The 6-point type is so small that it is nearly invisible, apparently unintended to be seen by the reader.[48]

The defendants also argued that if the Boy Scouts were found negligent for printing the ad supplement, it could set a precedent for publishers to be held liable for printing ads or articles about skiing, football, swimming or snorkeling, all of which entail some risk of injury.[49] The defendants also rejected the plaintiff's charge that they were offering to sell guns to minors, pointing out that the Texas Penal Code forbids the transfer of weapons to minors, referring to individual transactions rather than general-purpose advertising to the public.[50]

In 1991 the Texas District Court granted a summary judgment for the Boy Scouts, but Turley immediately filed an appeal. In 1993 the Court of Appeals of Texas (Fifth District) applied a risk-utility equation, but concluded that the social utility of the advertising supplement outweighed the risks because the court interpreted the ads as promoting "safe and responsible use of firearms . . . calculated to lessen the possibility of accidental death caused by a child's use of firearms."[51] Finding that the risk of injury from reading the ad supplement was not sufficiently foreseeable to outweigh the social utility of discussing the proper use of firearms, the court dismissed the negligence claim against the defendants. Rocky Miller's mother did not pursue an appeal.

IV. PURE OR CORE SPEECH CASES

Whereas courts are slightly less willing to extend First Amendment protection to commercial speech, it is well established that "pure" or "core" speech such as that designed to entertain, as in movies or even rap lyrics, receives the highest level of First Amendment protection. In considering those cases in which media allegedly instigated copycat violence, one notes that in one type of case, a child imitating a media stunt injured or killed himself, whereas in a second type of case, a teenager who had watched a violent film then intentionally injured or killed an innocent third party. The cases in which a child injured or killed himself rather than an innocent third party are outlined as follows:

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47. *See id.* at 25.

48. *See* Plaintiff's Response and Brief in Support to Defendant Boy Scouts of America's Motion for Summary Judgment at 25, Way v. Boy Scouts of America, 856 S.W.2d 230 (Tex. App. 1993) (No. 90-12265-B).

49. *See* Defendant Boy Scouts of America's Brief in Support of Its Motion for Summary Judgment at 27, Way v. Boy Scouts of America, 856 S.W.2d 230 (Tex. App. 1993) (No. 90-12265).

50. *See id.* at 34.

51. Way v. Boy Scouts of America, 856 S.W.2d 230, 236 (1993 Tex. App.).

A. *Earlier Cases in Which a Child Injured or Killed Himself*

1981 *Shannon v. Walt Disney Productions*[52] (11 year-old Craig Shannon followed suggestion of actor on The Mickey Mouse Club Show to put BBs in balloon, but balloon burst and propelled piece of lead into his eye, partially blinding him; parents sued for negligence but lost).

1982 *DeFilippo v. National Broadcasting Co.*[53] (13 year-old Nicholas DeFilippo accidentally hanged himself while attempting to imitate stunt hanging on *Johnny Carson's Tonight Show*; parents sued NBC for negligence but NBC prevailed).

1984 *Nezworski v. ABC and Hanna-Barbera Productions*[54] (6 year-old Jeremy Nezworski imitated cartoon hanging on *The Scooby Doo Show* and killed himself by accident; mother sued ABC and Hanna-Barbera for negligence and won out-of-court settlement).

1984 *Pulling v. TSR Hobbies*[55] (16 year-old Irving Pulling shot himself after allegedly experiencing "extreme emotional and psychological stress" from playing Dungeons and Dragons, but court granted summary judgment for TSR Hobbies).

1987 *Herceg v. Hustler Magazine*[56] (14 year-old Troy Dunaway accidentally hanged himself after reading *Hustler* magazine article on autoerotic asphyxiation; mother sued *Hustler* for incitement; mother prevailed in jury trial, but *Hustler* prevailed on appeal).

1988 *McCollum v. CBS Records*[57] (19 year-old John McCollum shot himself after listening to Ozzy Osbourne's music for five hours; father sued Ozzy Osbourne and CBS Records for negligence and later for incitement, but court ruled in favor of Osbourne and CBS Records).

1990 *Watters v. TSR, Inc.*[58] (minor Johnny Burnett killed himself after allegedly being "driven to self-destruction" as a result of playing Dungeons and Dragons; mother sued TSR for negligence but Sixth Circuit upheld lower court's grant of summary judgment for TSR, Inc.)

1990 *Vance v. Judas Priest*[59] and *Judas Priest v. Second Judicial District Court*[60] (19 year-old James Vance and 18 year-old Raymond

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52. 275 S.E.2d 121 (Ga. Ct. App. 1980), *reversed*, 276 S.E.2d 580 (Ga. 1981).

53. 446 A.2d 1036 (R.I. 1982).

54. Nezworski v. American Broadcasting Companies, No. G83-202 (Cir. Ct., Gogebic County, Mich., filed May 8, 1984).

55. Pulling v. TSR Hobbies, Inc., No. L-68-84 (Cir. Ct., Hanover County, Va., filed Oct. 10, 1984).

56. 814 F.2d 1017 (5th Cir. 1987).

57. 249 Cal. Rptr. 187 (Cal. App. 1988).

58. 904 F.2d 378 (6th Cir. 1990).

