

# LIABILITY OF MEDIA COMPANIES FOR THE VIOLENT CONTENT OF THEIR PRODUCTS MARKETED TO CHILDREN

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## INTRODUCTION

Children in the United States are frequently exposed to media violence, defined for the purposes of this Note as communication depicting physical force used to injure person or property.<sup>1</sup> Courts have refused to hold media corporations liable for the violent content of child-entertainment products,<sup>2</sup> but

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<sup>1</sup> See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 804 (1996) (stating that all forms of "broadcasting [including offensive programming,] is uniquely accessible to children, even those too young to read." (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978))); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577–79 (7th Cir. 2001) (examining an array of violent video games, many of which were marketed exclusively to children, and their effects on child consumers); Rupal Ruparel Dalal, *Congress Shall Make No Law Abridging Freedom of Speech—Even if It Causes Our Children to Kill?*, 25 SETON HALL LEGIS. J. 357, 362–63 (2001) (describing the many types of violent media products targeted to children); Anna Everett, *P.C. Youth Violence: "What's the Internet or Video Gaming Got To Do With It?"*, 77 DENV. U. L. REV. 689, 697 (2000) (commenting on "ubiquitous television violence"); J. Robert Linneman, Note, *Davidson v. Time Warner: Freedom of Speech . . . But Watch What you Say! The Question of Civil Liability for Negligence in the Mass Media*, 27 N. KY. L. REV. 163, 163 (2000) (discussing "[t]he prevalence of violence in film, television, music, games and other forms of entertainment" marketed to children); John Leland, *Violence, Reel to Real*, NEWSWEEK, Dec. 11, 1995, at 46–48 (examining the plethora of violent media products in America and their effects on viewers, including children). Despite numerous media violence suits and related scientific and popular literature, there is no generally accepted definition of "media violence."

<sup>2</sup> See *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) (concluding that media companies owe no duty to "mentally fragile" youths, even if they marketed their products to individuals with psychological conditions); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 179–83 (D. Conn. 2002) (holding manufacturer of violent video game immune to liability even if its product, marketed exclusively to children, influenced minor assailant to stab decedent friend); *Davidson v. Time Warner, Inc.*, No. CIV.A. V-94-006, 1997 WL 405907, at \*13–14 (S.D. Tex. Mar. 31, 1997) (rejecting the claim that violent music influenced murderer's behavior and

many legal commentators have argued for an expansion of the law.<sup>3</sup> This Note examines the circumstances under which media corporations may be civilly liable for the violent content of their youth-oriented products. Specifically, this Note will examine negligence suits and First Amendment protections. It will explore whether the expansion of the law, such as presumption of a causal link between media violence and aggressive behavior in children, is necessary. It will also look at whether the health and safety of children is a compelling interest that mitigates First Amendment protections. Finally, this Note will consider whether retaining current law is preferable absent scientific proof that media violence leads to aggressive behavior in children.

This Note suggests that courts in media-violence suits have not considered the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>4</sup> and that, despite scientific uncertainty regarding causal links between media violence and aggressive behavior in children, *Daubert* is not an absolute bar to expert testimony. Finally, this Note proposes that the health and safety of children is a compelling interest that should limit media companies' First Amendment freedom to market violent products to adolescents for pecuniary gain.

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holding record company and musician immune to liability); *Zamora v. CBS, Inc.*, 480 F. Supp 199, 202–03 (S.D. Fla. 1979) (dismissing minor plaintiff's claim that he became addicted to television violence, which allegedly desensitized plaintiff to real life violence); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 197–98 (Dist. Ct. App. 1988) (holding media company and musician immune to liability after distressed teenager, while lying in bed listening to defendants' product chronicle death and despair, committed suicide); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1070–72 (Mass. 1989) (affirming dismissal of wrongful death suit because producer of violent motion picture owed no duty to third-parties injured as a result of consumer's violent behavior after viewing defendant's product).

<sup>3</sup> See 145 CONG. REC. S5394, 5404–08 (daily ed. May 17, 1999) (statement of Sen. Sessions) (concurring with other senators, both conservative and liberal, that America must change the "culture of violence" targeted to children through media products). See generally Lisa Kimmel, *Media Violence: Different Times Call for Different Measures*, 10 U. MIAMI BUS. L. REV. 687 (2002) (addressing the extent to which media violence targets young people and possible legal remedies for aggrieved parties); David C. Kiernan, Note, *Shall the Sins of the Son Be Visited Upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207 (2000-01) (arguing that plaintiffs should be permitted to bring tort claims against manufacturers and producers of violent media products marketed to children).

<sup>4</sup> 509 U.S. 579 (1993).

### I. CAN VIOLENT MEDIA PRODUCTS LEAD TO VIOLENT BEHAVIOR IN CHILDREN?

Negligence claims hinge on whether plaintiffs can prove that media violence leads to violent behavior in children.<sup>5</sup> Since the early 1960s, some scientists have argued that such a causal connection exists.<sup>6</sup> Repetition of clinical and empirical studies cited by legal scholars continues to substantiate the hypothesis that media violence, including television, video games, and music, leads to aggressive behavior in children.<sup>7</sup> Thus, there is

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<sup>5</sup> These types of negligence suits have been largely unsuccessful. *See, e.g., Watters*, 904 F.2d at 384; *Wilson*, 198 F. Supp. 2d at 182–83; *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002); *Zamora*, 480 F. Supp. at 201–03; *McCullum*, 249 Cal. Rptr. at 193–94; *Yakubowicz*, 536 N.E.2d at 1072. *But see Rice v. Paladin Enters.*, 128 F.3d 233, 251–52, 266–67 (4th Cir. 1997) (reversing summary judgment and remanding wrongful death suit because genuine issues of material fact existed with respect to book's influence on novice hit man and because the district court erroneously concluded that the First Amendment barred suit); *Clift v. Narragansett Television, L.P.*, 688 A.2d 805, 809–11 (R.I. 1996) (reversing trial court's grant of summary judgment in favor of defendant television station because factual questions existed as to whether defendant's broadcast was a "but for" cause of decedent's suicide). Courts have rejected strict products liability of media goods. *See Watters*, 904 F.2d at 381 ("[T]he doctrine of strict liability has never been extended to words or pictures."); *Wilson*, 198 F. Supp. 2d at 171–74 (rejecting argument that interactive nature of video game rendered it a product with respect to strict products liability); *Sanders*, 188 F. Supp. 2d at 1277–79 (concluding that video games and movies were not products within the meaning of strict products liability); *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 811 (W.D. Ky. 2000) (concluding that "intangible thoughts, ideas, and expressive content are not 'products' within the realm of the strict [products] liability doctrine"); *Herceg v. Hustler Magazine Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983) (stating that "no court . . . has held that the content of a magazine or other publication is a product within the meaning of [strict products liability]"); *Beasock v. Dioguardi Enters.*, 130 Misc. 2d 25, 29–30, 494 N.Y.S.2d 974, 978 (Sup. Ct. N.Y. County 1985) (concluding that automotive publications were not subject to strict products liability doctrine).

