

BUMFIGHTS AND COPYCAT CRIMES . . . CONNECTING THE DOTS: NEGLIGENT PUBLICATION OR PROTECTED SPEECH?

Terri Day*

I. INTRODUCTION

A man's tooth is extracted with a pair of pliers.¹ A second man eats a frog.² Still, another man's hair is intentionally set ablaze.³ These are not the sadistic human experiments performed on concentration camp inmates by Dr. Josef Mengele.⁴ Rather, they are real, videotaped events of homeless people engaged in dangerous and degrading acts for the price of a drink or a bottle of alcohol.⁵ For the producers and distributors of *Bumfights*,⁶ the

* © 2008, Terri Day. All rights reserved. Associate Professor of Law, Barry University Andreas School of Law. LL.M., Yale University, 1995; J.D., University of Florida, 1991; M.S.S.A., Case Western Reserve University, 1976; B.A., University of Wisconsin, Madison, 1974. Many thanks to Professor Bruce Jacob for his support and encouragement; to my research assistant, Randa Maali; and my student, Jonathon Blevins, for educating me on "pop culture."

1. See YouTube, *Bumfights*, http://www.youtube.com/results?search_query=bumfights&search=Search (accessed Apr. 8, 2008) (containing a searchable database of clips from the *Bumfights* video series).

2. *Id.*

3. *Id.*

4. Dr. Josef Mengele was a Nazi SS physician who performed human experiments on camp inmates at Auschwitz-Birkenau from 1943 through 1945. Gerald L. Posner, *Mengele: The Complete Story* (Cooper Square Press 2000) (providing a biography of the SS physician); see also generally Michael Berenbaum, *The World Must Know* (Little, Brown & Co. 1993) (detailing the cruel medical experiments conducted by Dr. Mengele and other Nazi doctors).

5. See Greg Moran, *Bumfights' Participants Get Thousands; Video's Producers Agree to Settlement*, San Diego Union Trib. B3 (Apr. 7, 2006) (describing the real and brutal nature of *Bumfights*).

6. *60 Minutes*, "Bumfights Videos Inspired Joy-Killing" (CBS Oct. 1, 2006) (TV broad.). Producers Ray Latticia and Ty Beeson, both aliases, owned rights to the videos in 2006. See Kate Kowsh, *Vyuz Talks to Bumfights Creator Ryen McPherson*, http://www.vyuz.com/022706_Bumfights.htm (Feb. 20, 2006) (explaining that much of the negative publicity surrounding the videos is due to the marketing efforts of Ty Beeson). McPherson and his fellow filmmakers faced criminal charges stemming from the creation of *Bumfights*. *Id.* The San Diego, California Assistant District Attorney charged them with six felonies for

performance of dangerous, live stunts by the homeless is entertainment that earns multimillion-dollar profits.⁷

Recurring “characters” such as Rufus Hannah, known to viewers as “Rufus the Stunt Bum,” Donnie Brennan, and others engaged in “the equivalent of human cockfights”⁸ for pocket change.⁹ Some of the videos depict Rufus consuming excess alcohol, engaging in dangerous stunts, and fighting with Donnie while teens gather around cheering.¹⁰ One theme involves attacking homeless people while they sleep.¹¹ In these videos, an actor referred to as the “Bum Hunter” and the filmmakers sneak up on sleeping homeless people, tie them up, and gag them with duct tape.¹²

Bumfights symbolizes a “frightening trend” leading to the emergence of bum-bashing as sport.¹³ The videos have spawned a copycat phenomenon where young people, usually males in their teens or early twenties, attack the homeless just for fun.¹⁴ The perpetrators represent the spectrum of economic and racial

violating a state statute prohibiting the paying or offering of any consideration to an individual to fight. *Id.* They were acquitted of the felony charges, but sentenced to three years of probation and community service under misdemeanor violations for promoting illegal street fighting. *Id.* McPherson and one partner failed to perform the court-ordered community service; consequently, the judge ordered that they spend 180 days in jail in July 2006. *Id.*

7. Ryen McPherson, the original producer of *Bumfights*, sold his rights to the videos for \$1.5 million. In the first five years, 300,000 copies of *Bumfights* were sold for \$20 each, totaling \$6 million dollars. *60 Minutes*, *supra* n. 6.

8. CityNews, *‘Bumfights’ May Encourage Violence against Homeless*, http://www.citynews.ca/news/news_3749.aspx, at ¶ 1 (Sept. 21, 2006).

9. Rufus Hannah and Donnie Brennan sued Ryen McPherson for damages they suffered while fighting and performing other dangerous acts for the videos. The parties settled the lawsuit for an undisclosed amount. Greg Moran, *‘Bumfights’ Participants Get Thousands*, San Diego Union Trib. B3 (Apr. 7, 2006) (available at <http://www.signonsandiego.com/news/metro/20060407-9999-7m7bums.html>).

10. *See 60 Minutes*, *supra* n. 6.

11. *Id.*

12. *Id.*

13. According to California State University, San Bernardino, criminologist and expert of hate crimes, Brian Levin, violence against the homeless “is the new sport. In many parts of the country, it’s a rite of passage.” *60 Minutes*, *supra* n. 6.

14. *See* Jamie Marlernee, *Viciousness Confounds All Reasoning—How Can We Make Sense of Senseless Acts?* S. Fla. Sun-Sentinel 13A (Jan. 15, 2006) (describing several accounts of young men beating the homeless for sport, which many blame on violent videos such as *Bumfights*).

groups, including inner-city gang members and upper-class suburbanites.¹⁵ Some have started to make their own videotapes.¹⁶

Attacks on the homeless have increased in both number and intensity of their cruelty and brutality. During the first two years following *Bumfights'* first appearance in 2002, random violence against the homeless increased sixty-seven percent.¹⁷ According to the National Coalition for the Homeless, a recent five-year period has seen at least one inexplicable murder of a homeless person each month.¹⁸ Because the homeless rarely have families or advocates to rally a public outcry against such random acts of violence,¹⁹ the incidence of such violence against the homeless is likely even greater than reported.²⁰

The concept of bum-bashing as sport first received national attention when security cameras caught two young men viciously attack a homeless man while wielding bats and smiling.²¹ The following reports of violence against the homeless speak for themselves:

September 2005: A homeless man is set on fire. . . . Police . . . were looking for a young man . . . who poured lighter fluid on

15. *Id.*

16. Five teens from Calgary, Canada, made a home video of their attack on a homeless man they found sleeping in an alley. *60 Minutes*, *supra* n. 6. The teens kicked the man, beat him with a metal pipe, and broke a bottle on his head. *Id.* Four Australian teens also created their own version of a *Bumfights* video. Elissa Hunt, *Dead Homeless Man Victim of Teen Prank Video*, *The Australian* (Oct. 31, 2006) (available at <http://www.theaustralian.news.com.au/story/0,20867,20675039-2,00.html>). After tormenting and torturing a disabled homeless man, the teens set fire to his makeshift shelter and then went home to watch the video. *Id.*

17. Brian Haas & Jamie Malernee, *Outrage at 'Senseless' Attacks: 1 Dead, 2 Injured in Beatings of Homeless*, *S. Fla. Sun-Sentinel* 1A (Jan. 13, 2006). The National Coalition for the Homeless reports statistics using news and media reports. Natl. Coalition Homeless, *Hate, Violence, and Death on Main Street USA*, http://www.nationalhomeless.org/getinvolved/projects/hatecrimes/case_beating.html (accessed Apr. 8, 2008); *see also* CNN, *Teen 'Sport Killings' of Homeless on the Rise*, <http://www.cnn.com/2007/US/02/19/homeless.attacks/index.html> (Feb. 20, 2007) (reporting that attacks on the homeless are at the highest level in almost a decade).

18. *60 Minutes*, *supra* n. 6.

19. *See id.* (noting that there are no reliable statistics concerning violence against the homeless as "people living on the streets usually don't report crime").

