

TORT LIABILITY FOR MANUFACTURERS OF VIOLENT VIDEO GAMES: A SITUATIONAL DISCUSSION OF THE CAUSATION CALAMITY

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INTRODUCTION

Of the top-selling video games in 2001, 49% were considered to contain seriously violent content; in 41% of all video games, violence was necessary to the game objective, and in 17%, violence was the central point of the game.¹ Current video game content portrays increasingly rea-

1. René Weber et al., *Does Playing Violent Video Games Induce Aggression? Empirical Evidence of a Functional Magnetic Resonance Imaging Study*, 8 MEDIA PSYCHOL. 39, 40 (2006).

listic violence compared to its counterparts two decades ago—which were no more than glorified pinball machines. Industry research has shown that the favored storyline in a video game is that of “a human perpetrator engaging in repeated acts of justified violence involving weapons that results in some bloodshed to the victim.”² Studies show that pre-teen and adolescent boys favor violent video games with the “M” rating³—the most violent—and that minors have no trouble purchasing the games despite self-imposed industry regulations (like the rating system).⁴

Society is quick to boast about the positive aspects of learning that come from video games such as learning to read, learning a different language, practicing complex surgical procedures on a virtual patient, and training soldiers for war. However, society refuses to acknowledge the negative effects of video games, which include training a violent person with a lethal skill set and the violent acts committed as a result of playing the game. Violent video games have the ability to virtually train players to acquire a skill set that can be used in committing real-life acts of violence. In the development of *Soldier of Fortune*, a military mercenary was consulted in order to create twenty-six life-like killing zones to better train the player to kill.⁵ Thus, it follows that a person who has no training in firearms will better know how to kill a human after playing the game.⁶ Violence committed as a result of violent video games is not anything that should catch manufacturers off guard; many commentators have argued that recent violent acts and killing sprees are caused by violent video games.⁷

2. Stacy L. Smith et al., *Popular Video Games: Quantifying the Presentation of Violence and Its Context*, 47 J. BROADCASTING & ELECTRONIC MEDIA 58, 73 (2003).

3. See Entertainment Software Rating Board, *Game Ratings & Descriptor Guide*, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Feb. 15, 2009).

4. FTC, REP. TO CONGRESS: *Marketing Violent Entertainment to Children: A Fourth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, 18 (July 2004), available at <http://www.ftc.gov/os/2004/07/040708kidsviolencrpt.pdf> (asserting that 56% of unaccompanied 13-year-olds were able to purchase M-rated video games).

5. See *infra* notes 24–28 and accompanying text.

6. See Kevin W. Saunders, *The Need for a Two (Or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT L. REV. 257, 266 (2004). The teenage shooter in Paducah, Kentucky, had

no appreciable exposure to firearms, yet, with eight or nine shots, he had eight hits, all in the head or upper torso. That level of accuracy with a handgun is astounding. The FBI says that the average experienced law enforcement officer, in the average shootout, at an average range of seven yards, hits with approximately one bullet in five. While lacking firearms training, [the Paducah, Kentucky, shooter] did play first-person shooter video games, and they appear to have made him an effective killer.

Id. (internal citations and quotations omitted).

7. Most notably, the families of victims in the Columbine High School shooting brought a lawsuit after investigations concluded that playing violent video games had a significant influence on the shooters. See Mark Ward, *Columbine Families Sue Computer Game Makers*, BBC NEWS, May 1, 2001, <http://news.bbc.co.uk/1/hi/sci/tech/1295920.stm>. Similar shootings (e.g., Virginia Tech; Paducah, Kentucky) have been attributed to violent video games. See Winda Benedetti, *Were Video Games to Blame for Massacre?*, MSNBC, Apr. 20, 2007, <http://www.msnbc.msn.com/id/18220228>. Video

This Note argues that manufacturers of violent video games should be subject to tort liability for violent acts that are attributable to their games under theories of negligence or negligent entrustment. Specifically, this Note addresses the issues presented with causation and discusses theories of tort law (market-share liability, alternative liability, and probabilistic causation) where the rigor of causation is relaxed to serve a compelling purpose. This Note further shows that psychological research demonstrates that video games cause normal people to learn from on-screen violence how to commit real-life acts of violence. This Note argues that the findings of that research are persuasive evidence for causation.

Part I, for the first time in legal literature, devises categories to distinguish between different types of violent video games. The games are divided into two classifications: *modus operandi* games (games that simulate real-life situations and train the player to acquire a special skill set) and violent atmosphere games (games that are extremely violent and realistic—in some cases, nothing more than animated shooting galleries). This part suggests that the burden in proving causation is considerably less in *modus operandi* games because the violent act is a joint action between the manufacturer and the perpetrator that closely resembles traditional relationships in established tort law (e.g., aiding, abetting, or conspiracy). Furthermore, this part discusses the caveat that, although violent atmosphere games should be subject to liability because they create aggression in the player which results in violent acts, they face the difficulty of not closely resembling traditional areas of tort law and depend heavily upon psychology to show causation.

In Part II, this Note discusses psychological studies that show that playing violent video games increases aggression in the player. Further, this part explains how those findings show that violent video games are responsible for real-life acts of violence and provides evidence of causa-

games, as well, have been attributed to violence that has been less prominent in the news. See, e.g., David Kohn, *Addicted: Suicide over Everquest?*, CBS NEWS, Oct. 18, 2002, <http://www.cbsnews.com/stories/2002/10/17/48hours/main525965.shtml> (discussing an instance where an adult committed suicide while playing violent video game; mother and friends attributed suicide to game); Rebecca Leung, *Can a Video Game Lead to Murder?, Did Grand Theft Auto Cause One Teenager to Kill?*, CBS NEWS, June 19, 2005, <http://www.cbsnews.com/stories/2005/06/17/60minutes/main702599.shtml> (attributing a teen's killing rampage, which included the deaths of two police officers, to playing the game *Grand Theft Auto*); Cao Li, *Death Sentence for Online Gamer*, CHINA DAILY, June 8, 2005, http://www.chinadaily.com.cn/english/doc/2005-06/08/content_449494.htm (discussing a situation where a gamer killed another gamer in a dispute over a "cyberweapon"); Duncan Mansfield, *Lawsuit Filed Against Sony, Wal-Mart over Game Linked to Shootings*, AUGUSTA CHRONICLE, Oct. 22, 2003, http://chronicle.augusta.com/stories/102303/biz_124-4996.shtml (referencing a situation where teenagers shot automobile passengers after playing *Grand Theft Auto*); *Online Game Rivalry Ends With Real Life Murder*, RUSSIA TODAY, Jan. 17, 2008, <http://www.russiatoday.com/scitech/news/19777> (detailing a situation where a gamer was beaten to death by rival guild after rival guild's online character was killed during multiplayer online gameplay).

tion. Part III discusses First Amendment concerns that, in some instances, may prevent a manufacturer from being subject to tort liability.

Next, Part IV discusses the problems associated with causation in this context—as it constitutes the biggest hurdle for plaintiffs seeking to hold manufacturers liable in tort. It is essentially impossible to show that the video game was the but-for cause of the real-life act of violence, and Part IV proposes a solution for that problem. This part also discusses the alternate theories of causation that have been accepted when it is impossible to show that a defendant was the but-for cause of the plaintiff's injury. Finally, Part V synthesizes the law and psychology and applies them to the video games.

I. CATEGORIES OF VIOLENT VIDEO GAMES

The interactive nature of violent video games has a disturbing effect. Video games provide instant feedback to the user (e.g., scoring—whether it be points or fictional money). Blood and gore in gameplay often indicate that a player has succeeded in an objective, as blood is often a reward in video games.⁸ Not all violent video games are created equally, and, therefore, the law should not treat them the same. There are two types of violent video games: games that have a violent atmosphere (“atmosphere games”) and games that are simulations that train a player to create and develop a special skill set (“*modus operandi* games”).