<sup>6</sup> *See Linneman, supra* note 1, at 191 (asserting that numerous studies show media violence leads to aggressive behavior in children); *see, e.g., Albert Bandura et al., Transmission of Aggression Through Imitation of Aggressive Models*, 63 J. ABNORMAL SOC. PSYCHOL. 575, 576, 582 (1961); O. Ivar Lovaas, *Effect of Exposure to Symbolic Aggression on Aggressive Behavior*, 32 CHILD DEV. 37, 43–44 (1961).

<sup>7</sup> *See Fred Molitor & Kenneth William Hirsch, Children's Toleration of Real-Life Aggression After Exposure to Media Violence: A Replication of the Drabman and Thomas Studies*, 24 CHILD STUDY J. 191, 202 (1994); Patricia L. Murphy, *The Commodified Self in Consumer Culture: A Cross-Cultural Perspective*, 140 J. SOC. PSYCHOL. 636, 637 (2000); *see also Sharon Begley, Why the Young Kill*, NEWSWEEK, May 3, 1999, at 32–34 (discussing the "biological roots of violence"). *See generally* 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 (2001).

scientific support that violent media products lead to violence among children. Video games have received particular attention, where evidence of such causal links is especially strong.<sup>8</sup>

Nonetheless, some studies reach contrary results and conclude that, absent preexisting psychological abnormalities, media violence neither desensitizes children to real life violence nor leads to violent behavior.<sup>9</sup> According to these studies, the effects of motion pictures,<sup>10</sup> video games,<sup>11</sup> or other media products on children is negligible.<sup>12</sup> Thus, violent media products pose no risk to child consumers.

Hypothesized links between media violence and violent behavior in children remain speculative or, in the opinion of one researcher, "pitifully underwhelming."<sup>13</sup> The issue continues to generate debate within the scientific community, and a consensus has yet to be reached.<sup>14</sup> Parents, religious groups, and educators express concern that media violence may be unhealthy for children.<sup>15</sup> Furthermore, popular literature voices the

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<sup>8</sup> See Anderson & Bushman, *supra* note 7, at 353 (suggesting that "violent video games increase aggressive behavior in children and young adults"). Some researchers have further stated that media-influenced violence is inevitable and that virtually all consumer goods affect human behavior. See, e.g., Murphy, *supra* note 7, at 643-44 (finding that consumer goods significantly impact popular attitudes); see also *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 328-29 (7th Cir. 1985) (discussing the impact of pornographic media products on consumers).

<sup>9</sup> See, e.g., Michele J. Fleming & Debra J. Rickwood, *Effects of Violent Versus Nonviolent Video Games on Children's Arousal, Aggressive Mood, and Positive Mood*, 31 J. APPLIED SOCIAL PSYCHOL. 2047, 2063-65 (2001); Jonathan L. Freedman, *Television Violence and Aggression: A Rejoinder*, 100 PSYCHOL. BULL. 372, 377 (1986); Judith Van Evra, *Finally Clapping with Two Hands: Looking at Children's Talk About Television*, 112 AM. J. PSYCHOL. 313, 314-15 (1999) (book review); see also Bruce W. Sanford & Bruce D. Brown, *Hit Man's Miss Hit*, 27 N. KY. L. REV. 69, 69-71 (2000).

<sup>10</sup> See Van Evra, *supra* note 9 (concluding that violent television programs do not desensitize children to real life violence).

<sup>11</sup> See Fleming & Rickwood, *supra* note 9, at 2063-65 (finding that violent video games do not lead to violent behavior in children).

<sup>12</sup> See Freedman, *supra* note 9, at 372 (refuting the hypothesis that media violence leads to real life violence).

<sup>13</sup> Sanford & Brown, *supra* note 9, at 70.

<sup>14</sup> See Letters to the Editor, *Kids, TV Viewing, and Aggressive Behavior*, 297 SCIENCE 49, 49-50 (July 5, 2002) (describing the ongoing disagreement among scientists as to the effects of media violence on children).

<sup>15</sup> See Linneman, *supra* note 1, at 163; David Trend, *Merchants of Death: Media Violence and American Empire*, 73 HARV. EDUC. REV. 285, 290-91 (2003) (explaining the influence parents and religious groups have on politicians in the realm of media violence, as well as the activities of the National Parent Teachers Association); National Alliance for Non-Violent Programming, at

concerns of many laypersons that media violence is a negative influence on children.<sup>16</sup>

## II. MEDIA COMPANIES HAVE NOT BEEN HELD LIABLE FOR THE VIOLENT CONTENT OF THEIR PRODUCTS

Although scientists are divided, courts have decided the causation issue in favor of the media industry,<sup>17</sup> and violent media products have received broad First Amendment protections.<sup>18</sup> As a result, plaintiffs in media-violence suits are nearly foreclosed from presenting a genuine issue of material fact regarding causation because, even if the First Amendment does not bar suit, courts have concluded that media violence cannot, under virtually any circumstances, lead to violent behavior in children.<sup>19</sup> Therefore, media companies are held to owe no duty to third parties injured by youths under the influence of violent media products.<sup>20</sup> Furthermore, courts find

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and-jill.org/NANP.htm (last updated Jan. 28, 2004) (calling for educators, parents, religious groups, and others to join movement to rid the media of violent programming).

<sup>16</sup> See Begley, *supra* note 7, at 32–34 (documenting studies that suggest exposure to violence can lead to aggressive behavior in children); Richard Corliss, *This Essay Is Rated PG-13*, TIME, July 29, 2002, at 70 (expressing concerns about media products targeted to children).

<sup>17</sup> The media industry's interest in absolute protection from liability is intense. In *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), for example, defendant Paladin's "astonishing stipulations" that it intended for its publication to assist aspiring murderers did not dampen the media industry's enthusiasm to aid Paladin in its defense of a wrongful death suit. *Id.* at 266–67. Over a dozen media companies assisted Paladin as amici curiae, including America Online, ABC, The Washington Post, and The New York Times. *Id.* at 235.

<sup>18</sup> The First Amendment will be discussed *infra* Section III.

<sup>19</sup> Absent a genuine issue of material fact, a complaint cannot withstand summary judgment. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

<sup>20</sup> See *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1275 (D. Colo. 2002) (holding that media defendants owed no duty to third-parties injured by teenage consumers under the influence of defendants' violent media products); *Davidson v. Time Warner, Inc.*, No. CIV.A. V-94-006, 1997 WL 405907, at \*13–14 (S.D. Tex. Mar. 31, 1997) (concluding that musician and music company owed no duty to third-parties regarding the violent content of their music product); *Zamora v. CBS, Inc.*, 480 F. Supp. 199, 201–03 (S.D. Fla. 1979) (deciding that media company owed no duty to third-parties regarding violent television programming); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 195–97 (Dist. Ct. App. 1988) (media company and musician owed no duty to suicide victim who shot himself while listening to violent music product); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1070–72 (Mass. 1989) (affirming dismissal of wrongful death suit because media company did not violate any duty toward third-parties in relation to violent television programming).

that aggressive behavior after exposure to violent media products is an unforeseeable, superseding intervening cause of injury.<sup>21</sup>

