"Step Into the Game": Assessing the Interactive Nature of Virtual Reality Video Games Through the Context of "Terroristic Speech"

Robert Hupf, Jr

Available at: https://works.bepress.com/robert_hupf/3/
“STEP INTO THE GAME”: ASSESSING THE INTERACTIVE NATURE OF VIRTUAL REALITY VIDEO GAMES THROUGH THE CONTEXT OF “TERRORISTIC SPEECH”

ROBERT HUPF†

TABLE OF CONTENTS

I. THE WORLD OF VIRTUAL REALITY TECHNOLOGY HAS ARRIVED … 2-7
II. HISTORY OF FIRST AMENDMENT VIDEO GAME JURISPRUDENCE … 7-12
III. THE FUTURE OF FIRST AMENDMENT VIDEO GAME JURISPRUDENCE: THE “INTERACTIVE” ELEMENT ……………………………………… 12-18
IV. POTENTIALLY PROBLEMATIC CONTENT: “TERRORISTIC SPEECH” 18-23
V. PREDICTING THE FIRST AMENDMENT ANALYSIS ON VIRTUAL REALITY “TERRORISTIC SPEECH” VIDEO GAMES ……………………………… 24-42
   A. Bradenburg: The “Incitement” Test …………………………… 25-30
   B. Criminal Instruction Speech ……………………………………… 30-37
   C. Holder: Regulating “Terroristic Speech” ……………………… 38-42
VI. WHAT DOES THE FUTURE OF VIRTUAL REALITY VIDEO GAMING LOOK LIKE? ……………………………………………………………… 42-45
The World of Virtual Reality Technology Has Arrived
“Press Start”

Morpheus: “What is real? How do you define 'real'? If you're talking about what you can feel, what you can smell, what you can taste and see, then 'real' is simply electrical signals interpreted by your brain.”

Dr. Edgemar: “This might be difficult for you to accept, Mr. Quaid.”

Mr. Quaid: “I'm listening.”

Dr. Edgemar: “I'm afraid that you are not really standing here right now.”

Mr. Quaid: “You know doc, you could’ve fooled me.”

Dr. Edgemar: “Quite so. You're not here, and neither am I.”

Mr. Quaid: “Wow, that’s amazing. Where are we?”

Dr. Edgemar: “At Rekall. You were strapped to an implant chair, and we’re monitoring you from a psychic probe console.”

Narrator: “The fact that all of this was happening in virtual space made no difference. Being virtually killed by a virtual laser in virtual space is just as effective as the real thing, because you are as dead as you think you are.”

At the 2014 Game Developers Conference (“GDC”), there was one dominant theme: virtual reality gaming. The virtual reality (“VR”) movement, long predicted by screenwriters, science fiction authors, and game designers, has finally arrived.

Oculus VR first heralded the coming movement with their prototype VR headset “Oculus Rift.” Funded initially on Kickstarter under

---


2 THE MATRIX (Village Roadshow Pictures 1999).

3 TOTAL RECALL (Carolo Pictures 1990).


the tagline “Step into the Game,” Oculus Rift is a head-mounted VR display that tracks movement of the body, in particular actions such as leaning, crouching, and head-turning, onto a 7-inch stereoscopic 3D screen intended to fill the wearer’s entire field of view. Game and system development designers have had access to Oculus Rift development kits since 2012; so far, over 170 games have been designed or updated with the specific intent of using Oculus Rift’s immersive technology. A mass consumer version of Oculus Rift is expected as soon as 2015.

In response to the interest generated by Oculus VR, Sony Computer Entertainment announced at GDC its own VR headset for the PS4: Project Morpheus. Using the existing PlayStation Eye technology built into the PS4 for positional tracking and the PlayStation Move for 3D motion control, Morpheus is designed along similar lines to the Oculus Rift as a fully immersive head-mounted VR headset that tracks head movement and provides over a 90 degree field of view.

Developing technology related to VR gaming has not been limited solely to VR headsets. The company Virtuix has been pushing the development and production of the “Omni” treadmill, a circular frame supported by sensors and a centering harness allowing the user to simulate walking, running, and other mobile functions within the virtual world.