59. 1990 WL 130920 (Nev. Dist. Ct. 1990).

60. 104 Nev. 424; 760 P.2d 137; 15 Media L. Rep. 2010 (1988).

Belknap shot themselves in the head after listening to heavy metal music of Judas Priest; Belknap died but Vance survived; Vance and Belknap's mother sued Judas Priest and CBS Records for negligence, but court ruled in favor of Judas Priest and CBS Records).

1992 *Waller v. Ozzy Osbourne*[61] (16 year-old Michael Waller committed suicide after listening to Ozzy Osbourne's music for several hours; parents sued Ozzy Osbourne and CBS Records for negligence, but CBS Records prevailed).

1992 *Hamilton v. Osbourne*[62] (17 year-old Harold Hamilton committed suicide after listening to Ozzy Osbourne's music; mother sued Ozzy Osbourne and CBS Records for negligence, but Osbourne and CBS Records prevailed).

B. *Earlier Cases in Which a Teenager Hurt or Killed a Third Party*

A second type of case implicating pure or core speech involves situations in which violent media content allegedly triggers a child or teenager to injure or kill a third-party victim. Cases involving innocent third parties are outlined as follows:

1979 *Zamora v. Columbia Broadcasting System*[63] (15 year-old boy charged that CBS, NBC and ABC were negligent in airing so much televised violence that he had become desensitized to real-life violence and therefore shot to death his 83 year-old neighbor while burglarizing her home; court ruled in favor of defendant networks).

1981 *Olivia N. v. National Broadcasting Co.*[64] (mother of Olivia Niemi charged that NBC was negligent in airing *Born Innocent*, which portrayed graphic rape in girl's reform school and which instigated four teenagers to "rape" 9 year-old Olivia Niemi and a 7 year-old friend with a beer bottle four days after *Born Innocent* was broadcast; NBC prevailed).

1982 *Bill v. Superior Court*[65] (minor Jocelyn Vargas, who was shot after seeing "gang movie" *Boulevard Nights*, claimed that the movie producer was negligent in failing to warn her that the movie would attract viewers prone to violence; movie producer Tony Bill prevailed).

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61. 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992) (unpublished opinion).

62. 958 F.2d 1084 (11th Cir. 1992) (unpublished opinion), combined with Waller v. Osbourne, 958 F.2d 1084 (11th Cir. 1992) (unpublished opinion).

63. 480 F. Supp. 199 (S.D. Fla 1979).

64. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

65. 137 Cal. App. 3d 1002; 8 Media L. Rptr. 2622 (1982).

1984 *State of Florida v. Nelson Molina*[66] (Nelson Molina held down 10 year-old Karla Gottfried while her 16 year-old step-brother stabbed her to death; Molina's defense attorney argued that Molina was desensitized to violence by comedy film *Love at First Bite*; Molina was nonetheless convicted).

1989 *Yakubowicz v. Paramount Pictures Corp.*[67] (16 year-old Michael Barrett stabbed 16 year-old Martin Yakubowicz to death after Barrett watched "gang movie" *The Warriors*; parents of Yakubowicz sued Paramount for negligence, but Paramount prevailed).

1990 *Lugo v. LJN Toys*[68] (8 year-old Brian Franks threw spinning blade from "Voltron" toy, permanently damaging eye of 6 year-old Yessenia Lugo; mother sued for negligence; mother of girl won out-of-court settlement from LJN Toys).

C. *Cases Alleging that* Boyz 'n' the Hood *Incited Violence*

Three years after Martin Yakubowicz' parents sued Paramount unsuccessfully after Michael Barrett stabbed their son to death at the alleged instigation of the movie *The Warriors*, Columbia Pictures Industries distributed the film *Boyz 'n' the Hood*. In two separate screenings of the film, Alejandro Phillips and Jon Lewis were shot and seriously injured. Phillips and Lewis later filed two separate lawsuits; in both cases, the shooting victims charged that the advertising campaign for the film was designed to attract movie viewers with violent tendencies.

1. *Phillips v. Syufy Enterprises, Columbia Pictures Industries, Inc. et al* (1992)[69]

At a screening of the feature film *Boyz 'n' the Hood* in California in 1992, Alejandro Phillips was shot and seriously injured by an unknown assailant. He subsequently sued Syufy Enterprises (the movie theater's security service) and Columbia Pictures Industries, charging that Columbia Pictures had created an advertising campaign for *Boyz 'n' the Hood* which "was likely to incite violent and lawless activity during public screenings of the film."[70] Columbia Pictures filed a demurrer, and the California Superior Court of Contra Costa County ruled in its favor, finding that the First Amendment insulated Columbia Pictures from a lawsuit based on content of the ad campaign for the movie.

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66. No. 84-2314B (11th Jud. Dist., Dade County, Fla.) (Filed Oct. 19, 1984).
67. 536 N.E.2d 1067 (Mass. 1989).
68. 75 N.Y.2d 850; 552 N.E.2d 162; 552 N.Y.S.2d 914 (N.Y. 1990).
69. 20 Media L. Rptr. 1199 (1992).
70. *Id.* at 1199.