Refusing to permit jurors to decide whether media violence may have led to injury in a particular case is inconsistent with the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>22</sup> In *Daubert*, the Court discussed the judge's role as a gatekeeper with respect to the admissibility of scientific evidence regarding causation.<sup>23</sup> *Daubert* requires a trial judge rigorously<sup>24</sup> to evaluate scientific testimony<sup>25</sup> and exclude testimony of questionable merit.<sup>26</sup> Although *Daubert* requires trial judges to dismiss unqualified testimony, the Supreme Court has also emphasized that judges need not do so unnecessarily;<sup>27</sup> rather, the basic standard of admissibility is a liberal one,<sup>28</sup> and courts should relax barriers to scientific testimony when appropriate.<sup>29</sup> Therefore, scientific evidence regarding causal relationships between media violence and aggressive behavior in children does not need to be " 'known' to a certainty"<sup>30</sup> in order to be admissible. Despite these principles, courts in media violence suits generally refuse to permit jurors to hear scientific evidence regarding causation.<sup>31</sup> Although there

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<sup>21</sup> See *Watters v. TSR, Inc.*, 904 F.2d 378, 380 (6th Cir. 1990) (concluding that decedent's violent behavior was a superseding cause of his injury and that the wrongful death suit against media defendant should be dismissed accordingly); *Sanders*, 188 F. Supp. 2d at 1276 (absolving media defendants of liability because teenage gunmen's "intentional violent acts were [a] superseding cause of [injury]" that absolved media defendants of liability).

<sup>22</sup> 509 U.S. 579 (1993).

<sup>23</sup> See *id.* at 589–97. Specifically, plaintiffs in *Daubert* brought suit alleging that defendant's pharmaceutical product "Bendectin" caused "serious birth defects" in their children. *Id.* at 582. At issue was the admissibility of plaintiff's non-epidemiological based expert testimony, which allegedly refuted defendant's well-developed epidemiological evidence that Bendectin was safe. See *id.* at 583–85.

<sup>24</sup> See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150–51 (1999) (interpreting *Daubert* to require stringent standards).

<sup>25</sup> See *Bunting v. Jamieson*, 984 P.2d 467, 473 (Wyo. 1999) (discussing the trial judge's role to "[to] consider the soundness" of scientific testimony).

<sup>26</sup> See *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315–16 (9th Cir. 1995) (stating that "something doesn't become 'scientific knowledge' just because it's uttered by a scientist").

<sup>27</sup> See *Jamieson*, 984 P.2d at 472–73.

<sup>28</sup> *Daubert*, 509 U.S. at 587.

<sup>29</sup> *Id.* at 588 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

<sup>30</sup> *Id.* at 590. The Court added that "arguably, there are no certainties in science." *Id.*

<sup>31</sup> See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683, 693 (6th Cir. 2002)

may be “good science,”<sup>32</sup> as opposed to “unsupported speculation,”<sup>33</sup> addressing causal links between exposure to violence and aggressive behavior in children, and while ample research exists to “assist [a] trier of fact to . . . determine a [causation] issue,”<sup>34</sup> judges often dispose of media violence suits in favor of defendants.<sup>35</sup> Voluminous published research substantiating both sides of the causation debate should render such testimony admissible in court.<sup>36</sup> Media violence suits do not seem to be an instance where only a “scintilla of evidence . . . [renders the judge] free to direct a judgment.”<sup>37</sup>

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(holding that it appears “impossible to predict” that video games, movies, and internet sites would “incite a young person to violence”); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578–79 (7th Cir. 2001) (discrediting prior studies as not evidence that violent video games are any more harmful than other forms of entertainment).

<sup>32</sup> *Am. Amusement Mach. Ass’n*, 244 F.3d at 593. The Court stated that “[a] pertinent consideration [regarding whether scientific evidence is admissible] is whether the theory . . . has been subjected to peer review and publication.” *Id.* The absence of peer review and publication, however, does not necessarily bar testimony. *See id.* at 594.

<sup>33</sup> *Id.* at 599.

<sup>34</sup> *Id.* at 592.

<sup>35</sup> *See, e.g., Am. Amusement Mach. Ass’n*, 244 F.3d at 580; *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 169 (D. Conn. 2002); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1281–82 (D. Colo. 2002); *Torries v. Hebert*, 111 F. Supp. 2d 806, 810, 824 (W.D. La. 2000); *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 188–89 (Dist. Ct. App. 1988).

<sup>36</sup> *See, e.g.,* Committee on Communications, American Academy of Pediatrics, *Media Violence*, 95 PEDIATRICS 949, 949–51 (1995) (exploring the affects of media violence on children); Joanne Cantor, *Media Violence*, 27 J. ADOLESCENT HEALTH 30, 31–32 (2000) (concluding that media violence contributes to “violent and hostile behavior”); Rafael Art. Javier et al., *Violence and the Media: A Psychological Analysis*, 25 INT’L J. INSTRUCTIONAL MEDIA 339, 341–42, 351 (1998) (examining the relationship between violence and the media in the context of individual psychology and changes in society); Michael Craig Miller, *Does Violence in the Media Cause Violent Behavior?*, HARV. MENTAL HEALTH LETTER, Sept. 2001, at 5 (documenting research results of study to determine to what extent media violence changes feelings or behavior); Mary Muscari, *Media Violence: Advice for Parents*, 28 PEDIATRIC NURSING 585, 585–86 (2002) (noting that more than 3,500 studies about the negative effects of media violence on children have been conducted); Stephanie Stapleton, *Media Violence is Harmful to Kids—and to Public Health*, AM. MED. NEWS, Aug. 14, 2000, at 33 (“The link between media violence and real-life violence has been made by science time and again.” (quoting J. Edward Hall)).

<sup>37</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (2003). Furthermore, jury input has been long cherished and encouraged by the judiciary. *See Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 502–03 (1980) (emphasizing the importance of “the practical wisdom of the jury”); *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 78 (1st Cir. 2001) (explaining that “[c]ourts traditionally defer to the wisdom of juries in the resolution of fact-sensitive questions”); United States

Specifically, *Daubert* declared a two-part test to determine whether expert testimony is admissible evidence.<sup>38</sup> First, testimony must be of requisite scientific merit.<sup>39</sup> Although the Supreme Court provided no “definitive checklist or test,”<sup>40</sup> judges should weigh heavily whether testimony is grounded in scientific method-based research subjected to peer review.<sup>41</sup> Another “very significant” factor<sup>42</sup> is whether the testimony is based on research funded and conducted “independent of the litigation.”<sup>43</sup> The Court determined that independent research provides “objective proof”<sup>44</sup> of scientific merit, whereas research developed expressly for judicial trials is usually unfit to be relied upon.<sup>45</sup> Thus, *Daubert* attempted to discourage “shopping”<sup>46</sup> for expert testimony.

