Circuit Court Case Notes: Violence in the Media

DEANNE E. MAYNARD

Can damages and an injunction be obtained against political speech that is likely to encourage violence against identifiable persons? Can parental consent be required to allow minors to play video arcade games with violent content? According to March 2001 decisions by the Ninth and Seventh Circuits, respectively, the answer to each of these questions is "no."

These cases presented interesting questions regarding where the line between protected and unprotected speech lies. In *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, the Ninth Circuit wrestled with the issue of what constitutes an unprotected "threat" in the context of the heated, and sometimes violent, public debate on abortion.[1] The Seventh Circuit addressed the protected nature of video games containing violence, as well as the free speech rights of minors in *American Amusement Machine Association v. Kendrick*.[2] Although the contexts for both cases were very different, both Circuits concluded that the expression at issue was fully protected by the First Amendment. Not only do these cases reiterate the principle that speech with violent content that is not likely to cause imminent harm is protected, they also demonstrate a vigilance by the courts in protecting free speech rights in new forms of media.

"Nuremberg Files" Case

The American Coalition of Life Activists (ACLA) collected names, addresses, pictures, and other information about doctors who perform abortions, clinic employees, politicians, judges, and other abortion rights supporters. ACLA provided this information to an anti-abortion activist, who posted this information on a website. The website struck through the names of those who had been murdered by "anti-abortion terrorists" and grayed out the names of the wounded.[3] ACLA dubbed this collection of information the "Nuremberg Files," announcing that it had collected this information "so that Nuremberg-like war crimes trials could be conducted in 'perfectly legal courts once the tide of this nation's opinion turns against the wanton slaughter of God's children.'"[4]

Some of the doctors identified by the ACLA, along with two health centers, sued the ACLA and other anti-abortion activists, contending that their statements violated state and federal law, including the Freedom of Access to Clinic Entrances Act.[5] A jury awarded the plaintiffs $107 million in actual and punitive damages, and the district court enjoined the defendants from making or distributing the posters, the Web page, or anything similar.

In an unanimous opinion by Judge Kozinski, a three-judge panel of the Ninth Circuit reversed the judgment on First Amendment grounds. The Ninth Circuit noted the prevalence of "[e]xtreme rhetoric and violent action" in many American political movements, including the American revolution, the abolitionist movement, and modern crusades involving labor, anti-war, animal rights, and environmental issues.[6] The court reasoned that such rhetoric was often necessary to "rally public opinion and challenge conventional thinking."[7]

Relying on the Supreme Court's decisions in *NAACP v. Claiborne Hardware Co.*[8] and *Brandenburg v. Ohio*,[9] the Ninth Circuit concluded that the constitutionally relevant question was whether the defendants themselves were threatening to commit violent acts or whether their statements "merely encouraged unrelated terrorists."[10] The defendants could be liable only if they actually "'authorized, ratified, or directly threatened' violence."[11] "Political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party."[12] Otherwise, the court reasoned, political speakers would be chilled by being "saddle[d]" with "implications their words do not literally convey but are later 'discovered' by judges and juries with the benefit of hindsight and by reference to facts over which the speaker has no control."[13]

Applying this test to the facts, the Ninth Circuit held that the defendants could not be held liable.[14] The court recognized that the defendants' speech made it easier for would-be terrorists to target the identified abortion providers and could even have been interpreted by the jury as encouraging assaults. But that was not enough. The defendants' actual statements did not mention violence and none threatened the doctors with harm. Moreover, the court refused to infer a threat from the context of the statements, finding it highly significant that the statements were made in the context of "public discourse." The court reasoned that hyperbole in public discourse is less likely to be considered a threat than a personal communication of the same nature and that such statements on matters of public concern lie at the core of First Amendment protection. The Ninth Circuit set aside the jury verdict and remanded with instructions for the trial court to enter judgment for defendants on all counts.