Atmosphere games contain senseless violence that is necessary to achieve the goal of the game. Although this violence may be considerably objectionable, atmosphere games do not necessarily require the player to have or develop a particular skill set that could translate to or be implemented in real life. For example, in the *Grand Theft Auto* series, the player is a car thief whose objective is “to kill, steal, and beat individuals.”⁹ This series of games has been noted for “letting people live out their sociopathic fantasies”¹⁰ through random acts of senseless violence. *Grand Theft Auto* awards points according to how much mayhem the player causes (e.g., shooting a character in the head—known as a “head shot,” which immediately causes death with a single shot—rather than in the body), rather than according to a skill that the player uses. While *Grand Theft Auto* is considered a violent video game because one can cause harm to

8. See Kirstie M. Farrar et al., *Contextual Features of Violent Video Games, Mental Models, and Aggression*, 56 J. COMM. 387, 401 (2006) (finding that, in television, research suggests that blood does not increase aggression; rather, it is the interactive nature of video games—trying to earn points or the reward—that motivates the player).

9. Vincent Cicchirillo & Rebecca M. Chory-Assad, *Effects of Affective Orientation and Video Game Play on Aggressive Thoughts and Behaviors*, 49 J. BROADCASTING & ELECTRONIC MEDIA 435, 441 (2005).

10. Greg Kasavin, *Grand Theft Auto: Vice City for PC Review*, <http://www.gamespot.com/pc/action/grandtheftautovicecity/review.html> (last visited Feb. 15, 2009).

characters within the game (e.g., the player can run over or rob pedestrians), it does not reward based on skill. Thus, it is an atmosphere game. The game *Doom* is not as easily distinguished. *Doom* is essentially an animated shooting gallery full of blood and gore where a player must kill other characters to survive and reach the next level.¹¹ While *Doom* is a gruesome game with realistic violence, its realistic effect is slightly offset by the science-fiction cartoon-style characters and animated-feel gameplay. This offsetting places it within the atmosphere game classification.

A type of violent video game that is questionably between the two categories is the historical war reenactment, first-person-shooter genre—games like *Medal of Honor* or the *Call of Duty* series. In both games, the player reenacts real campaigns and missions from World War II in realistic war scenarios. Neither game spares the player from the grisly realities of war.¹² While the characters still bear a faint cartoon-esque appearance, they are remarkably realistic looking and will continue to become even more lifelike in the near future until they are unmistakably human in appearance.¹³ This type of game, which is easily accessible, can virtually train a person with the actual skills to commit real-life violence. For example, in *Call of Duty 4*—the newest of the series and set in the present day—one learns the real-life skills to be a sniper: to successfully execute a sniper shot on a far away human target, “you need to adjust for wind and the Coriolis Effect (caused by the rotation of the Earth). When you fire the shot, you’ll see it curve.”¹⁴ Although the training aspect of these games is comparable to games easily classified as *modus operandi*, these games may escape liability with greater ease under the auspices of the First Amendment because of the strong historical reenactment and movie sequences.¹⁵ It would, however, be nothing short of activism to allow a company to escape liability under the protection of the First Amendment when it entrusted a perpetrator of violence to train with a video game of

11. See Patricia Arriaga et al., *Violent Computer Games and Their Effects on State Hostility and Physiological Arousal*, 32 *AGGRESSIVE BEHAV.* 146, 151 (2006).

12. Dexter Pearson, *Reviewed: Call of Duty 3*, http://www.acegamez.co.uk/reviews_playstation3/Call_of_Duty_3_PS3.htm (last visited Feb. 15, 2009) (“Looking out past the helmet on my head that hangs down and almost hinders my view, I see allies getting blown to smithereens, giving their lives for their country, and I see enemies losing limbs and giving their lives for their cause . . . [T]he spiteful side of me wants these bastards dead, as they just shot my friend in cold blood.”).

13. See Michael McCann, *The Intersection Between Tort Law and Social Psychology in Violent Videogames*, <http://thesituationist.wordpress.com/2007/01/25/videogames-violence-and-the-law> (last visited Feb. 15, 2009); see also Pearson, *supra* note 12 (“[T]he people you shoot and fight alongside are very lifelike, the weapons are highly detailed and the buildings are covered with battle damage, half-ruined and scarred by gunpowder. There’s just no disputing that [*Call of Duty 3*] brings WWII right into your living room . . .”).

14. Hilary Goldstein, *Call of Duty 4: Modern Warfare Review*, <http://xbox360.ign.com/articles/832/832599p2.html> (last visited Feb. 15, 2009).

15. See *infra* Part III.

this type, who committed an act of real-life violence with the skills learned from the game.

Modus operandi games are violent video games that are simulators to train a player to acquire a skill or set of skills necessary to commit a real-life act of violence. The key here is that the real-life act of violence must be substantially similar to the unique or distinctive manner in which the player is trained in the video game.¹⁶ The *modus operandi* category is so named because it bears a resemblance to the *modus operandi* theory of evidence in criminal law (also known as the handiwork or signature exception).¹⁷ In criminal law, a prosecutor can produce *modus operandi* evidence to charge a defendant with a crime where the perpetrator is “unknown” because it is similar to a crime the defendant committed where he was the known perpetrator.¹⁸ This is allowed if the prosecutor can show that the two crimes were unique and committed in a substantially similar way, such that it is highly probable that the defendant committed both crimes.¹⁹ These games can range from rape simulators, to first-person shooters, to seemingly ordinary action-adventure games. They are the most dangerous of the violent video games because they expose the public to harm. While most of these games have realistic graphics (some more so than others) and some have gore, the important element is that all of them have the ability to equip the player with a skill set that translates from the ability to commit on-screen violence to the ability to commit an identical act of real-life violence.

RapeLay is a rape simulator with little plot, semi-cartoonish/semi-realistic characters, and an expansive repertoire of sexual acts than can be interactively performed.²⁰ *RapeLay* caters to “the rape grognards who want a rape simulator to be as realistic as possible. They want it to include accidental pregnancies, crying, abortion, threat of murder, fuel mixture, full elevator control, and pre-rape start-up checks.”²¹ And yes, this game does include all of the aforementioned, all of which are controlled by the player. The game allows the player to grope female characters, to disrobe

16. See generally 29 AM. JUR. 2D *Evidence* §§ 459–61 (2008) (describing the evidentiary use of *modus operandi* to link two crimes).

17. See *id.* § 459.

18. See *United States v. Foutz*, 540 F.2d 733, 737 (4th Cir. 1976).

19. *Id.*; see also *United States v. Medina*, 761 F.2d 12, 15 (1st Cir. 1985) (admitting *modus operandi* evidence that defendant participated in a prior kidnapping in a case where defendant had an identical plan and technique to kidnap another person); *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977).

20. See Zack Parsons, *RapeLay Review*, <http://www.somethingawful.com/d/hentai-game-reviews/rapelay.php> (last visited Feb. 15, 2009).

21. *Id.*; see also Zigfried Munihhausen, *Review of RapeLay*, http://www.honestgamers.com/systems/content.php?review_id=4775&game_id=21487&console_id=13 (last visited Feb. 15, 2009) (“*RapeLay* represents a substantial evolution in hentai gaming: diverse, real-time, interactive sexual intercourse. But let’s be honest. In *RapeLay*, you rape women in the most abusive manner possible and the women learn to like it.”) (emphasis added).

characters, and to control every second of every imaginable explicit sexual act—the game is, to say the least, fully inclusive. This game is beyond the bounds of decency in any civilized society. In one instance of gameplay, the player rapes a character that “looks about ten . . . in her gigantic bed while teddy bears look on. . . . Not only does she look like a child, not only does her room look [sic] like a child’s room, but [the character] visibly cries.”²² When the player zooms in on the character, one can see tears vibrating and falling from the young girl’s eyes.²³

Another *modus operandi* game, the first-person-shooter *Soldier of Fortune*, was developed in collaboration with the consultation of mercenary John Mullins (also the name of the lead character).²⁴ The game has been described as “realistically brutal.”²⁵ Mullins helped develop gameplay that features “26 different ‘killing zones’” and where the characters “respond realistically to different shots depending on where in the body they are shot, with what weapons, and from what distance.”²⁶ The game is so true to real life that a player can even shoot a weapon out of the enemy’s hand to cause surrender. *Soldier of Fortune* is so violent that British Columbia—where video games have never been regulated—made it illegal to sell or rent the game to any person under eighteen years of age.²⁷ First-person shooters such as *Soldier of Fortune*, *Call of Duty*, *Medal of Honor*, and *Counter-Strike* enable the player to learn tactical guerilla fighting skills that are easily translated into real-life.²⁸

Some are quick to dismiss the connection between skill training and video games; however, such critics overlook the every day uses of video game training. The military, for example trains soldiers with video games—such games have been used to teach soldiers to fire a firearm.²⁹ “Teaching someone to be an accurate shot is not particularly hard to do.