Unlike the litigation in *Daubert* involving Bendectin,<sup>47</sup> researchers have been investigating the causal links between media violence and aggressive behavior in children for decades,

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v. Landau, 155 F.3d 93, 105 n.3 (2d Cir. 1998) (“[J]udge[s] should [defer to] the findings of [a] jury, regardless of [their] own doubts in the matter.” (quoting CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2806 (1995))); United States v. Castillo, 148 F.3d 770, 775 (7th Cir. 1998) (refusing to “question the wisdom of the jury[]”); Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996) (emphasizing the importance of the “wisdom of . . . juries”); Clift v. Narragansett Television L.P., 688 A.2d 805, 815 (R.I. 1996) (Flanders, J., concurring in part and dissenting in part) (stressing the importance of jury determination of causation issues). Furthermore, some legal commentators argue that judges are not, nor should they be, arbiters of scientific debate. KARL MENNINGER, THE CRIME OF PUNISHMENT 132–39 (1968) (using the insanity defense to illustrate the importance of jury determination of cause-in-fact issues surrounded by scientific debate). Factual questions are usually best left to juries to resolve with the aid of expert witnesses. *Id.*

<sup>38</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995).

<sup>39</sup> *Id.* at 1316–17.

<sup>40</sup> *Id.* at 1316.

<sup>41</sup> *Id.* at 1316–17.

<sup>42</sup> *Id.* at 1317.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 1317–19.

<sup>46</sup> *Id.* at 1317.

<sup>47</sup> Plaintiffs’ witnesses in *Daubert* were all “experts in their respective fields, [but] none claim[ed] to have [specifically] studied the effect of Bendectin . . . before being hired to testify.” *Id.* The causal link problems in Bendectin litigation stemmed from the plaintiff’s burden of proving under California law that the drug “more than doubled” the risk of birth defects. *Id.* at 1320. Plaintiff’s experts “were . . . unprepared to testify that Bendectin caused plaintiffs’ injuries; they were willing to testify only that Bendectin is ‘capable of causing’ birth defects.” *Id.* at 1321 (citation omitted).

independent of litigation. This research has endured extensive peer review and has been published in scientific journals.<sup>48</sup> Therefore, expert testimony regarding media violence meets the first prong of the *Daubert* test.

The second prong of the *Daubert* test requires a “‘fit’ between the testimony and an issue in the case,”<sup>49</sup> in other words, that expert testimony is based on research directly relevant to the issue at trial. There is a “fit” between causal issues in media violence suits and independent studies concerning links between violent media products and aggressive behavior in children. In fact, the legal issue is identical to the scientific question.<sup>50</sup> There is a perfect “fit.”<sup>51</sup>

In *Sanders v. Acclaim Entertainment, Inc.*,<sup>52</sup> plaintiff’s wrongful death suit alleged that defendants’ violent media products influenced teenage gunmen’s destructive behavior.<sup>53</sup> The teenage gunmen, who killed thirteen and injured dozens, were described by the court as “excessive consumers” of violent video games and violent movies.<sup>54</sup> Nonetheless, the court, without reference to scientific authority or to *Daubert*, granted the media defendants’ motion to dismiss.<sup>55</sup> The court failed to cite a single scientific study yet concluded that defendants “had no reason to suppose” violent media products could lead to aggressive behavior in teenagers.<sup>56</sup> The court stated that “exposure to [violent] video games and . . . movie[s]” could not lead to violent behavior in children<sup>57</sup> and “no reasonable jury could find [otherwise].”<sup>58</sup> The district judge relied solely on his

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<sup>48</sup> See *supra* note 36 and accompanying text.

<sup>49</sup> *Daubert*, 43 F.3d at 1320.

<sup>50</sup> See *Testimony Report on Violence in the Media and Children: Hearing Before the Senate Comm. on Commerce, Science & Transportation*, 106th Cong. (2000) (testimony of Dr. Donald Cook, President, Am. Acad. of Pediatrics); see also *supra* note 36 and accompanying text.

<sup>51</sup> On the other hand, plaintiffs in *Daubert* relied on “circumstantial proof of causation” rather than studies that directly addressed the issue at suit. *Daubert*, 43 F.3d at 1320.

<sup>52</sup> 188 F. Supp. 2d 1264 (D. Colo. 2002).

<sup>53</sup> *Id.* at 1268.

<sup>54</sup> *Id.* Additionally, the killers’ strategy and behavior apparently replicated the events of one such movie. See *id.*

<sup>55</sup> See *id.* at 1270–76.

<sup>56</sup> *Id.* at 1272.

<sup>57</sup> *Id.* at 1272–73.

<sup>58</sup> *Id.* at 1264.

“common sense”<sup>59</sup> and ruled that violent media products cannot affect children’s behavior, and even if such products could lead to violent behavior in child consumers, the relationship was too attenuated to lead to liability.<sup>60</sup> The *Daubert* Court provided guidelines for determining the merit and admissibility of scientific evidence: One person’s “common sense” is insufficient to block plaintiff’s expert testimony and dismiss the suit.<sup>61</sup>

In *Wilson v. Midway Games, Inc.*,<sup>62</sup> plaintiff alleged that defendant manufacturer’s violent interactive video game was a but for cause of decedent’s murder.<sup>63</sup> Specifically, plaintiff alleged that defendant’s product spurred “killer responses” among players.<sup>64</sup> Plaintiff also emphasized the complexity and “futuristic technology” of today’s video games and argued that their ability to influence players and consume their attention is unprecedented.<sup>65</sup> Plaintiff alleged that the murderer, a child of unspecified age, became “addicted”<sup>66</sup> to defendant’s video game and stabbed the decedent in a manner akin to that seen in the game.<sup>67</sup> The court’s reference to scientific authority was limited to a single footnote in which the court recognized, but declined to evaluate, scientific research regarding the effects of media violence on children.<sup>68</sup> The court rejected plaintiff’s causal allegations and granted defendant’s motion to dismiss without mention of *Daubert*.<sup>69</sup> Thus, plaintiff was foreclosed from

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<sup>59</sup> *Id.* at 1271–72 (quoting *Perreira v. Colorado*, 768 P.2d 1198, 1209 (Colo. 1989)).

<sup>60</sup> *See id.* at 1276.

<sup>61</sup> In any event, the Supreme Court has stated that the judiciary may be the “group in the country [least] qualified . . . to have any considered judgment as to what the deleterious or beneficial impact of a particular [media product] may be on minds either young or old.” *Ginsberg v. New York*, 390 U.S. 629, 656 (1968) (Douglas, J., dissenting).

<sup>62</sup> 198 F. Supp. 2d 167 (D. Conn. 2002).

<sup>63</sup> *Id.* at 169–70.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 170.

<sup>66</sup> *Id.* at 169.

<sup>67</sup> *Id.* at 170. The child killer stabbed decedent in the chest with a knife in a manner consistent with that of one of the video game’s characters. *Id.*

<sup>68</sup> *See id.* at 182 n.33. Such causal relationships were crucial to plaintiff’s suit. For example, plaintiff alleged that juvenile game players would eventually believe that “violence [is] a viable problem-solving technique.” *Id.* at 170. The court, however, failed to include the work of the scientific community in its reasoning.