10 OCULUS RIFT, supra note 8.
13 Ohannessian, supra note 6, at section THE REALITY OF VIRTUAL REALITY.
15 Ohannessian, supra note 6.
16 Id.
17 Id.
18 Ohannessian, supra note 6, at section HAVE VR, WILL TRAVEL (“You can’t be more immersed in different worlds then putting a headset on and then using the Omni to walk around in that different world”); see also VIRTUALIZER,
Razer, another VR upstart, recently released the “Hydra,” a motion capture controller that would allow the user to simulate touching, holding, and interacting with various items in the virtual world. The “STEM system,” developed by Sixense, and the “PrioVR” motion control suit, developed by YEI technology, are similarly looking into improved motion capture technology. The companies Avenger Advantage and Alpha Gun have both designed a motion-controlled gun in order to allow better immersion into VR first person shooter (“FPS”) video games. A development team at Zurich University recently released a video of an Oculus Rift supported flying machine, complete with fan-generated wind, in order to allow users to simulate the experience of flight. Some developers have even mixed the use of VR technology with already existing camera mapping technology, such as that used by the Xbox Kinect, in order to maximize the positional tracking and motion capturing abilities of both sets of technology and increase the feeling of full VR immersion.

This generational development into highly immersive VR video gaming, backed by such influential leaders as Mark Zuckerberg of Facebook, suggests that the time of hyperrealism forewarned by gaming critics has already arrived, just three years after the Supreme Court’s
decision in *Brown v. Entertainment Merchant’s Association*. Preliminary developers and users of Oculus Rift and other VR technology have already reported how indistinguishable the experience is from real life. That hyperrealism has already generated some concern, even amongst communities more traditionally opposed to limiting video game content, due to fears regarding how “intense” and immersive VR FPS and violent themed games may be.

In *Brown*, Justice Alito forewarned that the Court must “proceed with caution” in defending the video game medium and “take into account the possibility that developing technology may have important societal implications that will become apparent only with time,” particularly noting a concern for the “interactive” nature of video games. While several commentators have assessed this language and speculated on its potential implications for the future, the recent developments in VR

---

28 *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2748-2749 (2011) (Alito, J., concurring) ("[I]n the near future video game graphics may be virtually indistinguishable from actual video footage . . . it is predicted that it will not be long before video-game images will be seen in three dimensions. It is also forecast that video games will soon provide sensory feedback. By wearing a special vest or other device, a player will be able to experience physical sensations supposedly felt by a character on the screen.") (internal citations omitted).

29 E.g. Liat Clark, *Walking the Plank with the Oculus Rift is Stomach-Churning Stuff* (May 30, 2013), http://www.wired.co.uk/news/archive/2013-05/30/oculus-vr ("It transforms the VR experience into something so compelling, it has the ability to transport you to an entirely other place the moment you put it on."); Steven Zeitchik, *Oculus Rift Carves Out Virtual-Reality Spot in Entertainment World* (May 6, 2014), http://www.latimes.com/entertainment/movies/la-et-mn-oculus-rift-20140506-story.html?page=1 ("Even with the most advanced 3-D movie you're always aware you're watching a film. But with virtual reality, you're no longer looking at the action — you're in it."); Lauda Sydell, *Goggles Bring Virtual Reality Closer to Your Living Room* (March 16, 2014), http://www.npr.org/blogs/alltechconsidered/2014/03/16/290234354/goggles-bring-virtual-reality-closer-to-your-living-room ("You simply can't believe how much your brain is being tricked . . . Each layer, your brain gets more deeply and deeply fooled and it just kind of makes you either smile or maybe let out a little yelp.")


31 *Brown*, 131 S. Ct. at 2742 (Alito, J., concurring).

32 Id. at 2750.

33 Garrett Mathew-James Mott, *Game Over for Regulating Violent Video Games? The Effect of Brown v. Entertainment Merchants Ass’n on First Amendment Jurisprudence*, 45 Loy. L.A. L. Rev. 633 (Winter, 2012); Lindsay E. Wuller,
technology ensures that this foretold future has arrived and a potential challenge by critics of interactive video games is imminent.

This article will begin the discussion on video gaming’s next interactive jump – total VR immersion – and examine whether the interactivity of VR changes the ordinary First Amendment analysis. Because the Court in Brown seemingly rejected an as applied challenge based solely on violent content, stating that the multitude of studies on the subject purporting to show a relationship between violent video games and harmful effects was insufficient, this paper will instead explore the medium of VR video gaming through the context of “terroristic speech.” Such speech carries a long history of legal condemnation and has been used, in different contexts, successfully by the U.S. government as a justification for regulation of speech. The focus on “terroristic speech” within video games is particularly apt in light of recent revelations that U.S. and British intelligence have been conducting surveillance and data monitoring on virtual gaming worlds since at least 2008 in order to track and investigate the medium for potential terrorists.