2. *Lewis v. Columbia Pictures Industries, Inc.* (1994)[71]

Just as Alejandro Phillips had been shot, Jon Lewis was shot and seriously injured at another screening of *Boyz 'n' the Hood* in Chino, California in 1994. Like Phillips, Lewis sued Columbia Pictures Industries and also charged that Columbia Pictures' advertising campaign was negligent and was also "likely to incite and produce violence and lawless activity during public screenings of the film."[72] The California Superior Court of San Bernardino County sustained Columbia Pictures' demurrer, but Lewis appealed to the California Court of Appeal, Fourth District. Lewis emphasized his argument that the shooting was foreseeable because Columbia Pictures had informed theater owners of the potential for violence at screenings of *Boyz 'n' the Hood* and had offered to pay for extra security precautions at certain movie theaters. But the California Court of Appeal held that all advertisements for *Boyz 'n' the Hood* were protected by the First Amendment. The court also considered the question of whether Columbia Pictures owed a duty of care to Lewis, but concluded that "To impose upon the producers of a motion picture the sort of liability for which plaintiffs contend in this case would...permit [people who react violently to movies] to dictate, in effect, what is shown in the theaters of our land."[73] Allowing liability for the advertisements for movies would result in a heavy burden on the movie industry, the court explained. "Predicting when or where individuals . . . might react violently to an advertisement for a movie would prove difficult, if not impossible, in our violence-prone society. Moreover, the fact that Columbia warned movie theater owners of potential violence and offered to assist in security measures at certain theaters does not impose a duty on Columbia."[74] The court concluded that "the violent actions allegedly in response to Columbia's advertisements for *Boyz 'n' the Hood* were not foreseeable; therefore, Columbia had no duty to Lewis."[75] The court thus affirmed the lower court's judgment sustaining Columbia Pictures' demurrer without leave to amend, and Lewis did not appeal.

D. *Davidson v. Time Warner (1997)*[76]

Unlike *Way* which involves a magazine advertising supplement, or *Phillips* and *Lewis*, which involve a feature film, *Davidson v. Time Warner, Inc.* involves the rap music lyrics of the late rapper Tupac Shakur. In April 1992, Ronald Howard was driving a stolen car through Jackson County, Texas. Officer Bill Davidson, a state trooper, stopped Howard for a possible traffic violation, not knowing that the car was stolen.

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71. 23 Media L. Rptr 1052 (1994).
72. *Id.* at 1053.
73. *Id.* at 1056 (citing Bill v. Superior Court, 137 Cal. App. 3d 1002 (1982).
74. *Id.* at 1056.
75. *Id.*
76. 25 Media L. Rptr. 1705 (S.D. Tex. 1997).

Howard fatally shot Officer Davidson with a 9-millimeter Glock pistol. At the time of the shooting, Howard was listening to a pirated audiocassette of *2Pacalypse Now*, a recording performed by Tupac Amaru Shakur and produced by Interscope Records and Atlantic Records. In an attempt to avoid the death penalty, Howard claimed that listening to *2Pacalypse Now* had incited him to shoot Officer Davidson. (Despite Howard's claim, the jury sentenced Howard to death.) Bill Davidson's widow Linda Davidson sued Time Warner, Tupac Shakur, Interscope Records and Atlantic Records, claiming that *2Pacalypse Now* incited Howard to murder Officer Davidson. Her attorney pointed to one rap number, "Crooked Ass Nigga," which glorifies the shooting of police officers. The lyrics in question are as follows:

> Now I could be a crooked nigga too
> When I'm rollin' with my crew
> Watch what crooked niggas do
> I got a 9-millimeter Glock pistol
> I'm ready to get with you at the trip of the whistle
> So make your move and act like you wanna flip
> I fired 13 shots and popped another clip
> My brain locks, my Glock's like a f—ckin' mop,
> The more I shot, the more mothaf—ka's dropped
> And even cops got shot when they rolled up.[77]

The U.S. District Court for the Southern District of Texas, Victoria Division, immediately granted the motions of Time Warner and Tupac Shakur to dismiss for lack of personal jurisdiction, but it considered the claims against Interscope Records and the Atlantic Recording Corporation.[78] The court dismissed the negligence claim, finding that the defendants could not reasonably foresee that distribution of *2Pacalypse Now* would result in the murder of a state trooper. The court declined to find *2Pacalypse Now* obscene.

Citing many of the cases outlined above, such as *Eimann*, *Way*, *Sakon*, *Herceg*, *McCollum*, *Waller*, *DeFilippo*, *Shannon*, *Bill*, and *Yakubowicz*, the court declined to find that the lyrics of "Crooked Ass Nigga" constituted incitement under the *Brandenburg* test. The court noted that *2Pacalypse Now* had been released three years before Officer Davidson was fatally shot, and of the 400,000 sales of the album, no one except Linda Davidson had claimed that the recording incited listeners to shoot police officers. The court's analysis of *2Pacalypse Now* in light of

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77. *Id.* at 1707 n.4.