<sup>69</sup> *Id.* at 169. In addition to rejecting plaintiff’s causation claim, the court grounded its decision in First Amendment jurisprudence. *Id.* See *infra* Section III for a discussion of First Amendment issues.

developing and presenting causal issues to jurors, or even to the judge through a summary judgment motion.<sup>70</sup> Instead, without meaningful explanation, the court simply refused to entertain plaintiff's allegations.<sup>71</sup>

In *Torries v. Hebert*,<sup>72</sup> the court granted injunctive relief in favor of a proprietor whose business marketed violent music to children.<sup>73</sup> Specifically, after responding to a disturbance caused by patrons at plaintiff Torries' skating rink, police seized compact discs containing violent music that allegedly sparked child patrons—who ranged in age from seven to sixteen—to riot.<sup>74</sup> Although skating was the primary activity at Torries' business, the “skating sessions . . . centered around music.”<sup>75</sup> Torries brought suit demanding the return of his compact discs.<sup>76</sup> The court rejected as “speculative” the defendants' claim that violent music was a substantial factor that helped spark aggressive behavior in children.<sup>77</sup> Rather than fully consider both sides of the scientific debate, the court rejected defendants' causal arguments and concluded that violent media products cannot lead to aggressive behavior in children.<sup>78</sup>

Similarly, in *McCollum v. CBS, Inc.*,<sup>79</sup> a California court dismissed the plaintiff's allegations that defendants' music product influenced decedent teenager's suicide.<sup>80</sup> Specifically, an emotionally distressed teenager shot himself while lying in bed listening to one of his favorite musicians chronicle despair,

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<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 181–82.

<sup>72</sup> 111 F. Supp. 2d 806 (W.D. La. 2000).

<sup>73</sup> *Id.* at 810–11.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 812.

<sup>76</sup> *Id.* at 813.

<sup>77</sup> *See id.* at 820. Specifically, the court responded to statements by defendant's witness whose specialization in the field of media violence was dubious given his failure to support his statements with citation to even a single scientific authority. Whatever the effectiveness of the defendant's witness, the court dismissed the possibility of causal connections between media violence and aggressive behavior in children without reference to a single authority countering the defendant's testimony. *See id.*

<sup>78</sup> *Id.*

<sup>79</sup> 249 Cal. Rptr. 187 (Cal. Dist. Ct. App. 1988).

<sup>80</sup> *Id.* at 188–89. Plaintiff alleged that defendant targeted troubled adolescents and encouraged their self-destructive behavior. *See id.* at 189–90. The court favored defendants' argument, which, among other things, likened defendants' music to “Hamlet's ‘to be or not to be’ soliloquy.” *Id.* at 190 n.4.

violence, and death.<sup>81</sup> Decedent's stereo was running at the time of his suicide.<sup>82</sup> Without citing scientific authority, the court concluded that media products cannot significantly affect teenage listeners and "[n]o rational person would or could . . . mistake musical lyrics . . . for literal commands or directives."<sup>83</sup> The court added that this was particularly so when music was recorded and thus "remote from the listener."<sup>84</sup> Despite the ongoing scientific debate, the court ruled that "there [was] no room for a reasonable difference of opinion,"<sup>85</sup> and similar to *Sanders*, the judge relied on his "common sense"<sup>86</sup> and dismissed the plaintiff's suit.

In *American Amusement Machine Ass'n v. Kendrick*,<sup>87</sup> the Seventh Circuit agreed with plaintiff trade association that violent video games cannot lead to aggressive behavior in children and held a local ordinance that sought to shield minors from violent video games unconstitutional.<sup>88</sup> The court recognized the importance of scientific evidence to its determination and thus proceeded to decide "whether . . . violent video games cause harm either to the game players or . . . the public at large."<sup>89</sup> Although the court acknowledged both sides of the scientific debate,<sup>90</sup> it nonetheless concluded, in part based on "[c]ommon sense,"<sup>91</sup> that media violence cannot manifest itself into actual violent behavior in children.<sup>92</sup> The court of appeals reversed the lower court and concluded that "harm . . . from [violent video] games is implausible, [and] at best wildly speculative."<sup>93</sup> The *Kendrick* decision essentially vetoed the ordinance and found that researchers who supported the possibility of causal links between media violence and aggressive

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<sup>81</sup> *See id.* at 189.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 194. The opinion did not indicate whether plaintiff cited scientific authority to support his causal hypotheses.

<sup>84</sup> *Id.* at 194 n.10.

<sup>85</sup> *Id.* at 196 (citation omitted).

<sup>86</sup> *Id.* at 194.

<sup>87</sup> 244 F.3d 572 (7th Cir. 2001).

<sup>88</sup> *Id.* at 578–80. The court, however, did not foreclose the possibility that a similarly worded ordinance could be constitutional. *See id.* at 579.

<sup>89</sup> *Id.* at 576.

<sup>90</sup> *See id.* at 574, 578–79.

<sup>91</sup> *Id.* at 579.

<sup>92</sup> *See id.* at 578–79.

<sup>93</sup> *Id.* at 579.

behavior in children—approximately half the scientific community—were mistaken.<sup>94</sup> To the contrary, the court stated that the absence of media violence would be unhealthy for children because they would be “raised in an intellectual bubble.”<sup>95</sup>

Perhaps the correct holding came from the district court in *Kendrick*.<sup>96</sup> There, the court stated that “definitive proof from . . . scien[tific] research that . . . [violent] video games . . . cause[] harmful aggressive behavior [in children]” was not a prerequisite to render the ordinance constitutional and thereby upheld the ordinance.<sup>97</sup> Despite “uncertainty”<sup>98</sup> within the scientific community, the court concluded that links between media violence and aggressive behavior in children were “solidly reasonable” beliefs.<sup>99</sup> In contrast to the circuit court’s view, that media violence can be beneficial to child development, the district court viewed violent video games as little more than “a complete learning environment for aggression” nearly devoid of social utility.<sup>100</sup>

### III. FIRST AMENDMENT CONCERNS

The media industry maintains that any step towards holding media corporations civilly liable for the violent content of their child-entertainment products would chill freedom of

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<sup>94</sup> *See id.* at 578–79.

<sup>95</sup> *Id.* at 577.

<sup>96</sup> 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev’d*, 244 F.3d 572 (7th Cir. 2001).

<sup>97</sup> *Id.* at 960.

<sup>98</sup> *Id.* at 959.

<sup>99</sup> *Id.* at 963.