Ultimately, this article will argue that even with the interactivity ensured by full immersion VR video gaming, and even with particularly problematic speech such as terrorism, the medium does not fall into any of the recognized limited categories excluding speech from ordinary First Amendment protection. Part II of this article will discuss the history of video games within First Amendment jurisprudence. Part III will discuss the “interactivity” of video games and how that may affect the ordinary First Amendment analysis. Part IV will delve into the history of “terroristic speech” and the recent concern regarding such speech on the Internet and within virtual worlds. Part V will predict and discuss the potentially relevant First Amendment doctrines pertaining to “terroristic speech.”


34 Brown, 131 S. Ct. at 2739.


2014] “STEP INTO THE GAME”

within VR video gaming. Part VI will conclude by suggesting that even with fully immersive VR inflammatory content, the Court should affirm the protection granted to video games and video game content in Brown under the First Amendment. The medium has already been recognized as speech and content depicted within that medium, even “terroristic speech,” fails to rise to the level of “incitement” or criminal instruction, in addition to being beyond the reach of Holder. Moreover, the community itself will self-regulate; presuming that consumers will want and need hyper-violence has already being disproved by community commentary on the direction and development of VR video gaming.

History of First Amendment Video Game Jurisprudence

“You Are in a Maze of Twisty Passages, All Alike.”

Recent notoriety on video games and the First Amendment has focused on the issue of violence, but debate over the status of video games as speech goes back to the earliest video games. Two of the earliest cases to directly examine the video game medium under the First Amendment were American Best Family Showplace Corp. v. City of New York and Caswell v. Licensing Commission for Brockton, cases from 1982 and 1983 respectively. In American Best Family, the court found that the video game medium is not speech and is thus not entitled to any protection under the First Amendment. In holding video games are not speech, the court found there to be no element of information or idea being communicated by the medium, instead comparing video games to games of “pure entertainment with no informational element” like chess or pinball. The court in Caswell affirmed the logic of American Best Family, finding video games to not be

42 Id. at 174.
speech, and rejected the contention that “video games might involve the element of communication.”

At least during these early years of video gaming, courts tended to affirm the logic of American Best Family and Caswell, despite the growth, spread, and development of video games into the mass market. A different line of reasoning began to develop, however, when video games began to be increasingly associated with violent and graphic depictions of death, murder, rape, or general apathy to the welfare of people.

One of the original video games commonly cited for this excessive violence was Death Race, a game involving the player driving a car to run over pedestrians for points. While crude, the game depicted each kill with a cross over the place where the pedestrian was struck and accompanied each killing with an “ahhk” sound. Even from this early point in the development of gaming, before improved graphics, surround sound, or “rumble” paks (simulating physical interactions on the screen with vibrations through the controller), news stories were already reporting on the detrimental effects of such violence on the psychology of video game players.

This conversation regarding video game violence and the effects of such violence on the psychology of players was magnified with the surge of school shootings in the 1990s. In 1997, Evan Ramsey shot and killed 2 students at Bethel Regional High School; Evan was afterwards reported to enjoy playing the FPS video game Doom. In 1999, Dylan Lebold and Eric Harris held hostage and killed 12 students at Columbine High School; afterwards, it was reported that both teenagers enjoyed playing violent video games, once again including FPS video games like Doom.

43 Caswell, 387 Mass. at 870-871 (“[A]ny communication or expression of ideas that occurs during the playing of a video game is purely inconsequential. Caswell has succeeded in establishing only that video game are more technologically advanced games than pinball or chess. That technological advancement alone, however, does not impart First Amendment status to what is an otherwise unprotected game.”)

44 Laughlin, supra note 38 at 490; see also Death Race (Exidy 1976).

45 Laughlin, supra note 38 at 490.


47 Laughlin, supra note 38 at 490.

48 Id. at 491.

49 Id.; see also Devin Coldewey, Knee Deep in History: 20 Years of “Doom” (December 10, 2013), http://www.nbcnews.com/tech/video-games/knee-deep-history-20-years-doom-f2D11722313.