22. Parsons, *supra* note 20.

23. See Parsons, *supra* note 20.

24. See Douglas A. Gentile & Craig A. Anderson, *Violent Video Games: Effects on Youth and Public Policy Implications*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 225, 227 (Nancy E. Dowd et al. eds., 2006).

25. See Tal Blevins, *Review of Soldier of Fortune*, <http://pc.ign.com/articles/162/162287p1.html> (last visited Feb. 15, 2009) (“There’s no doubt that [*Soldier of Fortune*] is the most horrific, bloodiest, and goriest games [sic] I’ve ever played.”).

26. Gentile & Anderson, *supra* note 24, at 227 (“Shooting a character in the arm at close range with a shotgun rips the arm from the socket leaving exposed bone and sinew while blood rushes from the wound.”).

27. See Kim Lunman, *Gory and Graphic Violence Earn Video Game B.C.’s First R-Rating*, THE GLOBE AND MAIL, July 12, 2000, at A5.

28. See Clive Thompson, *The Making of an X Box Warrior*, N.Y. TIMES, Aug. 22, 2004, § 6, at 34 (“Groundbreaking games like Quake and Counterstrike—so-called first-person shooters, because the players view the action from a first-person perspective—were pioneers of a style of graphics that depicted combat from an individual’s perspective. Computer-game designers in the 80’s looked enviously at the state-of-the-art graphics available to the military. Now military experts could walk into a Wal-Mart and buy games off the shelf that had crisper visuals and smarter artificial intelligence than some of their own tools.”).

29. *Id.*

Military trainers have learned that if you put someone through a week of intensive work with a point-and-shoot simulator (not unlike today's commercially available shoot-'em-up video games), he will be reasonably good with a rifle."³⁰ In fact, the Army even recruits through a video game available for download, named *America's Army*.³¹ Simulators also have obvious negative uses. The September 11, 2001 hijackers trained on commercially available flight simulators.³² While critics are quick to accept the positive influences that video games can have on users (e.g., educational video games and simulators that the army uses to train soldiers, foreign language instruction, flight simulators, surgery simulators for doctors practicing surgery, etc.), they are not willing to accept the negative ability to instruct and train that video games have.

II. THE PSYCHOLOGY

A plethora of studies have shown that video games cause aggressive behavior and cognition. The general conclusion is that playing violent video games induces aggressive behavior "via the cognitive (by priming aggressive thoughts), the affective (by increasing state hostility and anger), the arousal route (by increasing the individual's excitement)," or a combination of all three.³³ There are three types of studies on the subject: "experimental, correlational, and longitudinal."³⁴ While each type of study admittedly has its weakness, taken as a whole, with all factors carefully controlled, psychological causality can be inferred from the collective research.³⁵ It is hard to deny the existence of a real effect when it arises in all of the results regardless of how one conducts the study.³⁶ Experimental studies have the ability to determine causation and, thus, their findings

30. *Id.*

31. *See* America's Army: Special Forces, <http://www.americasarmy.com> (last visited Feb. 15, 2009).

32. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, 9-11 COMMISSION REPORT 226 (2004).

33. Arriaga et al., *supra* note 11, at 147.

34. Gentile & Anderson, *supra* note 24, at 228. For examples of experimental studies, see generally Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in Laboratory and in Life*, 78 J. PERSONALITY AND SOC. PSYCHOL. 772 (2000); Jason L. Deselms & Joanne D. Altman, *Immediate and Prolonged Effects of Videogame Violence*, 33 J. APPLIED SOC. PSYCHOL. 1553 (2003). For examples of correlational studies, see generally Craig A. Anderson et al., *Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior*, 36 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 199 (2004); Douglas A. Gentile et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 27 J. ADOLESCENCE 5 (2004); Barbara Krahe & Ingrid Möller, *Playing Violent Electronic Games, Hostile Attributional Style, and Aggression-Related Norms in German Adolescents*, 27 J. ADOLESCENCE 53 (2004). Because research on the effects of violent video games is a recent development, very few longitudinal studies have been conducted. *See* Gentile & Anderson, *supra* note 24, at 231.

35. *See* Gentile & Anderson, *supra* note 24, at 228.

36. *Id.* at 230.

should be given great weight.³⁷ However, the major weakness of any experimental study is the impossibility of using “real-world” measures of aggression, because any such measure (e.g., allowing the participants to hit each other) would be exceedingly unethical.³⁸ Since allowing actual and harmful violence in the studies would be beyond the bounds of ethics, psychologists must rely on well-accepted measures of aggression in the field of psychology.

Researchers have adopted the General Affective Aggression Model (GAAM) to measure the effect of exposure to violent video games upon aggressive behavior.³⁹ The model provides a framework to understand the effects through “activation and application of aggression-related knowledge structures stored in memory (e.g., scripts, schemas).”⁴⁰ The model measures how both short-term and long-term gameplays alter a player’s personality.⁴¹ The short-term model examines the effect of “situational and personal input factors . . . on behavior by influencing the present internal states of cognition, affect, and arousal.”⁴² This model posits that violent video games create an environment for learning real-world behavior (e.g., it provokes aggressive acts).⁴³ The model suggests that these aggressive acts are stored in scripts, which contain “rehearsed violent knowledge structures in the mind” and short-term activation of these scripts result in increased aggression.⁴⁴ Repetitive activation of these scripts—causing the need to aggress—over time creates an aggressive personality by causing “an effect where game play develops difficult-to-change hostile knowledge structures that are chronically accessible.”⁴⁵

A. The Findings

The findings show a positive relationship between violent video games and aggressive behavior.⁴⁶ Alarming, the studies have found that the size of the effect is very significant: “[V]iolent video game effect sizes are larger than the effect of second hand tobacco smoke on lung cancer, the effect of lead exposure to I.Q. scores in children, and calcium intake on

37. *Id.* at 228.

38. Kirstie Farrar & Marina Krcmar, *Measuring State and Trait Aggression: A Short, Cautionary Tale*, 8 MEDIA PSYCHOL. 127, 129 (2006) (“[T]he more valid the behavioral measure appears, the less ethical it is to use.”); Gentile & Anderson, *supra* note 24, at 228.

39. *See* Anderson & Dill, *supra* note 34, at 772–75.

40. Brad J. Bushman & Craig A. Anderson, *Violent Video Games and Hostile Expectations: A Test of the General Aggression Model*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1679, 1680 (2002).

41. Matthew S. Eastin, *Video Game Violence and the Female Game Player: Self- and Opponent Gender Effects on Presence and Aggressive Thoughts*, 32 HUM. COMM. RES. 351, 353 (2006).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 351; e.g., Anderson & Dill, *supra* note 34, at 776.

bone mass.”⁴⁷ Although the effect varies depending upon individual reactions to the game,⁴⁸ even small effects can cause high social costs or tremendous damage in high exposure situations.⁴⁹ Effect sizes in studies, however, have increased over time—a phenomenon that psychologists attribute to the progressive increase of realism in games.⁵⁰

Aggressive outcomes peak when the player identifies with the character in the game.⁵¹ The ability to undergo “deindividuation” and identify with the violent character is exceptionally likely to occur in adolescents because they are searching for role models to identify with in the process of developing their own identities.⁵² Deindividuation is stronger in violent video games than in film because of the interactive nature, which requires more than merely viewing and requires the player to undertake the perspective and identity of the violent character to successfully play the video game.⁵³ As one would expect, players are most likely to identify with the characters when the games are more realistic, which causes the player to feel more immersed in the game.⁵⁴ The game’s realism increases identity.