20. Homeless advocates argue that "if any other group was being targeted like this, there'd be a national outcry." *Id.*

21. *See* Haas & Malernee, *supra* n. 17 (describing the attacks perpetrated by young men in Florida and the subsequent attention these crimes generated as at least one incident was caught on tape).

him and set him on fire after a gathering crowd demanded, “Light him up!”²²

October 2004: [T]eens are charged with beating to death a homeless man, with rocks, a flashlight, a grill, a pipe, a bat and their feet. They also smeared him with feces.²³

October 2004: Five New Jersey teens are arrested and accused of attacking three homeless people because they were “bored.” The teens had reportedly bragged about their “bum-hunting” at school.²⁴

While no one can say for certain that there is a causal relationship between the *Bumfights* series and increasing violence against the homeless, police investigators and criminologists state it is hard to ignore the connection.²⁵

Furthermore, there is no conclusive evidence to support the hypothesis that exposure to violence through movies, video games, or professional wrestling causes one to commit a violent act.²⁶ However, the research does show that exposure to violence can cause increased feelings of aggression.²⁷ Also, repetitive exposure to violent material can desensitize the viewer to violence and influence more aggressive modes of conflict resolution.²⁸

The connection between viewing violence and subsequently committing violent acts has been studied,²⁹ liti-

22. Malernee, *supra* n. 14.

23. *Id.*

24. *Id.*

25. Police have, in fact, linked some attacks directly to *Bumfights*. *60 Minutes*, *supra* n. 6.

26. *E.g. Am. Amusement Mach. Assn. v. Kendrick*, 244 F.3d 572, 578–579 (7th Cir. 2001) (discussing the lack of evidence supporting a causal connection between video games and violent or aggressive thoughts, feelings, and behavior).

27. *Id.*

28. See Am. Acad. Child & Adolescent Psych., *Facts for Families, Children and TV Violence*, <http://aacap.org/page.wv?name=Children+and+TV+Violence§ion=Facts+for+Families> (last updated Nov. 2002) (stating that violence on television may cause children to “gradually accept violence as a way to solve problems”); Joe McDonnell, *Wrestling with the Truth*, <http://www.hofmag.com/content/view/378/30/> (Aug. 9, 2007) (stating that “[w]restling doesn’t, in itself, cause violence, but when combined with overall socialization, violence on television can affect what is perceived as socially acceptable behavior”).

29. See *e.g. Kendrick*, 244 F.3d at 578–579 (discussing an inconclusive study about the effects of video games on personality and conflicting expert testimony regarding the link between playing video games and aggressive behavior); Am. Acad. Child & Adolescent Psych., *supra* n. 28 (summarizing the findings of “[h]undreds of studies” that have ana-

gated,³⁰ and legislated.³¹ Many attempts to circumvent the potential negative effects of such objectionable material by restricting minors' access, prohibiting production and distribution, or holding publishers liable for the acts of susceptible viewers have been largely unsuccessful.³² Such attempts raise First Amendment considerations³³ and potentially stretch tort liability "to lengths that would deprive [the concepts of foreseeability and ordinary care] of all normal meaning."³⁴

Recently, the mainstream media has questioned the effect of violent professional wrestling, Web sites, and video games on minors.³⁵ Despite concern with the effects of these materials, no coherent, legally sustainable, theory for damages controls beyond

lyzed "the effects of TV violence on children and teenagers").

30. See e.g. *Zamora v. Columbia Broad. Sys.*, 480 F. Supp 199, 200, 202 (S.D. Fla. 1979) (determining that the major television-network defendants owed no duty of care to a teen killer who claimed that exposure to violence on television caused him to become desensitized to violent behavior and to develop a sociopathic personality); *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 803 (W.D. Ky. 2000) (holding that the defendants, who were makers, distributors, and owners of violent movies, video games, and an Internet site, owed no duty to the victims of a high-school-shooting spree perpetrated by a student who was a frequent viewer and consumer of the defendants' materials); *Sakon v. Pepsico, Inc.*, 553 So. 2d 163, 166 (Fla. 1989) (holding that a television producer had no duty of care to immature viewers because it was unforeseeable that a child would imitate a stunt performed in a Mountain Dew[®] commercial).

31. See *Kendrick*, 244 F.3d at 580 (reversing the denial of a preliminary injunction because an Indiana ordinance limiting minors' access to video games, which depict violence, was a content-based restriction that had little chance of surviving a facial challenge that the ordinance violated the First Amendment).

32. See generally Terri Day, *Publications That Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?* 36 Santa Clara L. Rev. 73 (1995) (detailing why courts often afford publishers protection under the First Amendment in third-party liability suits regarding violent publications) [hereinafter Day, *Publications That Incite*]; Terri Day, *Tort Law: Children v. Advertisers: TV Torts—Is There a Duty?* 42 Fla. L. Rev. 413 (1990) (analyzing the court's decision in *Sakon*) [hereinafter Day, *Tort Law*]. In addition to writing about publishers' liability, the Author served as an expert witness on the meaning of the term "negligent publication" in *Sony Computer Entertainment v. American Home Assurance Co.*, 2005 WL 3260483 at *1 (N.D. Cal. Dec. 1, 2005).

33. Day, *Publications That Incite*, supra n. 32, at 73, 74.

34. *James*, 90 F. Supp. 2d at 804 (citing *Watters v. TSR, Inc.*, 904 F.2d 378 (6th Cir. 1990)) (stating that manufacturers of the video game *Dungeons & Dragons* owed no duty to the mother of Johnny Burnett, who claimed that her son's suicide was caused by the negligent dissemination of the game and failure to warn of the "possible consequences" of playing).

35. See AP, *Health Groups Directly Link Media to Child Violence*, <http://archives.cnn.com/2000/HEALTH/children/07/26/children.violence.ap/index.html> (July 26, 2000) (questioning the link between youth violence and exposure to violence in television, music, video games, and movies).

parental vigilance has been posited. Although parental control is the ideal answer, American family life has drastically changed from the 1950s “Clever family” archetype.³⁶ In the majority of American families, the parent or parents are not always home to monitor their children’s television, Internet or video game consumption. Even if a parent had the time and physical presence to monitor a child’s Internet use, parents may lack the technological know-how to keep tabs on their children’s Internet-viewing habits. Unless parents install television v-chips or specialized computer software, children can outmaneuver their parents’ generation in Internet use and technological abilities.

Few legislative attempts to reduce young people’s exposure to violence have survived constitutional challenge. Most recently, these attempts have focused on violent video games, movies,³⁷ and crime-related trading cards.³⁸ In the aftermath of our nation’s shocking school shootings, plaintiffs have unsuccessfully sought civil damages, claiming that violent videos, movies, and Web sites have induced young people to commit these heinous crimes.³⁹

Thus far, local communities have been unable to legislatively stem the tide of violent material available to minors.⁴⁰ Further,

36. The “Clever family” was the subject of the 1950s television series *Leave It to Beaver*, a series centered on an idealistic, suburban family. David Halberstam, *The Fifties* 508–511 (Fawcett Books 1993). The optimistic Cleavers had an unstated conviction that “life was good and was going to get better.” *Id.* The family matriarch, June Cleaver, represented the archetypical stay-at-home mom who never worked, but “prepared two hot meals a day.” *Id.* In such sitcoms, “[e]veryone belonged to the political and economic center, and no one doubted that American values worked.” *Id.* The show reflected the 1950s push toward social conformity while portraying each family member as upbeat, happy, and healthy. *Id.*

37. See *Kendrick*, 244 F.3d at 580 (holding an Indianapolis ordinance limiting minors’ access to violent video games as unconstitutional); *Video Software Dealers Assn. v. Webster*, 968 F.2d 684 (8th Cir. 1992) (holding a Missouri statute prohibiting the rental or sale of violent videos to minors as not narrowly tailored, rendering it unconstitutional); but see *Interactive Digital Software Assn. v. St. Louis Co.*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002) (denying a plaintiff’s summary judgment motion while determining that a county ordinance regulating the rental or sale of violent video games to minors is constitutional).

38. See *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997) (affirming summary judgment by determining a county ordinance prohibiting the sale of crime-related trading cards to minors was unconstitutional).

39. E.g. *James*, 90 F. Supp. 2d 798; *Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264 (Colo. 2002).

40. The St. Louis County ordinance regulating the rental or sale of violent video games to minors is an exception. See *Interactive Digital Software Assn.*, 200 F. Supp. 2d at 1141 (determining the constitutionality of a county ordinance regulating the rental or sale of violent video games to minors).

the almost insurmountable obstacles to achieving civil-damage awards fail to discourage the production and distribution of violence-oriented media often viewed by minors.⁴¹ Notwithstanding nearly absolute First Amendment protection for violent movies, video games, and Web sites produced for and marketed to a youthful audience, *Bumfights* does not warrant these same protections. *Bumfights* is sui generis.⁴²

This Article presents a constitutionally permissible means for legislatively prohibiting the production and sale of *Bumfights* and for opening the door, albeit only a crack, for negligent-publication claims against the producers and distributors of *Bumfights*.