<sup>100</sup> *Id.* at 964 (alteration in original) (citations omitted). Consistent with this view, government officials, and the citizenry whom they represent, should consider whether the burden of proof in media violence suits should be placed on defendants. Common law public policy-based rules shifting the burden of proof to defendants in negligence cases is not uncommon. The decision hinges on whether to afford greater protection to business interests, or the interest of our youth. *See Ybarra v. Spangard*, 154 P.2d 687, 690 (Cal. 1944) (stating that it would be “manifestly unreasonable” to place the burden of proof on plaintiff appendectomy patient, and that “plaintiff [need] not identif[y] the instrumentality” that caused his injury); *Gilbert v. Korvette, Inc.*, 327 A.2d 94, 103 (Pa. 1974) (holding defendants escalator manufacturer and retail store liable absent proof that they were not negligent); *Loch v. Confair*, 93 A.2d 451, 453–54 (Pa. 1953) (concluding in personal injury case that “reason and justice alike” required the burden of proof be placed on defendants, in part because they could best explain techniques employed to ensure consumer safety).

expression.<sup>101</sup> Courts generally agree with the media industry on this point.<sup>102</sup>

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>103</sup> Although its plain meaning mandates that speech enjoy legal protection, regulation of speech is not always precluded by the First Amendment; for example, the First Amendment “would not protect a man in falsely shouting fire in a theatre.”<sup>104</sup>

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<sup>101</sup> See *Rice v. Paladin Enters.*, 128 F.3d 233, 265 (4th Cir. 1997) (“[T]he major networks, newspapers, and publishers, contend[] that *any* decision recognizing even a potential cause of action [in a media violence suit] . . . will have far-reaching chilling effects on the rights of free speech and press.”). Specifically, media companies argue that media violence suits “will disturb decades of First Amendment jurisprudence and jeopardize free speech from the periphery to the core. . . . No expression—music, video, books, even newspaper articles—would be safe from civil liability.” *Id.* (quoting Brief of Amici Curiae Washington Post, Inc., at 3). The *Paladin* court, however, rejected, with impunity, the media industry’s “breathhtaking” argument that *Paladin* may “intentionally and knowingly assist murderers with technical information.” *Id.*

<sup>102</sup> Although there have been scant exceptions, such as *Paladin*, 128 F.3d at 251–52 (rejecting media defendants’ First Amendment arguments and remanding case for further proceedings) and *Clift v. Narragansett Television, L.P.*, 688 A.2d 805, 817 (R.I. 1996) (Flanders, J., concurring in part and dissenting in part) (asserting that the First Amendment is not a “wall of immunity protecting the media from any liability” (citing *Galella v. Onassis*, 487 F.2d 986, 995–96 (2d Cir. 1973))), most courts have sided with the media industry and granted almost absolute First Amendment protections to defendants in media violence suits. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001) (comparing a child’s right to play graphically violent video games with the child’s right to read violent classic literature); *Watters v. TSR, Inc.*, 904 F.2d 378, 382 (6th Cir. 1990); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 179–81 (D. Conn. 2002) (stating that video games enjoy First Amendment protection); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (concluding that “video games deserve . . . full First Amendment protection”); *Zamora v. CBS, Inc.*, 480 F. Supp. 199, 205 (S.D. Fla. 1979) (analogizing the press to violent television programming, thereby justifying First Amendment protections); *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 198 (Cal. Dist. Ct. App. 1988) (finding that violent music, even if consumed by “emotionally fragile” youth, is entitled to First Amendment protection); *Bill v. Superior Court*, 187 Cal. Rptr. 625, 628–30, 634 (Cal. Dist. Ct. App. 1982) (dismissing plaintiff’s complaint against producers of violent film, citing First Amendment protections); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (concluding that a violent motion picture is entitled to First Amendment protection); see also *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001) (citing *Marci A. Hamilton, Art Speech*, 49 VAND. L. REV. 73, 84–86 (1996) (arguing that the First Amendment extends to artistic expression)).

<sup>103</sup> U.S. CONST. amend. I.

<sup>104</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

Challenges to First Amendment protections often result from either obscene or violent material.<sup>105</sup> Courts have been more willing to place restrictions on obscenity than on violence.<sup>106</sup> *Chaplinsky v. State of New Hampshire*<sup>107</sup> “laid the foundation” for restrictions on obscene material.<sup>108</sup> Later, the

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<sup>105</sup> See *Kendrick*, 244 F.3d at 574 (stating that “[v]iolence and obscenity are [two] distinct categories of [unprotected speech]” (citing *Winters v. New York*, 333 U.S. 507, 518–20 (1948))); *Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1135–36 (E.D. Mo. 2002) (distinguishing between violence and obscenity, both of which are not fully protected by the First Amendment); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, No. MDL 150 AWI, 1992 WL 133093, at \*3 (C.D. Cal. Apr. 30, 1992) (explaining that the First Amendment does not extend to obscenity or material “likely to incite . . . immediate and serious violence”); *Eckford-El v. Toombs*, 760 F. Supp. 1267, 1270 (W.D. Mich. 1991) (explaining that material which is neither obscene nor meant to incite violence falls within the First Amendment, but material outside those parameters is unprotected); *Mabey v. Reagan*, 376 F. Supp. 216, 222 (N.D. Cal. 1974) (concluding that “caustic dialogue” was protected by the First Amendment because “[a]t no time . . . did plaintiff use profane or obscene language and apparently [did not] incite violence”); *Byers v. Edmondson*, 712 So. 2d 681, 689 (La. Ct. App. 1998) (asserting that “speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action” is not protected by the First Amendment (citing *McCullum*, 249 Cal. Rptr. at 193)). Other exceptions to First Amendment protections include “libel, slander, misrepresentation, . . . perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, . . . speech or writing used as an integral part of conduct in violation of a valid criminal statute.” *Id.*

<sup>106</sup> Courts have a long history of restricting obscene material in order to benefit children. See *New York v. Ferber*, 458 U.S. 747, 754–55 (1982) (chronicling the judiciary’s obscenity jurisprudence); *Miller v. California*, 413 U.S. 15, 23 (1973) (stating that “obscene material is unprotected by the First Amendment” (citations omitted)); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (upholding a criminal statute that imposed penalties for obscene speech and stating that “the lewd and obscene” are not protected by the First Amendment). Media violence, on the other hand, has been granted First Amendment protections. See *Kendrick*, 244 F.3d at 578 (extending First Amendment protections to video games); *Wilson*, 198 F. Supp. 2d at 179–81 (stating that video games enjoy First Amendment protection); *Sanders*, 188 F. Supp. 2d at 1279 (“[V]ideo games deserve . . . full First Amendment protection.”); *Zamora*, 480 F. Supp. at 205 (stating that violent television programming enjoys First Amendment protections); *Yakubowicz*, 536 N.E.2d at 1071 (concluding that violent movies are entitled to First Amendment protections).

<sup>107</sup> 315 U.S. 568 (1942).

<sup>108</sup> See *Ferber*, 458 U.S. at 754 (“In *Chaplinsky* . . . the Court laid the foundation for the excision of obscenity from the realm of constitutionally protected expression.”).

Supreme Court stated that “obscenity is not within the area of constitutionally protected speech.”<sup>109</sup>

The Court expanded its obscenity jurisprudence in later decisions; for example, in *Osborne v. Ohio*,<sup>110</sup> the Supreme Court upheld a statutory ban on child pornography.<sup>111</sup> The Court recognized that the social utility of child pornography was “exceedingly modest”<sup>112</sup> and that the “[s]tate’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”<sup>113</sup> Accordingly, the Supreme Court has “repeatedly held that the protection of the First Amendment does not extend to obscene speech.”<sup>114</sup>

Even non-obscene, constitutionally protected indecent speech may be regulated in order to “protect[] the physical and psychological well-being of minors.”<sup>115</sup> In *Sable Communications of California, Inc. v. FCC*,<sup>116</sup> the Court stated that “[g]overnment may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest,” such as the health and safety of children.<sup>117</sup> Although *Sable* was couched in legal terms, the opinion was really a value judgment grounded in cultural considerations. Indeed, cultural considerations have guided much of the Court’s obscenity jurisprudence.<sup>118</sup>

In *Reno v. ACLU*,<sup>119</sup> the Court affirmed the “legitimacy and importance of . . . protecting children from harmful materials” although the Court invalidated a statute enacted to protect children from obscene and indecent material on the internet because of “wholly unprecedented”<sup>120</sup> statutory vagueness and

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<sup>109</sup> *Roth*, 354 U.S. at 485.