In a recent study, young boys were assigned to play a randomly pre-selected video game (violent or nonviolent) and then were instructed, after playing the game, to blast a confederate with noise through headphones.⁵⁵ The boys were given a choice of which volume of noise the confederate should receive and were instructed on the effects of each degree—ranging from 0 (no noise) to 10 (able to inflict permanent damage to hearing).⁵⁶ The results showed that the participants who played the violent video games and identified with the character were the most aggressive,⁵⁷ leading to the conclusion that the “detrimental effects of violent video games”

47. Craig A. Anderson, *Violent Video Games: Myths, Facts, and Unanswered Questions*, 16 PSYCHOL. SCI. AGENDA 1 (2003), available at <http://www.apa.org/science/psa/sb-anderson.html>.

48. See Weber et al., *supra* note 1, at 41; cf. W. James Potter & Tami K. Tomasello, *Building upon the Experimental Design in Media Violence Research: The Importance of Including Receiver Interpretations*, 53 J. COMM. 315, 316 (2003).

49. See Weber et al., *supra* note 1, at 41 (citing multiple studies).

50. See Farrar et al., *supra* note 8, at 388; cf. John L. Sherry, *The Effects of Violent Video Games on Aggression: A Meta-Analysis*, 27 HUM. COMM. RES. 409, 411–12 (2001).

51. See Farrar et al., *supra* note 8, at 392.

52. See Elly A. Konijn et al., *I Wish I Were a Warrior: The Role of Wishful Identification in the Effects of Violent Video Games on Aggression in Adolescent Boys*, 43 DEVELOPMENTAL PSYCHOL. 1038, 1038 (2007) (adolescent boys who look to video games will find “tough male warriors who solve problems using aggression, show no remorse for their aggressive actions, and are rarely punished for behaving aggressively”).

53. *Id.* at 1039; see also Arriaga et al., *supra* note 11, at 147 (“[G]iven that an active participation is required from players, . . . [video] games may have worse consequences than exposure to violent scenes in other media.”).

54. See Konijn et al., *supra* note 52, at 1041.

55. *Id.* at 1039–40.

56. *Id.* at 1040.

57. *Id.* at 1041.

could be diminished if the focus were on “the victims rather than on the perpetrators of violence.”⁵⁸

Many studies have shown that violent video games have physiological effects on the players.⁵⁹ The results show that there is a relationship between high levels of violence in video games and increased heart rate and systolic blood pressure in players.⁶⁰ The high levels of interactive violence in video games may increase emotional arousal and, thereby, may increase hostility.⁶¹ It is the increased physiological symptoms that immediately affect hostility and thus evoke violent behavior.⁶² Some critics argue that it is the increased level of arousal, and not the violent content of the games, which causes aggression to increase.⁶³ Arousal, however, cannot be attributed to the increase in aggression because the measured aggression did not onset *immediately* after gameplay.⁶⁴ Additionally, many studies controlled for the effects of arousal and still resulted in increased aggression by those who played violent video games.⁶⁵

Contrary to lay thought, the effect of violent video games is not simply one copying what one has observed.⁶⁶ Rather, violent video games increase aggression and hostility and thereby increase the odds of violent behavior.⁶⁷ Research shows that people who play violent video games more than others “begin to see the world more in terms of aggression” and that people who exhibit such a disposition are “more likely to react aggressively.”⁶⁸ One study shows a significant correlation between exposure to violent video games and hostile behavior in a sample of eighth graders.⁶⁹ The results show significant correlations between violent gameplay and hostile traits, fights, and arguments.⁷⁰ A similar study was conducted with a sample of college students and produced a similar result in aggressive cognitions.⁷¹

58. *Id.* at 1042.

59. *See, e.g.*, Craig A. Anderson & Brad J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 *PSYCHOL. SCI.* 353, 353 (2001); Arriaga et al., *supra* note 11, at 147; Sandra L. Calvert & Siu-Lan Tan, *Impact of Virtual Reality on Young Adults' Physiological Arousal and Aggressive Thoughts: Interaction Versus Observation*, 12 *J. APPLIED DEVELOPMENTAL PSYCHOL.* 125, 135 (1994).

60. Arriaga et al., *supra* note 11, at 148.

61. *Id.*

62. *See id.* at 155.

63. *Id.* at 147.

64. Anderson, *supra* note 47.

65. *Id.*

66. *See* Gentile & Anderson, *supra* note 24, at 231.

67. *See id.* at 229.

68. *Id.* at 231.

69. Krahé & Möller, *supra* note 34, at 59, 65–67.

70. Gentile & Anderson, *supra* note 24, at 230.

71. Anderson et al., *supra* note 34, at 233–34.

Importantly to this Note, the psychology literature should not be interpreted to say that all people who play violent video games will eventually become violent. It should, however, be understood that violent video games do elevate that risk.⁷² Furthermore, it is irrelevant whether people who play violent video games are more violent, or whether violent people play more video games.⁷³ The literature “is clear that regardless of the *initial cause*, playing violent video games still makes [people] *more aggressive*.”⁷⁴ While aggressiveness in itself is not illegal and is not grounds for tort liability, liability should arise for manufacturers when the increased aggression causes the player to commit an act of real-life violence.

III. FIRST AMENDMENT CONCERNS WITH IMPOSITION OF LIABILITY

First Amendment issues not only determine if one can get to the issue of liability, but they substantiate the policy arguments for liability. The same issues and rationale that find that First Amendment protection should not be afforded to violent video games are the very undergirding that favors exposure to liability. While the U.S. Supreme Court has not considered the issue of First Amendment protection for video games, several federal courts have. Without ultimate authority from the Supreme Court, decisions will vary and be enforced arbitrarily jurisdiction by jurisdiction. This would create a patchwork of laws that is disfavored by the interstate judicial system.

A. *Historical Commentary on Constitutional Protection*

1. *Denying Protection to Video Games—The 1980s*

In the early 1980s, many state and lower-federal courts were skeptical about whether video games possess the requisite communicatory ability to merit First Amendment protection.⁷⁵ These early constitutional challenges were in response to municipal ordinances that restricted access to video arcades.⁷⁶ The bellwether case denying protection was *America's Best*

72. Gentile & Anderson, *supra* note 24, at 234.

73. *Id.* at 232.

74. *Id.*

75. See, e.g., Malden Amusement Co. v. City of Malden, 582 F. Supp. 297, 297 (D. Mass. 1983) (holding that “video games are not protected speech within the First Amendment”); Am.’s Best Family Showplace Corp. v. City of N.Y., Dep’t of Bldgs., 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (video games are sans communicative ideas and devoid of informational elements); Kaye v. Planning & Zoning Comm’n, 472 A.2d 809, 812 (Conn. Super. Ct. 1983) (video games “clearly lack[]” element of information or communicated idea); Marshfield Family Skateland, Inc. v. Town of Marshfield, 450 N.E.2d 605, 609–10 (Mass. 1983) (denying First Amendment protection); Caswell v. Licensing Comm’n for Brockton, 444 N.E.2d 922, 927 (Mass. 1983) (“[A]ny communication or expression of ideas that occurs during the playing of a video game is purely inconsequential.”).

76. See, e.g., Marshfield Family Skateland, 450 N.E.2d at 609.

Family Showplace Corp. v. City of New York, Department of Buildings.⁷⁷ In *America's Best*, the court interpreted Supreme Court precedent for according First Amendment protection as applied to entertainment to require "some element of information or some idea being communicated."⁷⁸ In denying First Amendment protection, the court held:

In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element. That some of these games "talk" to the participant, play music, or have written instructions does not provide the missing element of "information."⁷⁹

2. Extending Protection

There are two different types of cases that have arisen more recently that extend First Amendment protection to video games: those that arose from ordinances similar to the cases denying protection in the 1980s⁸⁰ and those that arose out of tort actions against manufacturers and developers of violent video games.⁸¹ The courts establish a two-prong test to afford First Amendment protection to video games: first, the video games "must constitute[] a form of expression presumptively entitled to constitutional protection," and second, they must not "fall into any category of unprotected speech."⁸²

In *American Amusement Machine Ass'n v. Kendrick*,⁸³ video game manufacturers and their trade association sought an injunction against the enforcement of an Indianapolis city ordinance that sought to limit a minor's access to violent video games. The city ordinance sought to proscribe access to any video game that:

77. 536 F. Supp. 170 (E.D.N.Y. 1982).