Bumfights are outside the limits of protected speech. Legislatively prohibiting these videos or chilling the continued production and distribution of such material will not offend First Amendment principles or open the “floodgates” to publisher-liability suits. Part II of this Article describes recent attempts by municipalities to enact ordinances that restrict the use and purchase of violent video games and other violent material. In Part III, the Article categorizes *Bumfights* as unprotected speech falling outside the First Amendment umbrella of protection. Even if courts were to consider *Bumfights* as protected speech, a restriction on *Bumfights* could survive strict-scrutiny analysis. Part IV suggests that a carefully drafted ordinance prohibiting the sale and distribution of *Bumfights* can pave the way for third-party-liability claims under the theory of negligence per se. Finally, this Article concludes that the regulation of *Bumfights* through legislative prohibitions and civil-damage claims is consistent with free speech and tort principles.

II. IS VIOLENCE A CATEGORY OF SPEECH UNDESERVING OF FIRST AMENDMENT PROTECTION?

Using obscenity laws as a prototype, local governments have passed ordinances to restrict the sale of violent materials to minors. For example, the city of Indianapolis enacted an ordinance,

41. See *supra* n. 37 (illustrating courts’ reluctance to award damages for the production or distribution of violent media).

42. “Sui generis” is defined as “unique or peculiar.” *Black’s Law Dictionary* 1475 (Bryan A. Garner ed., 8th ed., West 2004).

applicable to operators of video-game machines, which prohibited a minor from using “an amusement machine” that is “harmful to minors” unless accompanied by a parent, guardian, or other custodian.⁴³ In defining the term “harmful to minors,”⁴⁴ the language of the ordinance tracked the test for obscenity articulated in *Miller v. California*.⁴⁵ These guidelines include the following:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴⁶

Because the ordinance targeted the violent content of the video games, the ordinance constituted a content-based restriction on speech.⁴⁷ Thus, to consider its ordinance constitutional, Indianapolis had to either categorize violence, like obscenity, as speech outside the First Amendment umbrella of protection or demonstrate that its ordinance survived strict-scrutiny analysis.⁴⁸

Prior to Indianapolis’ attempt to restrict violent video games to minors, Nassau County, New York enacted Local Law 11-1992, which regulated crime-related trading cards.⁴⁹ The Nassau

43. *Kendrick*, 244 F.3d at 573.

44. “Harmful to minors” is defined as

an amusement machine that predominantly appeals to minors’ morbid interest in violence or minors’ prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under that age, and contains either ‘graphic violence’ or ‘strong sexual content.’

Id. at 573.

45. 413 U.S. 15 (1973).

46. *Id.* at 24.

47. A speech restriction that is aimed at the subject or ideas conveyed in the message is content-based. *Perry Educ. Assn. v. Perry Loc. Educators’ Assn.*, 460 U.S. 37, 48 (1983).

48. *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942) (identifying categories of speech that “are no essential part of any exposition of ideas and are such slight social value as a step to truth . . .” and that which the “social value . . . is clearly outweighed by the social interest in order and morality”). A content-based restriction is subject to strict scrutiny. *Perry Educ.*, 460 U.S. at 45. Under a strict-scrutiny test, Indianapolis needed to show that its ordinance served a compelling state interest, that it was narrowly tailored to achieve that interest, and that there was no less-restrictive means of achieving that interest. *Id.*

49. *Gulotta*, 134 F.3d at 64.

County ordinance made it a misdemeanor to disseminate “indecent crime material to minors,”⁵⁰ specifically, “any trading card which depicts a heinous crime . . . or a heinous criminal and which is harmful to minors.”⁵¹ Similar to the Indianapolis ordinance, Nassau County incorporated the *Miller* factors applicable to a determination of obscenity in defining what was “harmful to minors.”⁵²

Both the Second and Seventh Circuit Courts of Appeals rejected the argument that violence, like obscenity, is low-value speech deserving of no protection under the First Amendment.⁵³ In *American Amusement Machine Association v. Kendrick*,⁵⁴ the Seventh Circuit Court of Appeals distinguished obscenity from violent depictions in video games based on the targeted evil of the respective restrictions.⁵⁵ Although the gravamen of obscenity law is offensiveness, the Indianapolis ordinance focused on the harm caused to minors when they play violent video games.⁵⁶ Indianapolis justified its content-based ordinance on the theory that playing violent video games causes young people to commit acts of violence.⁵⁷

Similarly, in *Eclipse Enterprise, Inc. v. Gulotta*,⁵⁸ Nassau County linked exposure to violent depictions to juvenile crime.⁵⁹ The legislative intent of the ordinance prohibiting the dissemina-

50. *Id.*

51. *Id.*

52. *Id.* For a definition of the *Miller* obscenity test, see *supra* note 46 and accompanying text.

53. *Gulotta*, 134 F.3d at 67 (determining that the standards for applying First Amendment protections are different for obscenity and violence); *Kendrick*, 244 F.3d at 574 (deciding that violence is distinguishable from obscenity when determining whether the government may regulate the content of expressive activity).

54. 244 F.3d at 572.

55. *Id.* at 574.

56. *Id.* at 574–575 (noting that obscenity restrictions are aimed at the offensiveness of obscenity, not at any harm that obscenity may cause; thus, no proof that obscenity is harmful is required to defend a statute’s constitutionality); *but see* Catherine A. MacKinnon, *Only Words* 91 (Harvard U. Press 1996) (arguing that material that may not rise to the level of obscenity but, nevertheless, degrades women should be restricted because of the harms that type of material causes through increased violence to women or the demeaning of women in the workplace).

57. *Id.* at 575 (holding that the basis of the ordinance is the “temporal harm [caused by playing violent video games] by engendering aggressive attitudes and behaviors, which might lead to violence”).

58. 134 F.3d 63.

59. *Gulotta*, 134 F.3d at 64.

tion of crime-related trading cards to minors was to protect children.⁶⁰ Nassau County justified its ordinance on the premise that the depiction of “heinous crimes and heinous criminals . . . [is] a contributing factor to juvenile crime” and endangers the county’s residents.⁶¹

Both the *Kendrick* and *Gulotta* courts found that the nexus between exposure to violent depictions and committing acts of violence was unsupportable and too attenuated to justify the content-based restrictions at issue.⁶² Moreover, the *Kendrick* court opined that to shield children from information that the government finds objectionable is dangerous and counterproductive to the development of “well-functioning, independent-minded adults and responsible citizens.”⁶³ Violent depictions permeate literature, movies, television news, and great works of art.⁶⁴ Courts are unwilling to distinguish “permissible” violent depictions from “impermissible” violent depictions.⁶⁵

Despite judicial reticence, proponents of regulating violent entertainment targeted at minors suggest that the *Miller* “community standards” test should be extended to works depicting violence.⁶⁶ Arguing that the establishment of high-value and low-value categories of violent expression is consistent with the First Amendment, Jendi Reiter criticized the *Golotta* court for rejecting the analogy between obscenity and depictions of violent crime.⁶⁷

60. *Id.* at 64–65.

61. *Id.*

62. *Kendrick*, 244 F.3d at 576 (stating that the “ground for thinking that violent [video games] cause harm either to the game players or [] the public at large . . . must be compelling and not merely plausible”); *Gulotta*, 134 F.3d at 68 (finding that the County did not “support the contention that the crime trading cards are harmful to minors or contribute to juvenile crime”).

63. *Kendrick*, 244 F.3d at 577 (predicting that children will not become “responsible citizens if they are raised in an intellectual bubble”).

64. *See id.* at 577–578 (describing violent depictions in daily life).

65. *Sanders*, 188 F. Supp. 2d at 1280 (citing *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987), *cert denied*, 485 U.S. 959 (1988)) (discussing the danger of creating categories of “good” and “bad” protected speech and judging speech by “majoritarian notions of political and social propriety and morality”).

66. Jendi Reiter, *Serial Killer Trading Cards and First Amendment Values: A Defense of Content-Based Regulation of Violent Expression*, 62 Alb. L. Rev. 183, 186 (1998) (discussing the workability of treating violence like obscenity and allowing community standards to distinguish between high-quality and low-quality works for purposes of First Amendment protection).

67. *Id.* at 186.