<sup>110</sup> 495 U.S. 103 (1990).

<sup>111</sup> *Id.* at 125–26 (finding defendant’s “First Amendment arguments unpersuasive” and upholding the constitutionality of an anti-obscenity statute).

<sup>112</sup> *Id.* at 108 (“[T]he value of permitting child pornography has been characterized as ‘exceedingly modest, if not *de minimis*.’” (quoting *Ferber*, 458 U.S. at 762)).

<sup>113</sup> *Id.* at 109 (quoting *Ferber*, 458 U.S. at 756–57).

<sup>114</sup> *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989).

<sup>115</sup> *Id.* at 126 (citing *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968)); see *Ferber*, 458 U.S. at 756–57 (commenting on the need to foster healthy psychological development of children).

<sup>116</sup> 492 U.S. 115 (1989).

<sup>117</sup> *Id.* at 126.

<sup>118</sup> *Id.* at 131 (Scalia, J., concurring) (recognizing that “value judgment[s]” guide the Court in decisions regarding indecent speech).

<sup>119</sup> 521 U.S. 844 (1997).

<sup>120</sup> *Id.* at 877.

breadth.<sup>121</sup> The Court also distinguished the “invasive”<sup>122</sup> nature of television and radio from the internet; the latter requires “sophistication and . . . ability to . . . retrieve [sexually obscene] material;”<sup>123</sup> whereas, violent media products on television and radio are accessed by “merely turning a dial.”<sup>124</sup> Finally, the Court noted that, unlike sexually explicit internet pages marketed to adults, targeting children for pecuniary gain limits First Amendment protection.<sup>125</sup>

Thus, the Court has permitted regulation of speech when children are at risk<sup>126</sup> and has granted regulatory “leeway”<sup>127</sup> in order to ensure that children live in a healthy environment. Recognizing that “[a] democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens,”<sup>128</sup> it seems that holding manufacturers accountable for the harmful effects of their products does not offend First Amendment principles. This is especially so when media products lack any “literary, artistic, scientific, or educational value.”<sup>129</sup> The interest of children “justifie[s] special treatment;”<sup>130</sup> thus, the Supreme Court has granted broad protections for children against obscene or indecent speech.

#### IV. THE SUPREME COURT’S OBSCENITY JURISPRUDENCE HAS NOT EXTENDED TO MEDIA VIOLENCE

Media violence cases have not paralleled courts’ distaste for obscenity.<sup>131</sup> Although regulation of violent media products would often affect “the form, rather than the content, of serious

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<sup>121</sup> *Id.* at 849.

<sup>122</sup> *Id.* at 869.

<sup>123</sup> *Id.* at 854.

<sup>124</sup> *Id.*

<sup>125</sup> *See id.* at 865.

<sup>126</sup> *See* *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (asserting that a stable society requires a positive environment in which children can develop into healthy adults (citing *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944))). The *Ferber* Court added that “[a]ccordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.” *Id.* at 757.

<sup>127</sup> *Id.* at 756.

<sup>128</sup> *Id.* at 757 (quoting *Prince*, 321 U.S. at 168).

<sup>129</sup> *Id.* at 777.

<sup>130</sup> *Id.* at 757 (citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

<sup>131</sup> *See* *Dalal*, *supra* note 1, at 358–60 (discussing media companies’ immunity from liability for the violent content of their child-entertainment products, and attempts to change the status quo).

communication,”<sup>132</sup> courts have nonetheless refused to burden media companies’ freedom to market violent products.<sup>133</sup>

It seems inconsistent that courts have taken such a vehement stance against obscenity, yet they grant media companies almost complete freedom to market violence to children. In fact, despite studies to the contrary, some judges believe that less media violence would be “deforming”<sup>134</sup> and leave children “unequipped to cope with the world as we know it.”<sup>135</sup> Thus far, the judiciary has not explained the apparent incongruity between obscenity and media violence jurisprudence.

Although opinion cannot be regulated under the First Amendment merely because it “gives offense”<sup>136</sup> or is “disagreeable,”<sup>137</sup> certain youth-oriented violent media products may lack any message or opinion whatsoever.<sup>138</sup> Such products

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<sup>132</sup> *Pacifica Found.*, 438 U.S. at 743 n.18.

<sup>133</sup> See, e.g., *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 576–77 (7th Cir. 2001) (comparing a child’s right to play graphically violent video games with the child’s right to read violent classic literature); *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) (stating that video game manufacturer is not responsible for determining the mental state of every potential buyer of the manufacturer’s video games); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (holding that the content of the defendant’s video game was protected by the First Amendment); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1275 (D. Colo. 2002) (holding that video game manufacturers do not have a duty of care to anticipate or prevent any violent acts committed by individuals who play video games); *Davidson v. Time Warner, Inc.*, No. CIV.A. V-94-006, 1997 WL 405907, at \*17 (S.D. Tex. Mar. 31, 1997) (stating that the violent lyrics of the defendant’s album are constitutionally protected); *Zamora v. CBS, Inc.*, 480 F. Supp. 199, 205–06 (S.D. Fla. 1979) (noting that the public has a right to access the ideas disseminated by the media); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (holding that defendant had a constitutional right to create and show a violent movie); *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 191–92 (Dist. Ct. App. 1988) (holding that the defendant has a First Amendment right to produce a song with violent lyrics).

<sup>134</sup> *Kendrick*, 244 F.3d at 577.

<sup>135</sup> *Id.* Although the scientific community is divided over whether media violence leads to violent behavior in children, no researcher has ever suggested that media violence is healthy or beneficial.

<sup>136</sup> *Pacifica Found.*, 438 U.S. at 745; see also *Texas v. Johnson*, 491 U.S. 397, 404–05 (1989) (documenting the broad protections granted by the First Amendment); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

<sup>137</sup> *Torries v. Hebert*, 111 F. Supp. 2d 806, 818 (W.D. La. 2000) (quoting *Johnson*, 491 U.S. at 414).