78. *Id.* at 173.

79. *Id.* at 174; see also *Caswell*, 444 N.E.2d at 926 (holding that video game where the objective is for the player to shoot other characters does not "demonstrate protected expression").

80. See, e.g., *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

81. See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002).

82. Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153, 153, 172-73 (2005).

83. 244 F.3d 572 (7th Cir. 2001).

“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.”⁸⁴

After the trial court denied the preliminary injunction, the manufacturers appealed to the Seventh Circuit on the grounds that the injunction was “a violation of freedom of expression.”⁸⁵ Judge Posner immediately condemned the ordinance for trying to “bracket[] violence with sex,” a legal maneuver that would categorize violence as obscenity—a term that is “normally concerned with sex and is not protected by the First Amendment.”⁸⁶ “A work is classified as obscene,” according to Posner, if “it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity.”⁸⁷ In other words, obscenity is proscribed not because it is harmful, but rather, because it is *offensive* to the community.⁸⁸ Posner found the ordinance at hand was concerned with the harmful effects that violent video games have upon children⁸⁹ and warned that safeguarding children “from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”⁹⁰

Refusing to equate violence with obscenity, Posner likened the violence in video games to classic themes in literature.⁹¹ Posner claimed that “[v]iolence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault is aware.”⁹² Posner preempted the argument that video games are distinguishable because of their interactive nature by stating that this point is

84. *Id.* (quoting the city ordinance). The language in the Indianapolis ordinance is modeled after the Supreme Court’s definition of obscenity in *Miller v. California*, 413 U.S. 15, 24 (1973).

85. *Am. Amusement Mach. Ass’n*, 244 F.3d at 573.

86. *Id.* at 574.

87. *Id.*

88. *See id.*; *see also id.* at 575 (“Offensiveness is the offense.”).

89. *Id.* at 576.

90. *Id.* at 577 (analogizing the ordinance to the Nazi German government’s control of young soldiers’ access to information and opinion during World War II).

91. *Id.* at 577–78 (“Self-defense, protection of others, dread of the ‘undead,’ fighting against overwhelming odds—these are all age-old themes of literature, and ones particularly appealing to the young.”).

92. *Id.* at 577 (citing also the *Odyssey*, *The Divine Comedy*, the stories of Edgar Allen Poe, and horror movies inspired by Shelley (*Frankenstein*) and Stoker (*Dracula*)).

“erroneous.”⁹³ “All literature . . . is interactive,” according to Posner, “the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.”⁹⁴ The court granted the injunction on First Amendment grounds because of the games’ “literary” character and portrayal of “unrealistic” graphic violence.⁹⁵

In three factually similar cases—*Entertainment Software Ass’n v. Foti*,⁹⁶ *Video Software Dealers Ass’n v. Maleng*,⁹⁷ and *Interactive Digital Software Ass’n v. St. Louis County*⁹⁸ (*IDSA*)—injunctions were granted under First Amendment concerns against enforcement of ordinances restricting a minor’s access to violent video games. In *IDSA*, the Eighth Circuit adopted the holding in *American Amusement*, which stated that video games follow age-old literary themes and that “there is no justification for disqualifying video games as speech simply because they are constructed to be interactive.”⁹⁹ The court held that the games should, accordingly, be “entitled to the protection of free speech as the best of literature.”¹⁰⁰ The court in *Maleng*, also in accord with *American Amusement*, refused to construe the obscenity analysis to include violence.¹⁰¹ In finding that video games “are expressive and qualify for the protections of the First Amendment,” the court made the distinction between the general definition of obscenity—which would include graphic violence—and the Supreme Court definition of obscenity as set forth in *Miller v. California*¹⁰²—obscenity is solely material that deals with sex.¹⁰³ Most recently, *Foti* consistently held with *American Amusement* and its progeny that “[d]epictions of violence are entitled to full constitutional protection.”¹⁰⁴ The court found that the statute at issue did not serve a compelling state interest under the analysis set forth in *Brandenburg v. Ohio*¹⁰⁵ because the State did not establish that

93. *Id.*

94. *Id.*

95. *Id.* at 579 (“These games with their cartoon characters and stylized mayhem are continuous with an age-old children’s literature on violent themes.”).

96. 451 F. Supp. 2d 823 (M.D. La. 2006).

97. 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

98. 329 F.3d 954 (8th Cir. 2003).

99. *Id.* at 957.

100. *Id.* at 958 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948) (regarding regulation of magazines)).

101. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004) (“[Violent] depictions have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protection of the First Amendment or subject to government regulation.”).

102. *Miller v. California*, 413 U.S. 15, 24 (1973).

103. *Maleng*, 325 F. Supp. 2d at 1185.

104. *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 830 (M.D. La. 2006).

105. 395 U.S. 444, 448–49 (1969).

“video games are directed towards inciting imminent lawless action or that they are likely to cause such action.”¹⁰⁶

While there is not a single U.S. Supreme Court decision that addresses the status of video games as protected speech,¹⁰⁷ most federal courts faced with cases that have arisen in tort have followed the approach in *American Amusement* and have held that First Amendment protection should be afforded to video games unless a *Brandenburg* or *Miller* exception is met.¹⁰⁸ In *James v. Meow Media, Inc.*,¹⁰⁹ the plaintiff was the father of two children murdered in the Paducah, Kentucky school killing spree inspired by violent video games. The Sixth Circuit held that “attaching tort liability to protected speech can violate the First Amendment.”¹¹⁰ In an injudicious act that negatively affected the outcome of one of the most influential recent First Amendment video game cases, the plaintiffs argued “that the video game[s], somehow, communicated to [the shooter] a disregard for human life and . . . persuaded him to commit three murders.”¹¹¹ Departing from Posner’s opinion in *American Amusement*, the Sixth Circuit held that not all aspects of video games are entitled to First Amendment protection—such as the interactive aspect “in which the player controls the game.”¹¹² A successful plaintiff, therefore, would not assert that video games communicate a message, but rather, that they train a player with a particular skill set. The distinction here, although it seems minor and inconsequential, determines liability. For instance, if the game communicated a message of violence to a player, it would likely be protected by the First Amendment; if the game trained a player to commit a violent act, First Amendment protection should not apply because the literary or communicative element is absent.

Although the court refused to include violence within the definition of obscenity—citing *Miller*—it made a distinction between violence that is offensive and violence that causes “consumers to commit violent acts.”¹¹³ In its application of the *Brandenburg* test, the court found that the manufacturers did not “intend” to produce the shooter’s behavior, the threat from the video games was not “imminent,” and the shooter’s actions were

106. *Foti*, 451 F. Supp. 2d at 832–33.

107. *See Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 179 (D. Conn. 2002).

108. *See e.g.*, *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002); *Wilson*, 198 F. Supp. 2d at 182; *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1279–80 (D. Colo. 2002).

109. 300 F.3d 683 (6th Cir. 2002).

110. *Id.* at 695.

111. *Id.* at 696 (“The plaintiffs . . . complain about none of [the] non-expressive features [of the game] Because the plaintiffs seek to attach tort liability to the communicative aspect of the video games produced by the defendants, we have little difficulty in holding that the First Amendment protects video games in the sense uniquely relevant to this lawsuit.”).

112. *Id.* (“[T]here are features of video games which are not terribly communicative.”).

113. *Id.* at 698 (“[I]deas and images that incite others to violence . . . [are] not entitled to First Amendment protection.”).

not foreseeable.¹¹⁴ The court noted that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct.”¹¹⁵

B. Distinguishing Violent Video Games

The reluctance to consider liability and, thus, not afford First Amendment protection to violent video games may likely be a product of a judiciary of an older generation that is unfamiliar with, and more hesitant to accept, the realities of modern technology.¹¹⁶ Several of the cases that afforded First Amendment protection to video games note in dicta that there may be instances in which the violent quality of a video game may not qualify for First Amendment protection.¹¹⁷ Posner suggested in *American Amusement* that video games may not qualify for First Amendment protection “[i]f the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries.”¹¹⁸ This may now be the case. In the seven years since *American Amusement*, video games have become more realistic and some do simulate real death and mutilation rather convincingly.¹¹⁹ Some of today’s violent video games would satisfy this exception scripted by Posner.¹²⁰ Therefore, modern video games may be more likely to necessitate First Amendment concerns than their predecessors.¹²¹

Modus operandi games fit such an exception because of their ability to simulate violence convincingly and train players to commit violence in a way identical to the game. The prominent element in these games is not communication; it is repetition and simulation (to acquire a skill set). Absent an element of communication, the First Amendment should not protect games. Accordingly, the First Amendment is *more likely* to protect atmosphere games. Atmosphere games generally contain a quality that is

114. *Id.* at 698–99.