50 Laughlin, supra note 38 at 491.
Subsequent and similar shootings occurred throughout the next 5 years, often linked to violent video games in the news reports. After the shooting at Columbine, states began moving to pass ordinances that restricted access to video arcades that included games considered “harmful to minors.” This wave of legislation against violent video games even reached the level of Congress, Congress introducing a bill that would have imposed similar access restrictions.

In 2000, an Indianapolis ordinance restricting access of minors to violent video games depicting “graphic violence” was challenged in American Amusement Machine. The district court, for the first time, moved away from early gaming precedent cases and stated, “the once-predicted future of video games has arrived . . . video games of the year 2000 have gone far beyond the simple displays and that many of today’s games are highly interactive versions of movies and story books, replete with digital art, music, complex plots, and character development.” In so finding, the district court acknowledged that at least “some” video games contain protected speech, even if video games as a whole are not speech. Notably, Judge Posner and the Seventh Circuit later reversed this district court decision, the language of their decision dismissing concerns about the “interactive” nature of video games often cited by defenders of the medium.

The logic of the district court in American Amusement Machine is interestingly contrasted with the logic of the district court in Interactive Digital Software. The court in Interactive Digital Software rejected the premise that “some” video games can contain protected speech and others

---

51 Id. at 491-492 (discussing in detail the history of school shootings in the 1990s, including Michael Carneal in Paducah, Kentucky, Mitchell Johnson and Andrew Golden in Jonesboro, Arkansas, and Sean Botkin in Glendale, Arizona).
52 Id. at 492 and accompanying n. 74 (citing Am. Amusement Mach. Ass’n v. Cottey, 115 F. Supp. 2d 943, 946-947 (S.D. Ind. 2000), rev’d sub nom. Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001)).
53 Id. at 492.
55 Id. at 951-952.
56 Id. at 953.
57 Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).
58 See discussion infra Part III.
59 Interactive Digital Software Ass’n v. St. Louis County, 200 F. Supp. 2d 1126 (E.D. Mo. 2002), rev’d 329 F.3d 954 (8th Cir. 2003).
cannot, finding such logic “dangerous.” The Eighth Circuit Court of Appeals rejected the district court’s direct holding but seemingly applied the same reasoning, although they concluded the other way concerning whether or not the entire medium is protected:

If the First Amendment is versatile enough to ‘shield the painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,’ . . . we see no reason why the pictures . . . sounds, music, stories, and narrative present in video games are not entitled to similar protection.

Other cases, while continuing to disagree on the logic of whether merely some or all video games are protected, also began consistently finding video games to be protected speech. In Wilson v. Midway Games, a case involving a mother suing the publisher of the video game Mortal Kombat for causing a friend of her son to stab and kill her son, the court stated that while video games “that are merely digitized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media . . . which convey information or evoke emotions by imagery, are protected . . . [T]he inquiry must be context-specific.” Meanwhile, the court in Sanders v. Acclaim Entertainment, Inc. found all video games, as a form of entertainment, to be a form of expression entitled to First Amendment protection.

The Supreme Court finally weighed in on the video games as speech debate in Brown v. Entertainment Merchants Association, a challenge to a California statute prohibiting the sale or rental of “violent video games” to minors. The statute defined “violent video games” as one where “the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being . . . .”

---

60 Id. at 1134 (“[E]ither a "medium" provides sufficient elements of communication and expressiveness to fall within the scope of the First Amendment, or it does not.”)
62 Laughlin, supra note 38 at 506-509.
65 Brown, 131 S. Ct. at 2732; for additional background on the facts and circumstances leading up to Brown, please see Mott, supra note 33 at 642-644.
66 Brown, 131 S. Ct. at 2732.
Ultimately, the Supreme Court held that the statute was a violation of the First Amendment, finding that all video games, as a medium, deserve First Amendment protection, and that violent video games do not fall into any of the “well-defined and narrowly limited classes of speech” exceptions to First Amendment protection (such as obscenity or “incitement”). The Court also explicitly rejected the creation of a new category of regulation specifically aimed at protecting children from offensive speech.

Interestingly, in reaching its conclusion that all video games are protected (including the ones with problematic content), the Court made a comparison between video games and the creation of animal cruelty videos in Stevens, stressing the Court’s holding that “There was no American tradition of forbidding the depiction of animal cruelty – though States have long had laws against committing it.” The Court later reaffirmed this logic in response to Alito’s concurrence by framing Alito’s focus on video game content such as racial cleansing and hyper-violence as an objection to the “ideas” expressed rather than to their “objective effects.”