78. In its decision the court noted that after Time Warner had filed its motion to dismiss, Tupac Shakur himself was killed in a drive-by shooting in September 1996. The court further noted, however, that Shakur's death would not affect the substance of its decision. Davidson v. Time Warner, Inc., 25 Media L. Rptr. 1705, 1706 n.1 (S.D. Tex. 1997).

the *Brandenburg* test was surprisingly different from all preceding media liability cases, however, in which courts had always declined to find that the songwriter or screenwriter had not intended for violence to result. In contrast, the U.S. District Court for the Southern District of Texas conceded that "the Davidsons may have shown that Shakur intended to produce imminent lawless conduct."[79] As evidence of Shakur's intent, the court cited two interviews with Shakur. In the first interview, Shakur said: "I think of me as fighting for the black man . . . . I'd rather die than go to jail."[80] In the second interview, Shakur said:

> 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.[81]

This admission of possible intent on Shakur's part meant that *2Pacalypse Now* might have met one prong of the *Brandenburg* test for incitement, but the court quickly qualified its admission, finding that "the Davidsons cannot show that Howard's violent conduct was an imminent and likely result of listening to Shakur's ["Crooked Ass Nigga."][82] Thus, even if the rap number met the second prong of the *Brandenburg* test, it did not meet the first prong.

The court explained that to assume that Davidson was killed because Howard was listening to *2Pacalypse Now* would be to commit the fallacy of *post hoc ergo propter hoc*. It was more likely that Howard shot and killed Davidson in order to avoid being arrested for driving a stolen car. Thus, although the court described the lyrics of *2Pacalypse Now* as disgusting and offensive, it nonetheless held that the lyrics were protected by the First Amendment, and dismissed Linda Davidson's case.

E. *Cases Alleging that* Natural Born Killers *Incited Murders*

There have been two lawsuits against Warner Brothers and movie producer Oliver Stone alleging that Stone's film *Natural Born Killers* incited a series of murders in real life. Like the two cases involving *Boyz 'n' the Hood*, the two cases involving *Natural Born Killers* were both dismissed on First Amendment grounds.

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79. *Davidson*, 25 Media L. Rptr. at 1722.
80. *Id.* at 1722 n.24.
81. *Id.*
82. *Id.* at 1722.

1. *Miller v. Warner Brothers* (1997)[83]

After repeatedly watching *Natural Born Killers*, Ronnie Beasley and Angela Crosby apparently tried to emulate the young couple in the film by going on a crime spree which included kidnapping, car-jacking, theft and murder. They shot and killed Olin Miller. After Beasley and Crosby were apprehended, they wrote each other letters signed "Mickey" or "Mallory," who were the two characters in *Natural Born Killers*. Miller's widow Margo Miller filed a wrongful death action against Time Warner Entertainment Company, Warner Home Video, Inc. and Warner Brothers, arguing that *Natural Born Killers* was the proximate cause of her husband's murder. The trial court dismissed her complaint for failure to state a claim upon which relief could be granted. Miller appealed, but the Court of Appeals of Georgia upheld the trial court's dismissal of the case.[84]

2. *Byers v. Edmondson* (1999)[85]

In March 1995 Sarah Edmondson and her boyfriend Benjamin Darrus watched *Natural Born Killers* "more than 20 times." Then they went on a crime spree in which they shot and killed the owner of a Mississippi cotton gin and then shot convenience store clerk Patsy Byers, leaving her a paraplegic. Byers filed suit against Time Warner and Oliver Stone, the producer of *Natural Born Killers*, arguing that "the Hollywood defendants" should be held liable for distributing "a film which glorified the type of violence [Edmondson and Darrus] committed against Byers by treating individuals who commit such violence as celebrities and heroes."[86] Byers essentially contended that Time Warner and Oliver Stone owed her a duty to not produce *Natural Born Killers*, or, failing that, to protect her from viewers who would imitate the violent acts or crimes committed by the film's two main characters. Patsy Ann Byers also charged the filmmaker with incitement: "Defendants are liable . . . for producing a film . . . which they intended . . . would cause or incite persons such as defendants Sarah Edmondson and Benjamin Darrus (via . . . glorification of violent acts) to begin shortly after repeatedly viewing same, a crime spree such as that which led to the shooting of Patsy Ann Byers."[87] The court ruminated over the question of intent: "If in fact [Byers] can prove the allegation that the Warner defendants . . . *intended* to urge viewers to imitate the criminal conduct of `Mickey and Mallory' .

83. 492 S.E.2d 353 (1997).

84. *Miller*, 492 S.E.2d at 353.

85. 712 So.2d 681 (La. Ct. App. 1998), *writ denied*, 726 So.2d 29 (La. 1998), *cert. denied sub nom.* Time Warner Entertainment Co., L.P. v. Byers, 19 S. Ct. 1143 (1999).

86. *Byers*, 712 So.2d at 684.

87. *Id.* at 685.

. . then the risk of harm to a person such as Byers would be imminently foreseeable."[88]

After considering *Bill*[89] and *Yakubowicz*,[90] both of which involved shootings of innocent third parties after the shooters had seen a movie glorifying gang violence, the court found that Byers had pleaded a cognizable cause of action under Louisiana law. The court relied most heavily on the Fourth Circuit's decision in *Rice v. Paladin Enterprises, Inc.*[91] In *Rice*, the U.S. Court of Appeals for the Fourth Circuit ruled that Paladin Press' book *Hitman: A Manual for Independent Contractors* did not necessarily comprise speech protected by the First Amendment. (In *Rice*, a hitman followed over twenty-seven specific "how-to" steps outlined in the book during his brutal murder of a mother, her son, and the son's full-time nurse); rather, the Fourth Circuit ruled that the case could proceed to trial, the U.S. Supreme Court denied certiorari, and Paladin Press finally settled with the survivors of the hitman's three victims on the day before the case was scheduled to go to trial.[92] In Byers, the Court of Appeal of Louisiana, First Circuit, cited *Rice*, in which the Fourth Circuit explained:

> Where the intentional, deliberative infliction of suffering and agony has the goal of emulation, such a product does not free from the specter of "liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment."[93]

Although judges in all the other cases outlined here watched the movies or listened to the rap songs alleged to incite violence, in *Byers*, strangely, the decision made it clear that the video of *Natural Born Killers* was not before the court; in other words, the court did not have access to the speech.