<sup>138</sup> See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001) (“‘Speech’ is an elusive term, and judges and scholars have debated its bounds for two centuries.”); see also Robert H. Bork, *Neutral Principles and Some First*

seem unintended to contribute to a “marketplace of ideas”<sup>139</sup> and, instead, simply release gratuitous violence for the shock value it has on adolescents and the pecuniary gain it generates.<sup>140</sup>

Nonetheless, the Court of Appeals for the Seventh Circuit, for example, declined to distinguish media violence from classic literature. In *American Amusement Machine Ass’n v. Kendrick*,<sup>141</sup> the court reversed the district court and ruled in favor of plaintiffs who challenged an anti-media violence ordinance.<sup>142</sup> The court was unable to distinguish violent video games from classic literature such as *The Odyssey*, *The Divine Comedy*, *War and Peace*, and the works of Edgar Allen Poe.<sup>143</sup>

This Note asserts that today’s violent entertainment cannot be compared with classic literary works containing violence. There is a crucial difference between insightful, albeit sometimes violent, speech about the virtues and/or frailties of the human persona and, on the other end of the intellectual spectrum, violent entertainment geared toward children.

The district court in *Kendrick*,<sup>144</sup> for example, would treat “[g]raphic violence” directed toward children as a form of obscenity.<sup>145</sup> Specifically, the court concluded that graphic violence was a “variable obscenity”—material constitutionally protected when distributed to adults, but unprotected in the hands of children.<sup>146</sup> Thus, the district court held that graphic violence enjoys no more First Amendment protection than

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*Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (suggesting the First Amendment should pertain only to political speech). Arguably, in light of media company censorship, perhaps the proper inquiry is not whether regulation is permissible under the First Amendment; rather the proper inquiry may be whether the First Amendment protects the marketplace of ideas.

<sup>139</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); *see also* *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (noting that the First Amendment is intended “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))).

<sup>140</sup> *See* Corliss, *supra* note 16, at 70 (commenting on the use of “[c]rude humor and violence” in films marketed to child audiences in order to get children’s “disposable income” needed to pay “pricey” media industry salaries).

<sup>141</sup> 244 F.3d 572 (7th Cir. 2001).

<sup>142</sup> *Id.* at 577–78.

<sup>143</sup> *Id.* at 577.

<sup>144</sup> 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev’d*, 244 F.3d 572 (7th Cir. 2001).

<sup>145</sup> *Id.* at 967.

<sup>146</sup> *See id.* at 955.

sexually explicit material.<sup>147</sup> Furthermore, although some video games enjoy First Amendment protection,<sup>148</sup> the district court held that the health and safety of children is a compelling governmental interest that permits regulation of media violence, even “in the face of inconclusive social science evidence.”<sup>149</sup>

The Supreme Court has interpreted the First Amendment to protect literary, artistic, political, and scientific thought.<sup>150</sup> In the framers’ words, the First Amendment targets the “advancement of truth, science, morality, and arts in general.”<sup>151</sup> Many violent youth-oriented media products do not advance these constitutional objectives. Instead, as the district court stated in *Kendrick*, media violence in the hands of children is no more beneficial to young people or society than obscene sexual material<sup>152</sup> and may lack ideas or other content protected by the First Amendment when in the hands of children.<sup>153</sup>

Courts must decide whether the effects of media violence on children justify regulation.<sup>154</sup> Although violent media products may be protected in other contexts,<sup>155</sup> exploitation of children for financial gain compels greater scrutiny.<sup>156</sup> There is a difference between regulating violent products targeted to children and unconstitutional regulation of the adult marketplace.<sup>157</sup> Because of a state’s compelling interest in protecting the health and

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<sup>147</sup> See *id.* at 971.

<sup>148</sup> *Id.* at 952.

<sup>149</sup> *Id.* at 972.

<sup>150</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001) (“The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or *scientific* value . . . .” (alteration in original) (quoting *Miller v. California*, 413 U.S. 15, 34 (1973))).

<sup>151</sup> 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774); see also *Corley*, 273 F.3d at 446. (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774)).

<sup>152</sup> *Kendrick*, 115 F. Supp. 2d at 971.

<sup>153</sup> See *id.* at 958.

<sup>154</sup> *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (stating that courts must decide “whether the gravity of the ‘evil’ . . . justifies . . . invasion of free speech [in order] to avoid the danger”).

<sup>155</sup> See *ACLU v. Reno*, 929 F. Supp. 824, 868 (E.D. Pa. 1996) (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978)).

<sup>156</sup> See *Am. Amusement Mach. Ass’n v. Kendrick*, 244F.3d 572, 575 (7th Cir. 2001) (“Protecting people from violence is at least as hallowed a role for government as protecting people from [obscenity].”).

<sup>157</sup> See *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 74–75, 218 N.E.2d 668, 671, 271 N.Y.S.2d 947, 951 (1996) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964)).

safety of children, violent media goods should not enjoy absolute First Amendment protection.<sup>158</sup>

The question still remains as to whether there should be a constitutional privilege for media companies to recklessly or negligently market violent products to children. Additionally, it is unclear whether such an approach would equate First Amendment free expression protections with “commercial exploitation [and] demean[the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.”<sup>159</sup> These issues have yet to be resolved and courts should not foreclose debate intended to address difficult First Amendment questions presented by media violence targeted to children.

#### CONCLUSION

Despite increasing concern over the effects of media violence on child consumers, courts have almost foreclosed the possibility of media company liability for the violent content of their child-entertainment products. Judges, inconsistent with Supreme Court precedent, generally refuse to permit juries to hear cause-in-fact issues in media violence suits. Similarly, courts in media violence suits have applied a First Amendment jurisprudence that is tangential to mainstream judicial thinking and graciously overprotective of the media industry. The accountability of media corporations for the violent content of their child-

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<sup>158</sup> *Id.*

<sup>159</sup> *Miller v. California*, 413 U.S. 15, 34 (1973). Additionally, it seems that media companies do not freely promote ideas; instead, they scrutinize and restrict speech and may market only that which most effectively leads to sales. *See Corliss, supra* note 16, at 70 (commenting on the media industry’s emphasis on sales). Furthermore, although there seems to be little primary or secondary material directly addressing the matter, some children’s media products, particularly music industry products, seem to frequently portray African Americans as gun-wielding protagonists. *See Maureen Dowd, Perspective: The Man Who Would Be Mayor*, TIMES UNION (Albany), July 1, 2001, at B5 (citing New York City mayor Michael Bloomberg’s assessment that some music products are “racist”); *see also Trevor Fisher, Chuck D Testifies at Stephens*, IOWA STATE DAILY, Feb. 6, 2002 (reporting rapper’s displeasure that “[i]n today’s hip-hop music,” racial slurs in reference to African Americans are commonplace) [http://www.iowastatedaily.com/vnews/display.v/ART/2002/02/06/3c60ce00e7f9e?in\\_archive=1](http://www.iowastatedaily.com/vnews/display.v/ART/2002/02/06/3c60ce00e7f9e?in_archive=1). It is worth bearing in mind that although “[p]eople often act in accordance with the images and patterns they find around them,” such media images may encourage harmful stereotypes towards African Americans. *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 328–29 (7th Cir. 1985); *see also Dalal, supra* note 1, at 374 n.113.

entertainment products is a matter ripe for legislative or Supreme Court review. Ultimately, the federal government must choose whether to permit the status quo to continue unabated or to adopt judicial endorsement of a culture that rejects violence and cherishes the health and safety of children. Hopefully, the public will compel the government to choose the latter.