Reiter advocates a new category of unprotected speech for violent expression called “depravity.”⁶⁸ She suggested using the *Miller* test to define the boundaries of this new category of “low value” speech.⁶⁹ Her position is that state and local governments should be free from judicial censure to enact content-based regulations aimed at protecting children from harm caused by exposure to violent depiction regardless of the dearth of social science research.⁷⁰ Reiter contended that one of the value functions vital to proper application of the First Amendment—promoting a democratic, self-governing society⁷¹—is undermined when the judiciary strikes down a democratically chosen regulation.⁷² To foster the self-government function underlying freedom of speech, Reiter posited that citizens should be free to “use democratic procedures to suppress expression that is considered dangerous and evil.”⁷³

However, Reiter’s directive to favor legislative decisions suppressing expression over judicial restraints on overreaching governmental power ignores Justice Harlan’s adage that “one man’s vulgarity is another’s lyric.”⁷⁴ Any categorization that devolves power in legislative decisions or community standards to determine the value of otherwise protected speech “would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality.”⁷⁵

While failing to adopt Reiter’s argument for a new category of unprotected speech for violent expression, one federal district court upheld a county ordinance regulating the sale or rental of violent video games to minors.⁷⁶ Contrary to other court deci-

68. *Id.* at 209.

69. *Id.*

70. *Id.* Reiter contended that the values underlying the First Amendment, including a search for truth and the fostering of a democratic, self-governing citizenry, are furthered by creating a category of unprotected speech for violent expression.

71. See Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 S. Ct. Rev. 245, 255, 262 (1961) (theorizing that the First Amendment protects the “freedom of activities of thought and communication by which we ‘govern’ . . . [L]iterature and the arts are protected because they have a ‘social importance’ [which Meiklejohn] called a ‘governing’ importance”).

72. Reiter, *supra* n. 66, at 199.

73. *Id.*

74. *Cohen v. Cal.*, 403 U.S. 15, 25 (1971).

75. See *Sanders*, 188 F. Supp. 2d at 1280 (citing *Herceg*, 814 F.2d at 1024).

76. *Interactive Digital*, 200 F. Supp. 2d at 1126 (finding that an ordinance proscribing

sions,⁷⁷ *Interactive Digital Software Assn. v. St. Louis County* found that the video games regulated by the county ordinance were not a form of speech protected by the First Amendment.⁷⁸ Alternatively, if the video games did fall under the protection of the First Amendment, the court found that the ordinance was constitutional because it served a compelling government interest and was narrowly tailored to achieve that stated interest.⁷⁹ The county asserted a compelling interest in protecting children from the harmful effects of continued exposure to violence.⁸⁰ Although the court applied a strict-scrutiny analysis, it required only minimal proof of the connection between exposure to violence and the resulting harm to children.⁸¹ The court permitted the county to rely on “society’s accepted view that violence is harmful to children.”⁸²

Typically, courts demand more than “mere conjecture” to support the requirement under strict-scrutiny analysis that the target of the speech restriction serves a compelling state interest.⁸³ However, when the government seeks to protect children

selling, renting, making available, or permitting the “free play” of violent video games to minors without a parent or guardian’s consent is constitutional).

77. See *Kendrick*, 244 F.3d at 577–578 (recognizing that video games, like books and movies, may contain stories, imagery, ideology, and messages); accord *Sanders*, 188 F. Supp 2d at 1279 (explaining First Amendment protection of video games based on the insignificant distinction between information and entertainment); see also William Li, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 Ariz. L. Rev. 467, 472 (2003) (comparing the expressive nature of modern video games to other forms of entertainment, including motion pictures, live entertainment, musical performances, theatrical productions, nudity on film, and nude dancing, to which the Supreme Court has extended First Amendment protection).

78. *Interactive Digital Software Assn.*, 200 F. Supp 2d at 1135 (finding that the video games reviewed by the court did not have “extensive plot and character development” and did not convey ideas or contain “expression for purposes of First Amendment protection”); see *id.* at 1133 n. 4 (providing a history of early 1980s cases holding that video games “lacked the expressive element necessary to trigger the First Amendment”).

79. *Id.* at 1136.

80. *Id.*

81. *Id.* at 1136–1137.

82. *Id.* at 1137; but see *supra* n. 64 (questioning the sufficiency of unsubstantiated concerns that exposure to violence is linked to juvenile crime in invoking First Amendment protection).

83. See e.g. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 236 (2002) (requiring more than the prospect of or mere tendency of speech to cause crime to sufficiently support suppression of protected speech). This aspect of strict scrutiny is related to the “narrowly tailored” prong of the strict-scrutiny test. *Id.* The “evil” targeted by the speech restriction (violent video games) must be sufficiently connected to the state’s interest (protection of

from the supposed ill effects of exposure to sexually explicit depictions, an otherwise content-based restriction does not circumvent strict-scrutiny analysis on the basis that it targets the secondary effects of the speech and not the speech itself.⁸⁴ It is not uncommon in such “secondary effects” cases for courts to defer to legislative findings, no matter how scantily supported.⁸⁵ In accepting St. Louis County’s reliance on “society’s accepted view” to establish the required nexus between violence and resulting harm to children, the *Interactive Digital* court applied a de facto secondary-effects doctrine.⁸⁶

Notwithstanding St. Louis County’s experience, more persuasive authority suggests that any attempt to restrict *Bumfights* to minors by using common sense to support the causal connection between viewing violent videos and harm to children will be unsuccessful.⁸⁷ Minors are not the victims of *Bumfights*.⁸⁸ The primary victims of the videos are the homeless people who are enticed to fight and perform other dangerous acts.⁸⁹ Harm results directly from participation in the videotaped fights and dangerous acts considered entertainment by the viewers of *Bumfights*.⁹⁰ Harm flows indirectly from both the degradation of homeless people and the portrayal of violence as sport.⁹¹ It will be argued later that *Bumfights* is not a form of expression protected by the First Amendment; therefore, any government restriction on *Bumfights* would not raise constitutional concerns.⁹²

If, however, the protective umbrella of the First Amendment does reach *Bumfights*, government restrictions would survive

minors) to support suppression of protected speech. *Id.* If the link between the speech in question (violent video games) and the interest to be achieved (well-being of children) is not sufficient, then, the speech restriction is not narrowly tailored. *Id.*

84. *Cf. City of Renton v. Playtime Theaters*, 475 U.S. 41, 49 (1986) (applying the doctrine of secondary effects to sexually explicit speech).

85. *E.g. id.* at 58–60 (Brennan, J., dissenting) (pointing out the relatively thin evidence upon which the majority affirmed).

86. *Interactive Digital*, 200 F. Supp 2d at 1137–1138.

87. *Supra* n. 37 and accompanying text.

88. *See* Natl. Coalition for the Homeless, *supra* n. 17 (explaining the harm caused by *Bumfights* to people who suffer from homelessness).

89. *Id.*

90. *Id.*

91. *Id.*; *supra* n. 7 (describing the attack and ultimate killing of Michael Roberts, a heinous crime apparently inspired by *Bumfights*).

92. *Infra* pt. III.

strict-scrutiny analysis. Whether applying the more stringent requirements of *Kendrick* and *Gulotta* or the less rigid requirement of *International Digital* in establishing the necessary link between exposure to violence and resulting harm, government restrictions on *Bumfights* could be narrowly tailored to serve a compelling government interest.

*III. IS BUMFIGHTS ENTITLED TO THE SAME
CONSTITUTIONAL PROTECTION AS VIDEO GAMES,
FILMS, AND OTHER PROTECTED FORMS OF
ENTERTAINMENT?*

Generally, “entertainment, as well as political and ideological speech, is protected by the First Amendment.”⁹³ Despite a minority view that speech protection should be limited to political speech only,⁹⁴ most legal theorists agree that entertainment is worthy of First Amendment protection because it contributes to individual development through the achievement of pleasure.⁹⁵ Purveyors of *Bumfights* claim that the videos are entertaining and provide pleasure through viewing.⁹⁶ However, this claim alone should not be the test for deciding whether *Bumfights* belongs under First Amendment protection. For example, child pornography, while entertaining and pleasurable for some, is unequivocally outside First Amendment protection.⁹⁷

The *Bumfights* Web site, when active, contained the following statement: “The purpose of these videos, through satire and sensationalism, is to call attention to the global epidemics of poverty, violence, addiction, and lack of education. Fighting and violence of any form is ignorant and pathetic.”⁹⁸ Despite these seemingly noble goals, other evidence contradicts any lofty intentions.

93. *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981).

94. See e.g. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20 (1971) (espousing the view that freedom of speech should be extended only to speech that is explicitly political).