After the appellate court in Louisiana ruled that Byers could proceed to trial, Time Warner and Oliver Stone appealed to the U.S. Supreme Court for certiorari, but the High Court declined to hear the case in March 1999, so the case proceeded to the discovery phase.

Entertainment lawyer Michael Kernan criticized the court's decision in *Byers*, arguing that

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88. *Id.* at 688.

89. 137 Cal. App. 3d 1002 (1982).

90. 536 N.E.2d 1067 (Mass. 1989).

91. 940 F. Supp. 836, *rev'd*, 128 F.3d 233, (4th Cir. 1997), *and cert. denied*, 118 S. Ct. 1515 (1998).

92. For a comprehensive discussion of Rice v. Paladin Enterprises, Inc. 940 F.Supp 836, *rev'd*, 128 F.3d 233 (4th Cir. 1997), *and cert. denied*, 118 S.Ct. 1515 (1998), see ROD SMOLLA, DELIBERATE INTENT: A LAWYER TELLS THE TRUE STORY OF MURDER BY THE BOOK (1999).

93. *Byers v. Edmondson*, 712 So.2d 681, 692 (1998) (citing Rice v. Paladin Enterprises, Inc., 128 F.3d 233 at 248 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998)).

> The *Byers* court drafted an ambiguous opinion—with no clear test—under which any author, composer or filmmaker can be held liable. Yet, unlike the *McCollum* court, and unlike the *Paladin* court, the *Byers* court did not in any way analyze the speech within the film . . . . Thus, under the *Byers* test, any song, book or film can face tort liability—as long as there is a conclusory pleading—because there is no analysis of the speech . . . . At the time Mark David Chapman murdered John Lennon, he was holding a copy of *The Catcher in the Rye* by J.D. Salinger. Under the *Byers* opinion, assuming John Lennon's heirs followed the conclusory pleading format in [*Byers*], J. D. Salinger could be forced to face litigation for *The Catcher in the Rye*.[94]

Kernan objected to the "conclusory pleading" in the *Byers* complaint, arguing that the complaint "merely claims in conclusory terms that Oliver Stone and the other film producers intended to incite and intentionally cause injury."[95] Under the *Brandenburg* test, Kernan explains, Patsy Ann Byers would have to allege specific facts to show that "Oliver Stone intended to cause Byers' injury and made [*Natural Born Killers*] for that purpose. Alleging that Stone intentionally engaged in the `glorification of violent acts' is quite different than showing Stone intended to cause injury and made [*Natural Born Killers*] available for that purpose."[96]

Kernan defended Oliver Stone:

> There has never been any evidence that Stone ever intended any injury. Rather, Stone says that his intent was to create a satire about the way the American culture and its media crave violence . . . . [T]he purpose of *Natural Born Killers* was to mock the way the media and the public respond to killings.[97]

Kernan warned that even though the Byers opinion merely permitted the case to proceed to discovery,

> it nonetheless could have a widespread implication for producers and studios, because they could face a flood of lawsuits. The problem with the *Byers* opinion is that it leaves no rule in place to determine which films could be held liable; there is no standard or guideline provided by the court . . . . If *Byers* becomes the rule, filmmakers will be forced to either settle cases at nuisance-value amounts, or pay for a costly defense.[98]

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94. S. Michael Kernan, *Should Motion Picture Studios and Filmmakers Face Tort Liability for the Acts of Individuals Who Watch Their Films?*, 21 Hastings Comm. & Ent. L.J. 695, 698 (1999).

95. Kernan, *supra* note 94. at 705.

96. *Id.* at 706.

97. *Id.* at 708, 709.

98. *Id.* at 699.

Oliver Stone stopped producing films for some time after the *Miller* and *Byers* cases were filed, but on March 12, 2001, Judge Bob Morrison of the 21st Judicial District Court in Amite, Louisiana dismissed *Byers*, ruling that the case was barred by the First Amendment. Joe Simpson, the attorney representing Byers' family, said that he intends to appeal the ruling.[99]

F. *James v. Meow Media, Inc. (1999)*[100]

On December 1, 1997, Michael Carneal, a 14 year-old freshman at Heath High School in Paducah, Kentucky, stole six guns from a friend's house, took all six guns to school the next day and opened fire on a prayer group that met before school began. Carneal killed three girls, Jessica James, Kayce Steger and Nicole Hadley, and wounded five others. Carneal had been an avid player of video games such as *Doom*, *Quake*, and *Mortal Kombat*, three so-called "splatter games" in which players navigate mazes in "subjective camera" perspective to shoot human beings, splattering blood with each kill. (Eric Harris and Dylan Klebold, who killed 12 students and a teacher at Columbine High School in Littleton, Colorado, were similarly devoted players of such games.)