115. *Id.* at 698 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002)).

116. See Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids’ Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 11 (2002).

117. See, e.g., *id.*; see also *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579–80 (7th Cir. 2001).

118. *Am. Amusement*, 244 F.3d at 579–80.

119. See, e.g., discussion of *Soldier of Fortune*, *infra* Part I.

120. See Ilana Lubin, Note, *Challenging Standard Conceptions of Tradition, Science and Technology in 2006: Why Laws Prohibiting the Sale of Violent Video Games to Minors Should Be Ultimately Upheld*, 13 CARDOZO J.L. & GENDER 173, 181–82 (2006).

121. The issue of First Amendment protection may very well come down to an individual determination where one knows violence when one sees it. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting the inadequacy of attempting to define hard-core pornography: “I know it when I see it.”).

more fantasy-like or more analogous to literature and are more likely to satisfy the communicative element.

IV. CAUSATION

It is well noted that the issue with litigating tort cases against manufacturers of violent video games is the difficulty of proving the causal connection between the on-screen killings and the real-life violent act. Causation presents an obstacle to the application of both the tort of negligent entrustment and the tort of negligence.

A. The Tort of Negligent Entrustment

Under a theory of negligent entrustment, the plaintiff would assert that the manufacturer had knowledge that consumers of their violent video games were susceptible to increased aggression or to commit violent acts (with instances of video-game-related violence becoming more common and psychological research more prevalent, manufacturers should be aware and not caught off guard by this assertion). Privy to the knowledge that consumers who play the game can present dangerous characteristics, the manufacturers have a duty to take proper precautions to prevent real-life violence. A manufacturer breaches that duty when a player commits a real-life act of violence that is attributable to the video game. A negligent entrustment theory is particularly beneficial because the element of causation is relaxed in negligent entrustment actions.

Negligent entrustment is “a legal theory separate and distinct from negligence.”¹²² The Restatement (Second) of Torts says one who is liable for negligent entrustment is

[o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.¹²³

In some situations, as is the case with negligent entrustment, a reasonable person may be expected to anticipate and safeguard against the tortious actions of others.¹²⁴ The duty to protect against the action of others

122. 57A AM. JUR. 2D *Negligence* § 311 (2004).

123. RESTATEMENT (SECOND) OF TORTS § 390 (1965).

124. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 33, at 197 (5th ed. 1984).

“becomes most obvious when the actor has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things.”¹²⁵ To determine the duty to take precaution

involves merely the usual process of multiplying the probability that such negligence will occur by the magnitude of the harm likely to result if it does, and weighing the result against the burden upon the defendant of exercising such care. The duty arises, in other words, only where a reasonable person would recognize the existence of an unreasonable risk of harm to others through the intervention of such negligence.¹²⁶

This standard is heightened, of course, when dealing with children,¹²⁷ as children “often are thoughtless and impulsive, [which] imposes a duty to exercise proportionate vigilance and caution in those dealing with children.”¹²⁸ Much like the situation with manufacturers of violent video games, “[t]here are . . . situations in which the defendant will be held liable because his affirmative conduct has greatly increased the risk of harm to the plaintiff through the criminal acts of others.”¹²⁹ The question for liability then becomes whether the “foreseeable risk of the crime is unreasonable considering the burden of taking precautions.”¹³⁰ Arguably, with video games, the burden to take proper precautions is becoming progressively more reasonable.

In *Brown v. Wal-Mart Stores, Inc.*,¹³¹ Wal-Mart sold gun ammunition to an 18-year-old against store policy and federal law, which required a customer to be 21 years of age to purchase guns or ammunition. When the child returned home from Wal-Mart, he confronted and shot dead his neighbor (the son of the plaintiff). The court held that although “one does not have a duty to act affirmatively to protect people” from the conduct of others, the “duty arises if the defendant knows or has good reason to believe that the third person intends to misuse the item.”¹³² The key factor in the case was foreseeability,¹³³ and the court found that the shooting was reasonably foreseeable because Wal-Mart could have reasonably anticipated the shooting and did not take proper precautions (e.g., verifying the shooter’s age) when it sold the ammunition.¹³⁴

125. *Id.* at 199.

126. *Id.*

127. *Id.* at 200.

128. *Wheeler Terrace, Inc. v. Lynott*, 234 A.2d 311, 312 (D.C. 1967).

129. *KEETON ET AL.*, *supra* note 124, at 203.

130. *Id.*

131. 976 F. Supp. 729 (W.D. Tenn. 1997).

132. *Id.* at 734.

133. *Id.* at 736.

134. *Id.*

In one of the landmark cases of negligent entrustment, *Vince v. Wilson*,¹³⁵ the plaintiff was seriously injured in an automobile accident by the driver of another automobile. The plaintiff filed suit against the automobile dealership that sold the car to the second driver claiming that they sold the automobile to the second driver with knowledge that he did not have a driver's license and "had failed the driver's test several times."¹³⁶ Drawing upon cases from other jurisdictions, the court decided that to be held liable for negligent entrustment it is sufficient to show that the "defendant had ownership and control over the instrumentality at the time it was turned over to an incompetent individual."¹³⁷ The case was remanded to a jury to determine if the automobile dealership did, indeed, have knowledge that the second driver was not licensed and had failed the driver's exam several times.¹³⁸ Importantly, under a negligent entrustment theory, the case should be sent to a jury to determine whether the video game manufacturer had knowledge of the potential dangerous characteristics of the consumer.¹³⁹ This is significant because causation is implied and becomes a question for the jury, rather than being decided as a matter of law and dismissed by a judge.¹⁴⁰

"[A]ffirming liability is the right result when the commercial seller . . . actually knows of the evidently dangerous characteristics of the buyer."¹⁴¹ There is additional argument about the growing "responsibility of product manufacturers to . . . stave off misconduct on the part of ultimate product purchasers."¹⁴² This is particularly relevant for video games because negligent entrustment is not constricted to a particular subject matter:

Although the negligent-entrustment doctrine has usually been applied in motor vehicle or firearm cases, courts have applied it to other chattels which, if placed in the hands of an incompetent or inexperienced person, present a likelihood of unreasonable risk of harm to third persons. The theory . . . does not hinge on the na-

135. 561 A.2d 103 (Vt. 1989).

136. *Id.* at 106.

137. *Id.* at 105.

138. *Id.* at 106.

139. *Cf. id.* (overturning a directed verdict and remanding the case).

140. *Cf. Schwartz v. United States*, No. 95-2719, 1995 WL 703712, at *2-*4 (7th Cir. 1995) (holding that the fact finder's determination of causation deserves deference).

141. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 19 cmt. h, Reporter's Note (Proposed Final Draft No. 1, 2005) (citing *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200 (Fla. 1997)).

142. *Id.*

ture of the property entrusted, but on the *supply* of the property to probable negligent users.¹⁴³

A stronger case is made for analogous application of the negligent entrustment doctrine for exposing manufactures of violent video games to liability because of the nature of the consumers of the video game—entrusting a person with “a known violent nature or disposition, or some other relevant character flaw”—would make a compelling negligent entrustment claim.¹⁴⁴

B. The Tort of Negligence

Causation is a legal requirement independent of negligence.¹⁴⁵ A finding of one does not automatically imply the other. Under traditional tort law, causation consists of two elements: actual causation (or causation in fact) and proximate causation (or legal causation). The two pronged element of causation requires a showing that the harm would not have happened but for the defendant’s breach of duty and that the defendant’s breach was the proximate cause of the harm.