95. E.g. Meiklejohn, *supra* n. 71, at 262.

96. *Infra*. n. 100 and accompanying text.

97. See *Ferber v. N.Y.*, 458 U.S. 747, 758 (1982) (categorizing child pornography as a class of material that is so harmful to children as to justify placing it outside the protection of the First Amendment).

98. Kristen Reed & Hal Boedeker, *Teen Says Videos Sparked Attack on Homeless Man*, Orlando Sentinel A1 (Sept. 29, 2006). After lobbying efforts by the National Coalition for the Homeless and others, major retailers removed *Bumfights* from their shelves. Lisa

In defense of *Bumfights*, Ty Beeson⁹⁹ attempted to justify the video series on the TV show *Dr. Phil*,¹⁰⁰ stating the following:

I am doing a service to the homeless people. I'm turning these people into something special. I'm motivating them, inspiring them. . . . We paid [one homeless man] twenty bucks [to eat a frog].

[O]ne guy, he was a crack-head and his teeth were bothering him. So, we got him a pair of pliers and we ripped one of his teeth out. He just wanted a bottle of J.D.

I believe our customers are infatuated with watching our videos because there's a lot of people that are addicted to violence.

[*Bumfights* is] [s]omething this world needs.

There are lines that I don't cross. I don't do hardcore porn, and I don't deal with death footage.

I've made multimillions off the [*Bumfights*] video series. I'm not surprised at my success. It's a sick world.¹⁰¹

These statements hardly support an intention to create satire for the purpose of focusing public attention on matters of public concern.¹⁰² Merely labeling something as satire and providing a laundry list of public concerns (“poverty, violence, addiction, and lack of education”¹⁰³) do not raise the specter of First Amendment protection.¹⁰⁴ Mr. Beeson's statements appear to be an admission

Suhay, *Hate, Violence, and Death on Main Street USA*, “A Report on Hate Crimes and Violence against People Experiencing Homelessness” 43, <http://i.a.cnn.net/cnn/2007/images/02/19/nch.2006.pdf> (2006); see also Todd Mitchell, *Article of Faith*, <http://articleofaith.blogspot.com/2006/10/bumfights.html> (Oct. 2, 2006) (commenting on *Bumfights*' “purpose statement”).

99. Ty Beeson purchased the rights of *Bumfights* from Ryen McPherson for \$1.5 million. See *60 Minutes*, *supra* n. 6.

100. *Dr. Phil* (Harpo Inc. Dec. 12, 2006) (TV series). Ty Beeson was forced to leave *Dr. Phil*'s show after attempting to portray *Bumfights* as positive, valuable, and necessary entertainment to *Dr. Phil*. *Id.*

101. *Id.*

102. *Id.*

103. *Supra* n. 98 and accompanying text.

104. See *Wis. v. Mitchell*, 508 U.S. 476, 484 (1993) (quoting *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968)) (stating that the Court has consistently rejected the “view that an appar-

of abuse by enticing homeless people, known to be alcoholics, to “perform” with payments of alcohol and other inducements.¹⁰⁵ It would be unconscionable for the producers and distributors of *Bumfights* to claim that the homeless people consented to appear in the videos or to perform such dangerous stunts.¹⁰⁶ Nevertheless, even if Ty Beeson could successfully argue that the homeless people who appeared in the videos had capacity to consent and received adequate consideration, such consent would still be illusory.¹⁰⁷

A. The First Amendment Does Not Protect Criminal Activity

In many states it is illegal to instigate, aid, or encourage, or act as an aider, abettor, or backer of a fight between two or more persons.¹⁰⁸ In fact, the San Diego County Deputy District Attorney prosecuted the *Bumfights* filmmakers for illegal fight promotion.¹⁰⁹ Some of the acts that brought criminal charges against the filmmakers were described as follows: “[the filmmakers] got [the homeless people] liquored up, and had them fight, jump off buildings, ram their heads into walls, . . . and pull out their teeth with pliers.”¹¹⁰

It is axiomatic that a valid contract can not be premised on criminal activities.¹¹¹ If the making of *Bumfights* constitutes criminal activity, then the videos are not a form of expression entitled to First Amendment protection.¹¹² Any claim that the videos

ently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”).

105. See *id.* (describing conduct that “is not by any stretch of the imagination expressive conduct protected by the First Amendment”).

106. See *e.g. Hauer v. Union St. Bank of Wautoma*, 532 N.W.2d 456, 460 (Wis. Ct. App. 1995) (stating that “the vast majority of courts have held that an incompetent person’s transactions are voidable—the incompetent has the power to avoid the contract entirely”).

107. *Id.*

108. *E.g. Cal. Penal Code Ann. § 412* (West 1999); *Ohio. Rev. Code Ann. § 2917.01* (West 2004).

109. Moran, *supra* n. 9 (discussing the civil lawsuit against the filmmakers for damages plaintiffs suffered from appearing in the videos); see also *supra* n. 6 (providing information about the criminal charges the *Bumfights* creators faced).

110. *Id.* (quoting San Diego County Deputy District Attorney Curtis Ross).

111. See *Clear Channel Outdoor, Inc. v. Schrem Partn.*, 2007 WL 1589435 at *3 (Wash. App. Div. 1st June 4, 2007) (stating that “[i]t is well established . . . that a court will not enforce a contract that is illegal or contrary to public policy”).

112. See *Ferber*, 458 U.S. at 761–762 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (stating that “[i]t rarely has been suggested that the constitutional

are entertainment does not transform *Bumfights* into expression worthy of First Amendment protection. The First Amendment does not guarantee protection for any and all forms of expression and certainly does not protect criminal activity.¹¹³

B. Regulation of *Bumfights* Is Permissible

One of the *Bumfights* filmmakers contended that homeless participants agreed to perform and that the videotaped acts are staged events.¹¹⁴ Setting aside the issues of consent and criminality, the government may still regulate *Bumfights*. Alternatively, even if determined to be protected expression, regulation of *Bumfights* would pass strict-scrutiny analysis. The cases discussed previously, pertaining to restrictions on violent video games and trading cards, as well as the Supreme Court decisions on child pornography, are instructive.

If *Bumfights* falls under the protective mantle of the First Amendment, any restriction on *Bumfights* would be content-based and subject to strict scrutiny.¹¹⁵ In the myriad of cases involving government restrictions on otherwise protected expression involving non-obscene material, courts easily recognize that protecting the psychological and physical well-being of children, those presumptively harmed by the targeted speech through involvement in its production, is a compelling state interest.¹¹⁶ A state's interest in protecting the physical and psychological well-being of homeless persons should be no less compelling. Both children and the homeless are similarly vulnerable in today's society¹¹⁷ because

freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute").

113. *Id.*

114. Michael Vizcarra, *A Crime Disguised as Entertainment*, <http://poormagazine.com/index.cfm?L1=newsstory=856> (July 9, 2002).

115. A restriction on *Bumfights* would be targeted at the communicative message conveyed by the videos. When government restricts protected expression because of its message, the restriction is content-based. *Perry Educ. Assn.*, 460 U.S. at 48. Content-based restrictions are presumptively invalid and are subject to strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Renton*, 475 U.S. at 42–47.

116. See e.g. *Ferber*, 458 U.S. at 756–757 (citing *Globe Newspaper Co. v. County of Norfolk*, 457 U.S. 596, 607 (1982) (noting that “a state's interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling’”).

117. Toby L. Schonfeld, Joseph S. Brown, Meaghann Weniger & Bruce Gordon, *Research Involving the Homeless: Arguments against Payment-in-Kind (Pink)*, 25 *Ethics & Human Research* 17, 17–20 (Sept.–Oct. 2003).

both often lack the capacity, skills, and means to protect themselves or to enlist the aid of others.¹¹⁸

The constitutional flaw in the attempts to restrict violent video games and trading cards concerned the “nexus requirement,” a showing that the harm to children flowed directly from the exposure to violent video games or trading cards.¹¹⁹ Child pornography is one area of speech restrictions where the connection between the harm and the targeted speech is readily apparent.¹²⁰ In reviewing the Child Pornography Protection Act, the Supreme Court reviewed provisions prohibiting any visual depiction that “appears to be . . . of a minor engaging in sexually explicit conduct.”¹²¹ The Court held that virtual child pornography¹²² is not directly harmful to children and is protected by the First Amendment.¹²³ The Court was not persuaded by Congressional findings related to the potential harm that may flow from the use or existence of virtual pornography.¹²⁴ In contrast, restrictions on actual child pornography are permissible because the harm to children flowing from the use of real children in the production of pornography is sufficiently apparent and direct.¹²⁵ In addition, a restriction that prohibits the use of children in the production of pornography is narrowly tailored to achieve a compelling state interest in protecting children.¹²⁶

Similarly, a government restriction that prohibits the production of *Bumfights* because they use real homeless people is narrowly tailored to achieve a compelling state interest in protecting

118. *Id.*

119. *Supra* n. 84.