Retaining attorneys Jack Thompson and Michael Breen, the parents of the three girls who Carneal murdered filed suit against Meow Media, the operator of a pornographic web site, Nintendo of America, Sega of America and several other videogame companies for making games such as *Quake*, *Doom*, and *Mortal Kombat*. They also filed suit against Time Warner, Polygram Film Entertainment Distribution, Palm Pictures, Island Pictures and New Line Cinema for their role in making or distributing *The Basketball Diaries*.[101] Thompson and Breen charged the movie producers with negligence, arguing that the producers knew or should have known that "copycat violence would be caused by *The Basketball Diaries*" and "there was an unreasonable risk of harm . . . either through the continuous effect of the movie . . . or by the foreseeable action of others."[102]

Carneal had confessed that the movie *The Basketball Diaries*, especially the scene in which the anti-hero Jim Carroll, played by Leonardo DiCaprio, has a dream about shooting his classmates and his teacher, inspired him to imitate the scene and kill his Heath High classmates. It is worth noting that the somewhat autobiographical novel by author Jim Carroll, on which the movie is based, contains no classroom shooting

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99. Kirk Honeycutt, *No Illusions: Stone Stops Producing*, HOLLYWOOD RPTR., May 4-10, 1999 at 3; Robert W. Welkos, *Company Town: Judge Throws Out Lawsuit Against Oliver Stone*, LOS ANGELES TIMES, March 13, 2001 at C-7.

100. Complaint, Civil Action No. 5:99CV-0096 (U.S.D., Western Dist. Ky., Paducah Division, filed April 12, 1999).

101. Complaint, *James*, No. (5:99CV-0096).

102. *Id* at 10.

episode whatsoever. Attorneys Thompson and Breen charged that the producers of the movie "fabricated a gratuitous and graphic murder spree for the sole purpose of hyping the movie . . . . This had the effect of harmfully influencing impressionable minors such as Michael Carneal and causing the shootings."[103]

Dr. Diane Schetky, a professor at Yale School of Medicine and psychiatrist retained by Carneal's defense team, concluded that violent and pornographic media images had had a profound effect on Carneal. She explained that "The media's depiction of violence as a means of resolving conflict, and a national culture which tends to glorify violence, further condoned [Carneal's] thinking."[104]

Turning from *The Basketball Diaries* to the video game defendants, Thompson and Breen charged that games such as *Quake*, *Doom* and *Mortal Kombat*:

> made the violence pleasurable and attractive, and disconnected the violence from the natural consequences thereof, thereby causing Michael Carneal to act out the violence.
>
> Additionally, said games [taught] Carneal how to point and shoot a gun . . . making him an extraordinarily effective killer without teaching him any of the constraints or responsibilities needed to inhibit such a killing capacity . . . .
>
> [The defendants] knew or should have known that copycat violence would be caused by their products.
>
> [The defendants] knew or should have known that there was an unreasonable risk of harm to others either through the continuous effects of the video games or . . . by the foreseeable action of others.[105]

Shortly after Jack Thompson and Michael Breen filed their complaint and before any decision was made in the case, law professor Scott Whittier predicted that in deciding James, the judge would look to *Watters v. TSR, Inc.*[106] which involved a negligence action against TSR, the maker of the fantasy role-playing game *Dungeons and Dragons*.[107] In 1987, minor Johnny Burnett, a "devoted" *Dungeons and Dragons* player, had shot and killed himself. His mother sued TSR, charging that as a result of his exposure to the game, her son "lost control of his own independent will and was driven to self-destruction." Federal district court Edward Johnstone, the same judge to decide *James v. Meow Media, Inc.*,

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103. *Id.* at 9.
104. *Id.* at 8.
105. *Id.* at 17.
106. 904 F.2d 378 (6th Cir. 1990).
107. Scott Whittier, *The Recent School Shootings: Are Video Game Manufacturers Liable?* N.Y. LAW JOURNAL (Sept. 13, 1999).

had granted summary judgment in *Watters* solely on First Amendment grounds. Johnstone held that *Dungeons and Dragons* comprised protected speech, regardless of whether the game was classified as literature or just as a game, or was intended to inform the public or merely to entertain it. The U.S. Court of Appeals for the Sixth Circuit had upheld Johnstone's decision; like the federal district court, the appellate court declined to find TSR negligent in creating *Dungeons and Dragons*: "If Johnny's suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to defendant TSR."[108]

Whittier indeed predicted the court's decision correctly: In April 2000 Judge Edward Johnstone dismissed *James*, relying upon his own previous decision in *Watters* and on the Sixth Circuit's decision affirming the dismissal of Watters. Johnstone explained that to submit James to a jury "would be to stretch the concepts of foreseeability and ordinary care to lengths that would deprive them of all normal meaning."[109] Johnstone continued: "Just as Johnny Burnett's suicide in *Watters* was unforeseeable to the distributors of the game Dungeons and Dragons, so was Michael Carneal's killing spree unforeseeable to the [media] defendants . . . . [In *Watters*,] Johnny's death surely was not the fault of his mother, or his school, or his friends, or the manufacturer of the game he and his friends so loved to play. Tragedies such as this simply defy rational explanation, and courts should not pretend otherwise . . . ."[110] "The fact that Michael Carneal chose to kill his classmates rather than himself does not make his actions any more foreseeable."[111] Johnstone thus dismissed the case, resulting in a First Amendment victory for the defendants.