1. Problems with Actual Causation

Actual causation presents a problem to a plaintiff who brings a tort action against a video-game manufacturer. The problem is that the current tests for causation are not sufficient to prove causation. In other words, it is difficult to say, “but for the violent video game manufacturer developing the game, the player would not have pulled the trigger in a real-life killing spree.” This is not to say that causation does not exist—quite the contrary. The psychology discussed in Part II strongly suggests causation. There are some circumstances that tort law recognizes where the current tests for causation are insufficient to determine causation¹⁴⁶ and another method must be used to determine causation.¹⁴⁷ This subpart will briefly discuss the current test for causation (the but-for test) and the secondary test sometimes used as an alternative (substantial-factor test).

143. 57A AM. JUR. 2D *Negligence* § 325 (2004) (emphasis added).

144. *Id.* § 324; see also RESTATEMENT (SECOND) OF TORTS § 390 (1965).

145. 57A AM. JUR. 2D *Negligence* § 435 (2004).

146. See 52 AM. JUR. 2D *Negligence* § 462 (2004).

147. For methods, see discussion *infra* Part IV.C.

a. But-for Test for Causation

The but-for test is used to determine whether the negligent conduct was the proximate cause of the injury.¹⁴⁸ In other words, the test asks whether the injury would have happened “but for” the defendant’s negligence. It is precisely this question on which tort liability for manufacturers of violent video games hangs: if, without the video-game manufacturer’s negligence, the shooter would have gone on the killing spree.¹⁴⁹ However, in some cases where the defendant’s actions cannot be said to be a but-for cause, the defendant’s actions played such an important part in causing the plaintiff’s injury that responsibility should be imposed upon the defendant.¹⁵⁰ In this situation, where the defendant cannot be absolved by saying that the harm would not have occurred without the defendant (thus, imposing no liability), courts have imposed the substantial-factor test or other methods of determining causation (e.g., market-share or alternative liability).¹⁵¹

b. Substantial-Factor Test

The substantial-factor test would be a sufficient and enabling test for causation. In many cases the question of cause-in-fact is sufficiently answered by the but-for test.¹⁵² When there are two or more potential causes, the question becomes whether the effect of the defendant’s negligence was substantial or merely negligent.¹⁵³ If the effect of the defendant’s negligence is deemed to be substantial, then the defendant proximately caused the plaintiff’s injury through the substantial-factor test.¹⁵⁴ This test may be particularly relevant in violent-video-game cases where the manufacturer cannot be shown as the but-for cause, but a jury finds that the manufacturer proximately caused the plaintiff’s injury because its actions were a substantial factor in causing the harm.

2. Proximate Causation: The Real-Life Violent Act as a Superseding Intervening Factor

Generally, one party is not liable to a second party when a third party’s criminal action becomes a superseding legal cause of the first party’s negligence.¹⁵⁵ However, “the erosion of the proximate cause limitation for

148. 57A AM. JUR. 2D *Negligence* § 454 (2008).

149. See RESTATEMENT (SECOND) OF TORTS § 432 cmt. a (1965).

150. 57A AM. JUR. 2D *Negligence* § 457 (2004).

151. *Id.*

152. See RESTATEMENT (SECOND) OF TORTS § 431 cmt. b (1965).

153. See RESTATEMENT (SECOND) OF TORTS § 431 (1965).

154. *Id.*

155. *Id.* § 448.

intervening acts can be regarded as a temporal shift in moral sensibilities from a more individualistic era to one in which tort law . . . increasingly reflects more *expansive* notions of responsibility for the conduct of others.”¹⁵⁶ The view proposed by the *Restatement (Third) of Torts: Liability for Physical Harm* is that “in certain situations criminal misconduct is sufficiently foreseeable as to require a full negligence analysis of the actor’s conduct.”¹⁵⁷ This strongly supports applying a full negligence analysis to situations where a plaintiff tries to hold a video-game manufacturer liable for a third party’s violent acts. Furthermore, “[t]here is no requirement that a cause, to be regarded as the proximate cause of an injury, be the sole cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result.”¹⁵⁸ Therefore, the law should not easily dismiss these cases because the development, manufacturing, and distribution of the product are substantial factors although they may not be the act closest to the violence.

C. Alternative Theories of Causation: Theories of Tort Law with Relaxed Causation

Since a foreseeable harm has been identified, as well as an insufficient test of causation, the standard for causation should be relaxed to ensure proper redress of a wrongdoing. After all, “it is a proper function of tort law to assign responsibility and create appropriate incentives for safety”¹⁵⁹ With tort liability for violent video games, exposing manufacturers to liability would serve as both the assignment of responsibility and the incentive to ensure safety. The idea is that “[n]ot only has the immediate harm been committed by an elusive, often unidentifiable intervenor, but the risk-initiator itself is an enterprise whose product . . . contributes in a collective, nonsegregable way to the overall harm done by [the product] generically.”¹⁶⁰

Grouping together the shooter and the manufacturer for liability purposes is consistent with established principles of tort law.¹⁶¹ It is not uncommon for one to be held liable for an injury caused by the conduct of another. For example, a co-conspirator is liable for injuries caused by other co-conspirators in furtherance of the conspiracy,¹⁶² one may be held

156. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 441–42 (2000) (emphasis added).

157. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 19 cmt. f (Proposed Final Draft No. 1, 2005).

158. *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991).

159. Rabin, *supra* note 156, at 436.

160. *Id.* at 451.

161. See Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 460 (2006).

162. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

liable for the injuries resulting from aiding or abetting a tortfeasor,¹⁶³ and an employer may be held vicariously liable for torts committed by an employee.¹⁶⁴ While it may be difficult to prove that the manufacturer caused the shooter's tortious behavior, a theory analogous to other theories of liability—market-share liability or alternative liability—which groups together the defendants, faces no such barrier because the two have acted jointly through the actual tortious act or aiding and abetting to cause the injury to the plaintiff.¹⁶⁵ Therefore, the shooter and the manufacturer should each be responsible for the injuries caused by the group, regardless of individual causation.¹⁶⁶ Without grouping, the actions are not independently sufficient to prove causation; however, the combined tortious conduct will satisfy the test for causation.

1. Market-Share Liability

Market-share liability is one of many legal theories in which the standard of causation is relaxed. Market-share liability is available in instances where an injured party is unable to pinpoint the manufacturer of the exact product that caused the injury.¹⁶⁷ The general rule of relaxed causation is that one must show that the manufacturer was “in some way responsible for the product.”¹⁶⁸ The unique aspect of market share liability is that “an injured person may hold a product manufacturer liable for damages in proportion to its share of the total market for the product. . . .”¹⁶⁹ Again, this evades the normal requirement of causation that is often fatal in video-game litigation.

In the famous case of *Hymowitz v. Eli Lilly & Co.*,¹⁷⁰ the plaintiffs alleged that they were injured by a drug manufactured by the defendant and ingested by the mother during pregnancy. Because of the mass production of the drug by many different manufacturers, it was “generally impossible” to identify the precise manufacturer of the drug ingested by that particular mother. The court adopted a nationwide market share liability model that, admittedly, would not “approximate causation.”¹⁷¹ The court chose “to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large.”¹⁷²

163. *Id.*

164. *See* Geistfeld, *supra* note 161, at 460.

165. *See id.*

166. *Id.* at 479.

167. 72A C.J.S. *Products Liability* § 55 (2004).

168. *Id.*

169. *Id.*

170. 539 N.E.2d 1069 (N.Y. 1989).

171. *Id.* at 1078.