120. *Ferber*, 458 U.S. at 757 (citing research in support of the conclusion that the sexual exploitation of children as subjects of pornographic materials creates permanent physical and emotional damage).

121. *Ashcroft*, 535 U.S. at 253 (explaining that the concern about how pedophiles might use computer-generated child pornography in the future is an insufficient basis upon which to suppress what is otherwise protected speech because the potential for harm to children is not direct and is insufficiently linked to the objectionable material).

122. Virtual child pornography includes computer-generated child-like images or adult actors who appear to be minors, engaging in sexually explicit conduct. *Id.* at 268 (Rehnquist, J., concurring).

123. *Id.* at 237–238.

124. *See Ferber*, 458 U.S. at 756–757 (stating that the future use by pedophiles or creating obstacles to future prosecution of pornographers who use real minors do not pose direct harms to children).

125. *Id.*

126. *Id.*

homeless people. Theoretically, if the producers of *Bumfights* used computer-generated images or adult actors who only appear to be homeless but have capacity to consent, then *Bumfights* would be entitled to First Amendment protection.¹²⁷ While virtual *Bumfights* may be no less objectionable than the real thing and may spawn copycat crimes just as readily, the First Amendment does not permit the government to favor one man's lyric over another man's vulgarity.¹²⁸ Valid restrictions on protected speech must be targeted at the actual harm, not a potential or indirect harm that may flow from the challenged expression.¹²⁹

C. *Bumfights* Falls outside First Amendment Protection

The above discussion of permissible restrictions and strict-scrutiny analysis presupposes that *Bumfights* is a form of expression subject to First Amendment protection. However, the criminality surrounding their production and the fact that "the evil to be restricted so overwhelmingly outweighs the expressive interest, if any, at stake"¹³⁰ permit the conclusion that *Bumfights* is outside the protection of the First Amendment.

If unprotected, the government may restrict the production and distribution of *Bumfights* under less exacting scrutiny. Such a restriction would be within the legitimate powers of state and local governments to regulate public safety and to protect "the social interest in order and morality."¹³¹ Thus, there is no constitutional impediment to target the "secondary effects" of *Bum-*

127. *C.f. Ashcroft*, 535 U.S. 234 (holding a provision of the Child Pornography Prevention Act of 1996, which banned depictions of sexually explicit conduct that conveyed only the *impression* that the material contained a depiction of a minor engaging in sexually explicit conduct, as substantially overbroad and in violation of the First Amendment).

128. *See Cohen*, 403 U.S. at 25 (reversing a criminal conviction for wearing a jacket inscribed with the words "Fuck the Draft").

129. *Id.* at 26.

130. *See Ferber*, 458 U.S. at 747 (concluding that because the harms caused by child pornography far outweigh the expressive interest, if any, in child pornography, treating child pornography as a category of unprotected speech is justified, and no case-by-case adjudication of these materials is required).

131. *Id.* at 754. State or local officials may hold public hearings and take comment from citizens and area experts on subjects related to or associated with the production, distribution and viewing of *Bumfights*. Upon consideration of the public testimony, the enacting body may make legislative findings to support the articulated purposes for and interests served by a restriction on *Bumfights*. The preamble to the statutory restriction should clearly articulate these legislative findings.

*fight*s,¹³² such as the harm to the physical and emotional well-being of the homeless, an increase in violence or crime against the homeless, and the potential harm to the consumers of *Bum-fights*.¹³³

IV. WILL “OPENING THE DOOR” TO PUBLISHER LIABILITY
FOR THE HARMS CAUSED BY THIRD-PARTY
VIEWERS OF BUMFIGHTS OFFEND
PRINCIPLES OF TORT LAW?

Everyday news reports are rife with stories on violence.¹³⁴ We are bombarded with violent images and gruesome stories on a daily and even hourly basis.¹³⁵ The list of violent events streaming across our TV screens and plastered on the front-page news is both heart-wrenching and dumbfounding.¹³⁶

It is no surprise that the search for answers, combined with the need to hold someone or something accountable, transform into civil lawsuits.¹³⁷ Most people’s human experience and worldview require the need to look beyond the actual perpetrator to something more controllable and, perhaps, understandable, even preventable. What could possibly cause students to go on shooting rampages,¹³⁸ or cause young boys to brutally assault a homeless

132. The enacting body could determine that a connection exists between viewing violent videos and antisocial behavior based on common sense. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (reasoning that “[n]othing in the Constitution prohibits a State [or local government] from reaching [the conclusion that antisocial behavior is linked to prolonged viewing of obscene videos] and acting on it legislatively simply because there is no conclusive evidence or empirical data”).

133. See *Kendrick*, 244 F.3d at 576 (discussing the subtler concern for the psychological welfare of the more susceptible viewers who may be “incited” to commit violence and then be subject to criminal retribution).

134. See generally Henry J. Kaiser Family Found., *Children and the News: Coping with Terrorism, War and Everyday Violence* 1–4 (Kaiser Found. Spring 2003) (available at <http://www.kff.org/entmedia/upload/Key-Facts-Children-and-the-News.pdf>) (explaining the prevalence of violence in everyday news reports).

135. *Id.*

136. *Id.*

137. See *Phillips v. Ostrer*, 481 So. 2d 1241, 1246 (Fla. 3d Dist. App. 1985) (citing *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 547 (Fla. 1981)) (explaining that “the purpose of an award of compensatory damages is to make the injured party whole . . . or to place him in the position in which he would have been had no wrongful act occurred”).

138. The massacre at Virginia Tech is considered the deadliest shooting in modern United States history, leaving thirty-three dead and fifteen wounded. AP, *At Least 33 Dead in Virginia Rampage*, <http://www.msnbc.msn.com/id/18134671/> (last updated Apr. 17, 2007). In 1999, two students embarked on a shooting rampage at Columbine High

person, videotape that degradation, and claim they did it for fun?¹³⁹ Even if criminality is not a factor, injured victims need consolation and closure. Faced with serious injuries or death as a result of tragedy, victims and loved ones may seek to place responsibility in someone or something external to themselves as a way of easing the pain, relieving guilt, subsidizing the costs, or preventing others from similar losses.¹⁴⁰

A. Constitutional Considerations and Foreseeability Issues in Publisher-Liability Cases

There have been only a handful of cases holding the publisher of expressive material liable in tort.¹⁴¹ Few plaintiffs have successfully proven that the expressive material directly or through third-party influence caused physical injury or death.¹⁴² In *Rice v. Paladin Enterprises, Inc.*,¹⁴³ the court found that the publisher of the manual, *Hit Man: A Technical Manual for Independent Contractors*, could be held civilly liable for aiding and abetting a hit

School, killing twelve students. AP, *Columbine Questions Still Unanswered*, <http://www.msnbc.msn.com/id/18226635/> (last updated Apr. 20, 2007). After murdering his wife and mother, Charles Whitman shot and killed seventeen people and wounded thirty-one others from the tower observation deck at the University of Texas at Austin in 1966. Alwyn Barr, Tx. St. Historical Assn., *Handbook of Texas Online: Whitman, Charles Joseph*, available at <http://www.tsha.utexas.edu/handbook/online/articles/WW/fwh42.html> (accessed Apr. 8, 2008). He was later killed by police. *Id.*

139. See *supra* n. 7 (referencing an attack by a group of boys, caught on a security camera, where the boys bashed a homeless person with bats for no apparent reason other than it amused them).

140. See generally *e.g. Zamora v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979) (claiming exposure to TV violence caused a teenage boy, who killed his 83-year-old grandmother, to become desensitized to violence and to develop a sociopathic personality); *McCollum v. CBS*, 202 Cal. App. 3d 989 (Cal. App. 2d Dist. 1988) (claiming Ozzy Osbourne's song "Suicide Solution" influenced a young boy to commit suicide); *Sakon*, 553 So. 2d 163 (claiming the depictions in a Mountain Dew commercial induced a young boy to do a dangerous stunt on his bike, causing paralysis).