V. DISCUSSION

Because courts nearly always dismiss lawsuits involving copycat violence and media liability on the grounds that these suits are barred by the First Amendment, it is not surprising that judges in *Miller, Byers* and *James* dismissed the lawsuits alleging that *Natural Born Killers* and *The Basketball Diaries* had incited viewers to commit violence against innocent third parties.[112] Of the commercial speech cases outlined above, the plaintiffs prevailed in *Hanberry* and *Weirum*, and the plaintiffs in *Norwood* and *Braun* won out-of-court settlements from *Soldier of Fortune* magazine. (Although no legal precedent is set when a media defendant settles out of court, such settlements might be perceived as victories for the plaintiffs: even if there is no admission of guilt on the part of the me-

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

109. *James v. Meow Media, Inc.*, Civil Action Number 5:99CV-96-J, Memorandum Opinion at 9 (U.S. District Court, Western District of Kentucky, Paducah Division, filed April 6, 2000).

110. *Id.* at 14.

111. *Id.* at 9.

112. *See supra* notes 85-99.

dia defendant, the fact that the media defendant pays a large and usually undisclosed sum of money to the plaintiff no doubt gives the appearance of a tacit victory for the plaintiff in such cases.)

Of the "pure" or "core" speech cases outlined above, the only out-of-court settlement occurred in *Nezworski*, when the mother of 6 year-old Jeremy Nezworski hanged himself by accident and died while trying to imitate a cartoon hanging *on The Scooby Doo Show*. Media defendants ABC and Hanna-Barbera Productions may have settled *Nezworski* out of court in order to avoid negative publicity or to avoid the costs of litigation even though they would probably have prevailed, had the case gone to trial. Of the pure or core speech cases outlined above, only *Herceg* and *Vance* proceeded to trial, whereupon the media defendants prevailed. Legal precedents for cases proceeding to trial or cases settled out-of-court are thus rare, as are the plaintiffs' victories in the commercial speech cases.

A. *Violence in Video Games*

In *James*, the complaint specifies not only *The Basketball Diaries*, but also violent video games such as *Doom*, *Quake* and *Mortal Kombat*,[113] which apparently influenced Michael Carneal as well as Eric Harris and Dylan Klebold. The International Committee of the Red Cross has recently published a report on the impact of violent video games as "killing simulators and firearms training devices."[114] The Red Cross committee concludes the following:

- Humans have a natural resistance to kill which must be overcome before any act of armed violence is committed.
- Training devices such as combat simulators [like video games] may not permit soldiers to develop the reflexes of not attacking civilians or wounded and surrendering combatants.
- Young people watch violent films in the cinema in a pleasurable environment, maybe even eating popcorn in the company of a girlfriend; they come to associate killing with pleasure . . . .
- Some violent video games have been developed from combat simulators. Players continually repeat the training sequence of seeing a target and firing.
- To deny the link between visual violent media and violence in our society is truly like denying that tobacco causes cancer . . .[115]

113. Complaint, *James*, No. (5:99CV-0096).

114. International Committee of the Red Cross, Robin Coupland, ed. *Humans and Weapons*, Internal Document (February 10, 2000).

115. *Id.* at 2-18.

The Red Cross report is based in part on research by retired military psychologist David Grossman, who explains that video simulators are designed to desensitize soldiers to killing through repetition, and to condition soldiers to fire as a stimulus-response or reflex, not as a deliberative act.[116] Grossman argues that "these same simulators are now in our homes and arcades teaching the children of Paducah, Columbine and the rest of the nation to kill."[117] Grossman thus warns that video games in which a child is "rewarded" for hitting targets may be dangerous if the line between fantasy (video games) and reality becomes blurred in the child's mind.

B. *Violence in Rap Music and Movies*

Considering the question of whether the media should be held liable for instigating teenagers to shoot their classmates or innocent convenience store employees leads us to the larger question of the extent to which gratuitous, graphic violence such as that portrayed in Tupac Shakur's rap *Crooked Ass Nigga, Boyz 'n' the Hood, The Basketball Diaries* or *Natural Born Killers* should receive First Amendment protection when it is painfully evident that such images are inciting a few mentally unstable teenagers to imitate these scenes in real life. But legal precedents point toward no finding of liability for movie producers when their on-screen mayhem becomes the subject of copycat violence.

Of course, so many variables are involved in human behavior that it is usually impossible to isolate one cause of violence. For example, a high percentage of children who are victims of child abuse—sadly—grow up to become violent abusers themselves.[118] In addition to environmental causes of aggression, causes of violent behavior could be physiological. Professor Adrian Raine of the University of Southern California has found that brain scans of men who committed assault, rape, armed robbery and murder indicated that these men had 11-14% less brain tissue containing mostly brain cells ("gray matter") rather than nerve fibers.[119] New York Times reporters Lauri Goodstein and William Glaberson compiled data on 100 "rampage killers" and concluded that the vast majority of rampage killers had serious mental health problems.[120] Duh.