172. *Id.*

2. *Alternative Liability*

A similar theory of collective liability that has been applied in products liability cases is alternate or alternative liability.¹⁷³ With alternative liability, the tortious acts of two or more defendants cause an injury and the plaintiff is unable to identify which one of the defendants caused the injury. Under this theory of liability, the burden then shifts to the defendants to prove “that they were not responsible for the plaintiff’s injury”¹⁷⁴ This is, again, an example of tort law seeking, for policy reasons, to assign responsibility¹⁷⁵ in an instance in which there is an actual injury caused by the defendant manufacturer and the standard for causation is insufficient to provide proper redress. This theory of liability, however, “applies only where all defendants who could have possibly caused the injury are before the court, and all of the defendants’ products created a substantially similar risk of harm.”¹⁷⁶ This is relevant to the video game issue since when there is no causation, “the purpose of the theory is to impose liability only on those companies which *potentially* could have manufactured the [product] which caused the plaintiff’s injuries”¹⁷⁷

3. *Probabilistic Causation*

In *Dillon v. Evanston Hospital*,¹⁷⁸ the plaintiff brought a medical malpractice claim against a hospital for an injury incurred during the course of her treatment for breast cancer. During treatment a catheter was inserted into the plaintiff’s chest to assist with chemotherapy. After treatment the catheter was removed, but, unbeknownst to the plaintiff, it was not removed in its entirety. A subsequent routine x-ray showed that the catheter had migrated and embedded itself in the plaintiff’s heart. The court broadly held that

a plaintiff must be permitted to recover for *all* demonstrated injuries. The burden is on the plaintiff to prove that the defendant’s negligence increased the plaintiff’s risk of future injuries. A plaintiff can obtain compensation for a *future injury that is not reasonably certain to occur*, but the compensation would reflect the low probability of occurrence.¹⁷⁹

173. See 72A C.J.S. *Products Liability* § 55 (2004).

174. *Id.*

175. See Rabin, *supra* note 156, at 436.

176. 72A C.J.S. *Products Liability* § 55 (2004).

177. 63 AM. JUR. 2D *Products Liability* § 203 (1997) (emphasis added).

178. 771 N.E.2d 357 (Ill. 2002).

179. *Id.* at 370 (emphasis added).

Again, this case demonstrates that there can be liability without causation. This is relevant in tort actions against manufacturers of violent video games because most of the time the video games will not cause the player to commit a real-life act of violence. However, sometimes players will commit real-life acts of violence and those acts are becoming more foreseeable as they have become increasingly more common in recent years. *Dillon* would subject manufacturers of violent video games to tort liability because foreseeable, real-life acts of violence caused by their games do occur, albeit at a low probability. If the plaintiff could prove that the manufacturer increased the risk of harm to the plaintiff (a considerably low standard),¹⁸⁰ the plaintiff could recover against the manufacturer, but the amount of recovery would take the low probability of occurrence into consideration.¹⁸¹ This emerging rule is substantial because it, in essence, says that manufactures can be held liable for the harm caused by their products if the harm is substantial; however, because there is a relaxed standard of causation, a monetary award will reflect the deficiency in causation. In other words, there is liability for negligence *without* the element of causation when there is a compelling reason for imposing liability.

V. APPLICATION OF THE LAW AND PSYCHOLOGY TO VIOLENT VIDEO GAMES

Violent video games should be subject to liability because psychological studies show a substantial connection between violent video games and their ability to motivate one to commit violent acts. Although traditional tests for causation are not sufficient to show causation, analogy to other areas of traditional tort law shows sufficient support for causation. Traditional theories of negligent entrustment provide a theory under which a victim could bring an action. This theory takes into account that manufacturers invest money into making their games realistic, know the violent potential of the games, market the games to children, and know that children have claimed that these games have prepared them to commit violent acts (therefore, foreseeability should not be an issue as violence predicated upon video games is progressively increasing). The theory of negligent entrustment has the potential to become even more expansive when one considers the potential for perpetrators to use the multi-player communications to come into contact with other players and conspire to commit crimes with or against them.¹⁸²

180. Tort actions against manufacturers of violent video games, essentially, are actions for increased risk.

181. See *Dillon v. Evanston Hosp.*, 771 N.E.2d 357, 370 (Ill. 2002).

182. Example 1: Player 1 plays a multi-player violent video game and intends to use the tactical training to carry out a school shooting. Player 1 comes into contact with Player 2 and recruits that player to train with him on that game. The players train through in-game features such as sniper shoot-

Evidentiary grouping, much like market-share liability, is a valid way to show causation. Atmosphere games may not be as vulnerable to liability because they do not have as strong of a potential to help a player acquire a skill set. *Modus operandi* games, however, should not be as privileged. Because *modus operandi* games have the ability to instill a particular skill set in a player (whether it be through repetition of a unique pattern or through the truly interactive nature of the game), actual causation should be easier to show. Such games present a stronger case for liability because the relationship between the video game (and, thus, the manufacturer) and perpetrator more closely resembles that of abettor, co-conspirator, or one who aids. Considering the many positive uses of video games (such as military training) to help develop a special skill set, it is not a stretch to conclude that the manufacturer who provides the training device (that is, the *modus operandi* video game) aids, abets, or conspires with a perpetrator who commits a real-life violent act that uses the skill developed in the video game because the two have acted jointly in committing that violent act. The award of damages, however, may not be as clear. If a plaintiff were to use the above model and prove negligence, any damages awarded would be reduced by the theory of probabilistic causation.¹⁸³ In such a case, any award of damages would reflect the relatively low probability of the violent act actually occurring.

Tort liability can be stronger in particular cases. In a *modus operandi* case where a video game allows a player to commit a violent act in a highly unique way through sequential acts, a more compelling case is made for liability where the player commits a real-life violent act according to the unique steps in that game.¹⁸⁴ This is analogous to the *modus operandi* (also known as handiwork or signature) exception in evidence where a defendant is charged with two separate crimes because they were committed in a very similar, unique process. Liability is also more compelling in cases

ing from behind an obstruction that they use exactly the same in actually committing a school shooting. This scenario becomes particularly compelling in situations where the player has the option to design the environment through in-game features or where the game is an exact replica of a real-life structure, and the player trains in the real-life environments to commit a real-life act of violence. *See, e.g., Cathedral Row over Video War Game*, BBC NEWS ONLINE, http://news.bbc.co.uk/2/hi/uk_news/england/manchester/6736809.stm (last visited Feb. 15, 2009) (Church of England sues Sony over violent video game that takes place in an exact replica of Manchester Cathedral). Example 2: Player 1 is a violent sociopath who uses a video game such as *Second Life*, which allows users to create real-life characters and buildings. Player 2 is a female who has an actual replica of her house on the video game. Player 1 uses a rape simulator feature on the game to practice entering Player 2's house and raping her. After several virtual practices, Player 1 enters Player 2's house and rapes her exactly as practiced in the video game.

183. Other factors, however, may come into play depending upon the facts of the case. For example, the theory of contributory negligence may, as well, reduce any award of damages.

184. The difference between a *modus-operandi*-video-game crime and a copy-cat crime from a movie is that the video game allows a player to train and develop that particular violent skill, whereas, a movie only provides information on how to commit the violent act. Culpability, in this instance, should be obviously distinguishable.

similar to market-share liability where the defendant plays multiple violent video games and commits an act of real-life violence. In this scenario, causation would be relaxed in a market-share-analogy theory because there are multiple manufacturers who must prove that their violent video game did not cause the plaintiff's injuries.

CONCLUSION

The burden in proving psychological causation should be considerably lower in *modus operandi* violent video games than in violent-atmosphere video games. Because *modus operandi* games present elements more commonly accepted in present day tort law (e.g., causation for aiding, abetting, or conspiring), a strong case for liability does not need to be as reliant upon psychological causation. While this paper argues that manufacturers of both types of games—*modus operandi* and atmosphere—should be subject to liability for any violent acts that are caused by their games, atmosphere games are more shielded from liability because plaintiffs must rely heavily upon psychology to show causation. Tort law has traditionally been slow to accept social science, in particular psychology and psychological illness.

Self-imposed industry regulations are neither sufficient to prevent children from having access to material that is too graphic for adults, nor are they adequate to prevent the psychological harm and training that evokes real-life violence. While increasing the transaction costs of violent-atmosphere video games is the best way to prevent children from having access to violent video games, and requiring a license and background check¹⁸⁵ (if not a psychiatric evaluation) to purchase *modus operandi* games, would be more efficacious than the self-imposed industry regulations in place, neither would adequately prevent the emotional and physical harm that results from violent video games. Subjecting manufacturers to liability is the only way to ensure that video games do not train players to commit violent acts.

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185. This would not have too devastating an effect, as licenses and background checks are required to purchase and possess other dangerous goods (e.g., firearms).

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