141. See generally *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40 (Cal. 1975) (finding a radio station liable for the wrongful death of two young motorists who participated in a contest sponsored by the radio station to locate a disc jockey who was driving around the city and giving away money and prizes); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1122 (11th Cir. 1992) (finding the publisher of a "Gun for Hire" advertisement liable for negligent publication because "the language of [the] ad should have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk that [the solicitor] was soliciting violent and illegal jobs").

142. See generally Lisa A. Powell, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 Ind. L.J. 503 (1983–1984).

143. 128 F.3d 233, 265 (4th Cir. 1997).

man in a successfully executed triple-murder hire-to-kill plot.¹⁴⁴ While the *Rice* case provides little support for holding publishers liable in negligence, it is instructive on the issue of the cause-and-effect relationship between expressive material and the wrongful acts of third parties.¹⁴⁵

“Publisher liability” collectively refers to the tort claims and theories of recovery—aimed specifically at publishers—for the acts of third parties allegedly influenced or misinformed by publications.¹⁴⁶ One author suggests a further categorization of these cases, recognizing that misinformation cases (stemming from advertisements and how-to books) differ from copycat cases (resulting from exposure to violence-oriented media; euphemistically referred to as “television intoxication”¹⁴⁷ claims).¹⁴⁸

First Amendment protections will shield publishers from most of these claims. Thus, the plaintiffs’ ability to successfully argue that the publication at issue falls into one of the unprotected categories of speech or is not speech at all is critical.¹⁴⁹ Many copycat cases allege that the harmful publication falls into the unprotected speech category of incitement.¹⁵⁰ In *Yakubowicz v. Paramount Pictures Corp.*,¹⁵¹ parents who lost their son to gang violence claimed that the movie *The Warriors* incited the gang members who caused his death.¹⁵² Immediately prior to the at-

144. *Id.* at 265.

145. *Id.* at 266.

146. *Id.* at 1076–1084. The Author includes in the term “publisher liability” anyone in the chain of distribution who might be sued in negligence for producing, distributing, marketing, and selling. The term “publication” includes all forms of expressive material. *Id.* at 1076.

147. Li, *supra* n. 77, at 497 (discussing the *Zamora* case and others that raise claims suggesting that exposure to violence caused the purveyor to commit violence—what this author called the “television intoxication” excuse).

148. Susan M. Gilles, *Poisonous Publications and Other False Speech Physical Harm Cases*, 37 Wake Forest L. Rev. 1073, 1077–1078 (2002) (suggesting that the class of cases involving “false speech physical harm” be analyzed under a *N.Y. Times v. Sullivan* defamation standard).

149. *Supra* n. 53 (distinguishing violence from obscenity regarding the government’s ability to regulate and the standards to apply regarding First Amendment protections).

150. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that mere advocacy of illegal activity is protected speech; only when advocacy is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action” can speech be infringed upon).

151. 536 N.E.2d 1067, 1068 (Mass. 1989).

152. *Id.*

tack, the accused viewed the defendant's movie.¹⁵³ The plaintiffs alleged that Paramount "produced, distributed, and advertised *The Warriors* in such a way as to induce film viewers to commit violence in imitation of the violence in the film," thus inciting the gang members to violence.¹⁵⁴ The court rejected plaintiffs' allegations of incitement because the film did not "order or command anyone to any concrete action at any specific time, much less immediately."¹⁵⁵

Most forms of expression will fail to satisfy the imminence requirement of the *Brandenburg* incitement test.¹⁵⁶ Copycat cases, like *Yakubowicz*, do not easily fit into a category of unprotected speech.¹⁵⁷ Incitement is a difficult standard to meet, and as discussed previously, the "violence-like-obscenity" argument is unavailing.¹⁵⁸ However, constitutional considerations are not the only obstacles plaintiffs must overcome in copycat cases.¹⁵⁹

In *James v. Meow Media Inc.*,¹⁶⁰ parents whose daughters were killed by Michael Carneal in a Kentucky school-shooting spree brought a wrongful death action against the publishers and distributors of violent video games, Web sites, and a movie, claiming that the violence-oriented materials negatively influenced impressionable minors and caused the shootings.¹⁶¹ Following the Sixth Circuit Court of Appeals' ruling in another copycat-negligent-publication case,¹⁶² the *James* court granted the defendants' motion to dismiss based on state tort law, never reaching the First Amendment issue.¹⁶³ Applying the elements of negli-

153. *Id.*

154. *Id.* at 1071.

155. *Id.*

156. *Brandenburg*, 395 U.S. at 448.

157. *Yakubowicz*, 536 N.E. at 1071.

158. *Supra* n. 53 (distinguishing violence from obscenity regarding First Amendment protection).

159. *James*, 90 F. Supp. 2d at 818.

160. 90 F. Supp. 2d 798 (W.D. Ky. 2000).

161. *Id.* at 819 (granting defendant's motions to dismiss on claims that defendants' negligence in producing, distributing, and marketing violent expressive material and their failure to warn of the dangers associated with violence-oriented publications caused the Michael Carneal to shoot his fellow students).

162. *Watters v. TSR, Inc.*, 904 F.2d 378, 384 (6th Cir. 1990) (affirming the lower court's dismissal of a mother's claim that exposure to a violent video game caused her son to commit suicide based on state tort law).

163. *James*, 90 F. Supp. 2d at 818.

gence to the facts alleged in the plaintiffs' complaint, the court held that the defendants owed no duty to foresee the chain of events that led from disseminating their products "to [p]laintiffs' injuries from Michael Carneal's actions."¹⁶⁴ In dismissing all plaintiffs' claims against the defendants, the court stated that "this was a tragic situation, but 'tragedies such as this simply defy rational explanation, and courts should not pretend otherwise.'"¹⁶⁵

If constitutional principles and tort law make it nearly impossible to bring publisher-liability claims, how can the producers and distributors of *Bumfights* be held civilly liable for copycat crimes? The constitutional considerations, while weighty in most publisher-liability cases, are distinguishable when applied to *Bumfights*.¹⁶⁶ As stated above, *Bumfights* is not expression and does not fall under the umbrella of the First Amendment.¹⁶⁷ To exclude *Bumfights* from the reach of constitutional protection does not offend the principles of free speech.¹⁶⁸

Bumfights is not speech; it is conduct. *Bumfights* is no more than instigating, aiding, and encouraging homeless people to fight, a violation of criminal law.¹⁶⁹ The videos are not transformed to protected expression by labels or purpose statements. Furthermore, the fact that people are entertained by *Bumfights* is irrelevant. There is no denying that fighting is a theme of great interest and entertainment. From the Roman Gladiators to pro-wrestling, fighting has entertained the populace throughout history.¹⁷⁰ Nevertheless, it is not the subject matter of *Bumfights* that is objectionable (at least for First Amendment purposes); it is

164. *Id.* at 803.

165. *Id.* at 819 (quoting *Watters*, 904 F.2d at 384).

166. *Supra* nn. 37–38 and accompanying text (holding in both *Kendrick* and *Gulotta* that violent expression is distinguishable from obscenity for the purposes of governmental regulation).

167. *Ferber*, 458 U.S. at 763 (discussing the harm of child pornography as the physical and psychological injury to real children used in producing child pornography). The Author analogizes the reasoning in *Ferber* to conclude that *Bumfights* is unprotected speech because of the harm caused to real homeless people in its production.

168. *Id.*

169. *E.g.* Cal. Penal Code Ann. § 412; Ohio Rev. Code Ann. §§ 2917.01.

170. *See generally* Susanna Shadrake, *The World of the Gladiator* (Tempus 2005); Scott M. Beekman, *Ringside: A History of Professional Wrestling in America* (Praeger Publishers 2006).

the manner of producing *Bumfights* that is undeserving of expressive protection.¹⁷¹

B. Liability of *Bumfights* Producers under a Negligence Theory

With no constitutional impediments to overcome, *Bumfights* liability claims are defined by the elements of negligence.¹⁷² As for all negligence claims, the elements of duty and causation raise issues of fairness and foreseeability; they are essentially “policy determinations.”¹⁷³ The responsibility to undertake a duty for the acts of third parties, particularly criminal acts, is extremely circumscribed by tort law.¹⁷⁴ Fairness and policy dictate that liability should not be premised on unforeseeable risks.¹⁷⁵ The *Zamora v. Columbia Broadcasting System*¹⁷⁶ court refused to recognize a duty on broadcast companies to undertake any responsibility for the wrongful acts of susceptible viewers as follows:

The impositions pregnant in [imposing such a duty] are awesome to consider. [T]he three major networks [would be] charged with anticipating the minor’s alleged voracious intake of violence on a voluntary basis; his parents’ apparent acquiescence in this course, presumably without recognition

171. See *Ferber*, 458 U.S. at 757 (upholding legislation regulating child pornography, based in part on the manner by which it is produced, and notwithstanding any constitutional implications).

172. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. Ct. App. 1928) (describing the elements of negligence as duty, breach, causation, and resulting damage).

173. This is a general principle of tort law. See *Walker v. Giles*, 624 S.E.2d 191, 200 (2005) (quoting *Atlanta Obstetrics and Gynecology Group, P.A., v. Coleman*, 398 S.E.2d 16 (1990), which states, “[t]he requirement of proximate cause constitutes a limit on legal liability; it is a policy decision that, for a variety of reasons . . . the defendant’s conduct and the plaintiff’s injury are too remote for the law to countenance recovery”); see *Palsgraf*, 162 N.E. at 104 (explaining “the natural results of a negligent act—the results of which a prudent man would or should foresee—do have a bearing upon the decision as to proximate cause”).

174. See *Pendelton v. St.*, 921 A.2d 196, 211 (Md. App. 2007) (quoting *Restatement (Second) of Torts* § 315 (1965)) (noting that generally, unless there is a special relationship, “there is no duty to control the conduct of a third person as to prevent him from causing physical harm to another”); *Madison ex rel. Bryant v. Babcock Center, Inc.*, 638 S.E.2d 650, 656 (S.C. 2006) (stating that absent certain special circumstances, “there is no general duty to control the conduct of another or to warn a third person or potential victim of danger”).

175. *Walker*, 624 S.E.2d at 200.

176. 480 F. Supp. 199.

of any problem; and finally that young Zamora would respond with a criminal act of [this] type in question.¹⁷⁷

However, when the risks are foreseeable to the defendant, are sufficiently connected to the conduct in question, and are avoidable within the exercise of reasonable care, the imposition of a duty is fair and good policy if the risk to be avoided is important and is worth the cost of avoiding.¹⁷⁸ The determination of a duty is a legal conclusion of “whether a plaintiff’s interests are entitled to legal protection against the defendant’s conduct.”¹⁷⁹

Sometimes duty and breach are considered together as in negligence per se cases.¹⁸⁰ In these cases, the statute resolves the issue of duty and defines what constitutes a breach.¹⁸¹ The judge determines whether the violation of the statute governs the plaintiff’s case.¹⁸² In making that determination, the judge considers the following three factors: (1) if the language of the statute is sufficiently specific to articulate a standard; (2) if the statute was intended to protect the class of persons to which plaintiff belongs; and (3) if the statute was intended to protect the type of harm that plaintiff suffered.¹⁸³ It is up to the jury to decide if the defendant violated the statute and whether the violation of the statute was the cause of plaintiff’s injuries.¹⁸⁴ In negligence per se cases, it is appropriate for violations of criminal statutes or local ordinances to govern the duty, breach, and causation elements.¹⁸⁵

The doctrine of negligence per se is one way, perhaps the only way, to open the door for imposing tort liability on the producers and distributors of *Bumfights* for the copycat crimes of their viewers. As previously argued, a statute or local ordinance prohibiting the production and distribution of *Bumfights* should be constitutionally permissible, within the legitimate powers of state

177. *Id.* at 202.

178. *Barber v. Chang*, 60 Cal. Rptr. 3d 760, 768 (Cal. App. 4th Dist. 2007).

179. *James*, 90 F. Supp. 2d at 803.

180. *E.g. Chambers v. St. Mary’s School*, 697 N.E.2d 198, 201 (Ohio 1998); Dan B. Dobbs, *The Law of Torts* 315–329 (West Group Publ. 2000).

181. *Chambers*, 697 N.E. at 201.

182. *Id.*

183. *E.g. Rains v. Bend of the River*, 124 S.W. 3d 580, 591 (Tenn. App. 2003).

184. *Id.* at 588.

185. *Chambers*, 697 N.E.2d at 201.

and local government,¹⁸⁶ and could support a claim for negligence per se. The statute or local ordinance must be carefully drafted with a preamble that clearly articulates the legislative findings,¹⁸⁷ the purposes of the statute, and the interests to be served (who and what the statute is intended to protect).¹⁸⁸

Alleging a statutory violation to impose tort liability does not guarantee that a plaintiff will prevail.¹⁸⁹ The doctrine of negligence per se only helps the plaintiff survive a motion to dismiss and, hopefully, to get the claim to a jury.¹⁹⁰ A jury may determine that the videos are not the actual or proximate cause of the plaintiff's injuries. Even so, there is merit in letting a jury hear and decide the case. Ideally, the jury is applying community standards.

V. CONCLUSION

Coming full circle, this Article begins and ends with thoughts about applying community standards to judge the value of violent depictions. In the *Bumfights* case, allowing the jury to judge the worthiness of the videos is proper and furthers the goals of tort law. The jury will weigh the utility of the videos against the costs according to community standards. In determining the causation issue, the jury will apply society's general view of the connection between viewing violence and committing violence. If the jury believes that the connection between *Bumfights* and copycat crimes is sufficiently strong, it will place responsibility for the secondary effects of the videos on the producers and distributors by imposing liability.¹⁹¹ No doubt the imposition of civil damages will create a

186. *Ferber*, 458 U.S. at 754–756.

187. The legislative finding could include opinions by experts and their studies linking prolonged exposure to violent videos with violent and antisocial behavior. *E.g. Interactive Digital Software Assn.*, 200 F. Supp. 2d at 1129–1130. The necessity for the prohibition can be shown by listing crime statistics for the community and, specifically, the number of acts of violence against homeless people and the percentage of increases from year to year. The findings must be specific with studies and expert testimony to support a need to target the “secondary effects” of the videos (i.e. copycat crimes) and can include statements indicating public outrage. *Id.*

188. *Id.*

189. *Chambers*, 697 N.E.2d at 201.

190. *Id.*

191. *Barber*, 60 Cal. Rptr. 3d at 768.

chilling effect on the production of *Bumfights*.¹⁹² However, if the commercial profits of producing and distributing *Bumfights* are great, the filmmakers are free to continue the production and distribution (notwithstanding the criminal prohibitions)¹⁹³ and pay for the consequences.

Opening the door to *Bumfights* liability suits will neither cause a flood of publisher-liability suits nor have a chilling effect on protected speech or First Amendment rights.¹⁹⁴ In reality, homeless people have few protectors who have both standing and the desire to beat down the courthouse doors to sue *Bumfights* producers for wrongful death. Sadly, when calculating wrongful-death damages, the value of a homeless person's life is minimal.¹⁹⁵ Wrongful death damages are measured in terms of lost earning capacity and the emotional costs to others of loss companionship.¹⁹⁶ If liability is imposed, any damage award would be small unless punitive damage awards are available.¹⁹⁷

While not all people have equal faith in the tort system, the jury system allows a balancing of the benefits of a specific violent publication against the risks of a particularized harm by applying community standards. A violent publication could only be subject to tort liability if the harm to be challenged is the mode and manner of production and not the content or message conveyed.¹⁹⁸ Then, it is the publisher's conduct that is subject to suppression, not the publisher's message. This is far superior to a system that subjects all violence-oriented publications to a sort of "community standards fitness test" by treating violence, like obscenity, as subject to the *Miller* community standards test.

The creation of a new category of unprotected speech for violence-oriented material would permit "majoritarian notions of political and social propriety and morality" to dictate what is lyric and what is vulgarity. Such a system would offend the principles

192. *Id.*

193. *Supra* n. 175. To date, there has been only one criminal prosecution of the makers of *Bumfights*.

194. *Supra* n. 166 (referencing *Kendrick* and *Gulotta*, which protect publishers from liability in copycat cases).

195. *See Knott v. Cal.*, 28 Cal. Rptr. 2d 514, 527 (Cal. App. 4th Dist. 1994) (calculating wrongful death damages).

196. *Id.*

197. *Id.*

198. *Ferber*, 458 U.S. at 761–762.

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of free speech and the fostering of independent-thinking citizens necessary for a democratic, self-governing society. First Amendment rights, while not absolute, protect both the expressive message of speech and the right of speakers and listeners to distinguish for themselves “lyrics” from “vulgarity.”