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116. DAVID GROSSMAN, STOP TEACHING OUR KIDS TO KILL 132 (1999).

117. GROSSMAN, *supra* note 116.

118. E. Magnuson, *Child Abuse: The Ultimate Betrayal*, TIME, Sept. 5, 1983 at 20-22. Magnuson says: "Child abuse perpetuates itself. In a great preponderance of cases—estimates run as high as 90%—the abusive parent was abused as a child."

119. Curt Suplee, *Violent People's Brains May Lack 'Gray Matter;' Condition May Affect Behavior, Study Finds* (Wilmington, Delaware) NEWS JOURNAL, Feb. 15, 2000 at A7.

120. Laurie Goodstein and William Glaberson, *The Well-Marked Roads to Homicidal Rage*, N.Y. TIMES, April 10, 2000 at A1, A12-13.

Given that some percentage of the population of school children will indeed have mental health problems, how do we prevent them from the mass murder of their classmates? In considering the 12 cases of school shootings outlined at the beginning of this discussion, the obvious question to ask is: Why are guns so easily accessible to school children in the United States? Why do minors have such easy access to semi-automatic rifles? The National Rifle Association would of course prefer to deflect our attention from this question, pointing us instead toward blaming media influences but never the gun manufacturers and gun dealers who peddle assault rifles to anyone with $130, few questions asked.[121] During the past several years, however, courts have appeared to be more willing to find that gun dealers owe a duty of care to gunshot victims murdered by those who purchase guns and ammunition from dealers in violation of the Federal Gun Control Act.[122]

Meanwhile, pundits on television talk shows wring their hands and gnash their teeth, while good faith attempts to pass gun control legislation survive the U.S. Senate but die in the House of Representatives. After Harris and Klebold murdered 12 classmates and a teacher at Columbine High School, public outcry forced the U.S. Congress to consider gun control seriously for the first time since 1994. The Senate passed gun control provisions to close the gun show loophole by requiring background checks for all purchases at gun shows. In June 1999 Tom Mauser, the father of one of the students killed at Columbine, called on the House of Representatives to pass the same legislation which had passed the Senate. Sadly, however, NRA board member Representative Bob Barr of Georgia prevented any meaningful gun control legislation from passing in the House.[123]

Turning from gun control legislation to the question of media liability, if movies provide the ideas of mass murder and guns provide the means, should Hollywood producers be liable, or should gun manufacturers be liable, or both? Where were the parents of the teen-murderers, and what were they doing? Although the easy availability of guns in our society is an excruciatingly painful reality, this question is beyond the scope of this discussion, which has focused on the allegations that magazine ads, rap lyrics, movies, videogames or pornographic web sites have incited certain teenagers to commit murder.

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121. William Glaberson, *Man and His Son's Slayer Unite to Ask Why,* N.Y. TIMES, April 12, 2000 at A1, A22.

122. *See* Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774 (Fla. App. 1994); Sogo v. Garcia's Nat'l Gun, Inc., 615 So. 2d 184 (Fla. App. 1993). *See also* Sposato v. Intratec Firearms, et al., No. 960937 (S.F. County Super. Ct., filed May 18, 1994) (plaintiffs alleged negligence after Gian Luigi Ferri killed eight people in a law firm with two assault pistols; court permitted suit against manufacturers of assault pistols to proceed to trial).

123. *Progress Report: The Nation After Littleton* (Fall 1999) at 1, 5. Newsletter published by Handgun Control, Inc.

Looking to legal precedent, it was painfully predictable that courts would conclude that the First Amendment protects Leonardo DiCaprio's graphic shootings in *The Basketball Diaries*, as well as Woody Harrelson and Juliette Lewis' gleeful sadism in *Natural Born Killers*. It is such a cliché to say that freedom of speech comes with a price. But sadly, this is exactly the question we must ask. If we were to use a utility/risk analysis, as the court in *Way* did, we could balance the "utility" or entertainment value and box office profits of *The Basketball Diaries* and *Natural Born Killers* against the "risk" that yet another deranged teenager will imitate the scenes and massacre innocent school children.

If, as a society, we continue to blindly assert First Amendment freedoms without looking carefully at the glorification of violence in a Boy Scout magazine ad, rap lyrics, videogames, pornographic web sites or Hollywood films, will we pay for this "freedom of expression" with the lives of our school children?

Of course, the answer is obvious: yes, we will. We don't know whose children will be shot and killed. We don't know whose children will be injured for life. But as long as guns are so easily accessible, and as long as our media continue to glorify gratuitous violence, mentally disturbed children will kill other children. When the 6 year-old boy in Mount Morris Township, Michigan shot and killed his 6 year-old classmate Kayla Rolland,[124] Genesee County prosecutor Arthur Busch spoke to the 6 year-old murderer, who was nonchalant about his crime. Busch reported that the boy said: "Well, this just kinda happens on television."[125] Unless we as a society make a concerted effort to 1) prevent easy access to guns and to 2) convey to Hollywood producers a lack of interest in gratuitous violence, school shootings will continue to "just kinda happen." It's time to stop kidding ourselves.

124. NEW YORK TIMES, March 1, 2000 at A1.

125. <http://newsweek.com/nw-srv/printed/us/na/a17088-2000mar5.html>.