Video Games

Indianapolis passed an ordinance designed to limit the access of minors to video games that depict violence. The ordinance forbade operators of arcades and games in other public places from allowing a minor unaccompanied by a parent or guardian to use "an amusement machine that is harmful to minors." Such games also had to be accompanied by warning signs and be separated apart from other games by a

Deanne E. Maynard (dmaynard@jenner.com) is a partner at Jenner & Block, LLC, in Washington, D.C. The firm filed an amicus brief in the Seventh Circuit in American Amusement Machine Association v. Kendrick on behalf of the Interactive Digital Software Association, and is bringing a challenge to a similar ordinance in St. Louis County, Missouri. The views expressed are those of the author and do not necessarily represent those of the firm or its clients.

partition. An amusement machine was defined to be "harmful to minors" if it

> predominately 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 the age of eighteen (18) years, and:
> (1) Contains graphic violence; or,
> (2) Contains strong sexual content."[15]

"Graphic violence" was defined as "an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration."[16]

Video game manufacturers and their trade association sought a preliminary injunction of the ordinance, which was denied by the district court. The Seventh Circuit granted a stay of the ordinance pending its review of that denial and, after argument, remanded to the district court with instructions to enjoin preliminarily the ordinance.

In an unanimous opinion by Judge Posner, the Seventh Circuit found that video games, including violent ones, are speech fully protected by the First Amendment. The court rejected the city's attempt to "squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity," which is not protected by the First Amendment.[17] Instead, the court held that the city would have to prove a compelling basis for believing that video games actually caused the harms it feared to game-playing minors or to the public at large.[18]

The Seventh Circuit stressed that the grounds must be compelling because children have First Amendment rights. Referring to Hitler's youth movement and its efforts to control the thoughts of young people, the court noted "the danger of allowing government to control the access of children to information and opinion": "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."[19] The fact that the video games may have violent content did not deprive them of this full protection. The court noted that much of culture, "both high and low," includes violent themes, referring to graphic descriptions in the *Odyssey*, *The Divine Comedy* and *War and Peace*, as well as to the classic fairy tales collected by Grimm, Andersen, and Perrault.[20] Video games, reasoned the Seventh Circuit, "with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes."[21]

Moreover, the court recognized that video games, like books and movies, are expressive, with themes, plots, and even ideologies.[22] The court rejected any suggestion that the interactivity of video games made them less protected, noting that "[l]iterature 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."[23]

Finally, the Seventh Circuit rejected the city's reliance on two psychological studies. The court found that the "studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere."[24] The court concluded that the city's "claim of harm to its citizens from these games is implausible, at best wildly speculative."[25] Accordingly, the court preliminarily enjoined enforcement of the ordinance and concluded that the city was "unlikely" to establish its legality.[26]

At the time this article went to press, petitions for rehearing were pending in both cases.

Endnotes

1. Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, No. 99–35320, 2001 U.S. App. LEXIS 4974 (9th Cir. Mar. 28, 2001), petition for reh'g filed Apr. 11, 2001.
2. American Amusement Machine Ass'n v. Kendrick, No. 00–3643, 2001 U.S. App. LEXIS 4371 (7th Cir. Mar. 23, 2001), petition for reh'g filed Apr. 19, 2001.
3. *Planned Parenthood*, 2001 U.S. App. LEXIS 4974, at **4–5.
4. *Id.* at *4. ACLA also published the names, addresses, and photographs of doctors on posters at demonstrations, at its events, and in an affiliated magazine. One of the posters offered $500 to "'any ACLA organization that successfully persuades [a particular doctor] to turn from his child killing through activities within ACLA guidelines,' (which prohibit violence)." *Id.*
5. *Id.* at *6 (citing 18 U.S.C. § 248).
6. *Id.* at **9–10.
7. *Id.* at *27.
8. 458 U.S. 886 (1982).
9. 395 U.S. 444 (1969) (per curiam).
10. *Planned Parenthood*, 2001 U.S. App. LEXIS 4974, at *11.
11. *Id.* (quoting *Claiborne Hardware*, 458 U.S. at 929).
12. *Id.*
13. *Id.* at *27.
14. *Id.* at **19–29.
15. City-County General Ordinance, No. 72, § 831–1 (2000), attached as Exhibit A to American Amusement Machine Ass'n v. Kendrick, 115 F. Supp. 2d 943, 983 (S.D. Ind. 2000).
16. *Id.* (attached at 115 F. Supp. 2d at 982).
17. *American Amusement Machine Ass'n*, 2001 U.S. App. LEXIS 4371, at *4.
18. *Id.* at *12.
19. *Id.* at **12–14.
20. *Id.* at **14–15.
21. *Id.* at *19.
22. *Id.* at **15–18.
23. *Id.* at *15.
24. *Id.* at **19–20.
25. *Id.* at *22.
26. *Id.* at **22–23.