After finding video games to be protected speech, the Court considered whether California’s statute could survive strict scrutiny. The California statute did not - the Court found neither a compelling government interest, finding the studies of psychologists linking violent video games and harmful effects as merely expressing correlation and not

---

67 Id. at 2733 (“Like the protected books, plays, and movies that preceded them, video games communicate ideas – and even social messages – through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.”) (second emphasis added).

68 Id. (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942)).

69 Id. at 2735-2736 (“That is unprecedented and mistaken. ‘[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them’ . . . ‘Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.’”) (citing Erznoznik v. Jacksonville, 422 U.S. 205, 212-214 (1975)).

70 Id. at 2734.

71 Id. at 2738.

72 Id. (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny – that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”)
causation, nor a means chosen narrowly tailored enough to serve the proposed interest, finding so many other violent mediums to exist and the parental consent/parental authority provision of the statute as making the statute overwhelmingly under-inclusive.

Only 3 years after this decision in Brown, the world of video gaming has already undergone significant and dramatic changes. Of most importance is the advancement, due to virtual reality technology, of that aspect of video games causing the most concern with critics - its “interactive” element. This development demands an examination of the “interactive” element in order to best predict how the Court will assess the medium when VR video games reach a state of being nearly indistinguishable from real life.

**The Future of First Amendment Video Game Jurisprudence:**

**The “Interactive” Element**

“Might I Just Be a Brain in a Tank Somewhere . . .”

Despite intense discussion of the “interactive” element of video games leading up to the Brown decision, including several amicus briefs on the subject, the majority in Brown only devoted a few paragraphs to the issue. In doing so, the Court brusquely rejected a major contention underlying many of the scientific studies put forward by critics of video

---

73 *Id.* at 2739 (“The State’s evidence is not compelling . . . studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning.) Instead, ‘[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.’”); *but see id.* at 2768-2779 (Breyer, J., dissenting) (noting in substantive detail the significant and qualified research supporting the allegation of a connection between interactive violent video games and learned violent / aggressive behavior).

74 *Id.* at 2740 (“California has singled out . . . video games for disfavored treatment – at least when compared to booksellers, cartoonists, and movie producers – and has given no persuasive reason why.”)

75 *Id.* at 2740-2742.

76 See discussion supra Part 1.


78 See e.g., *Brief for International Game Developers Association et. al. as Amici Curiae Supporting Respondents, Schwarzenegger v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (No. 08-1448), Briefs LEXIS 1782.

79 *Brown*, 131 S. Ct. at 2737-2738.
games, that the “interactive” nature of video games, requiring of the player a constant, active engagement in every decision made throughout the game, facilitating a habitual learning mechanism for various activities through repetition (including a learned desensitization towards malevolent behavior), and rewarding “success” with rewards and other positive reinforcement tools, carries a significantly higher risk of affecting the psyche of an individual than other comparable “interactive” mediums such as television, movies, or books.\textsuperscript{80} Due to this significantly higher risk, proponents of the “interactive” argument suggest a unique First Amendment analysis be given to video games, or at least the expansion of existing doctrine to include certain types of video games within non-protected categories of speech.\textsuperscript{81}

The majority in \textit{Brown} gave two direct responses to the “interactive” element of video games argument. First, the Court noted that “interactive” mediums involving decision-making and user initiative are nothing new, illustrating their point by referring to late 1960s “choose-your-own-adventure” stories.\textsuperscript{82} The Court then suggested that interactive participation within the video game context, in comparison to other mediums, is “more a matter of degree than of kind.”\textsuperscript{83} In doing so, the Court cited to Judge Posner’s famous observation in \textit{American Amusement}, reversing the lower district court holding, that:

\begin{quote}
Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature . . . is interactive. 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.\textsuperscript{84}
\end{quote}

\begin{itemize}
\item \textsuperscript{80} See \textit{Brown}, 131 S. Ct. at 2768-2779 (Breyer, J., dissenting); see also Althea Vail Wallop, \textit{When Virtual Reality Becomes Simply Reality}, \textit{INTERSECT}. Vol. 5 (2012) (noting the use of new technologies such as functional magnetic resonance imaging (fMRI) that indicate decreased activity in the brain of video gamers in relation to non video gamers when observing violent stimuli and the use of real-life war imagery in “realistic” war games that fail to trigger signs of empathy or disgust in the gamers playing).
\item \textsuperscript{81} Wuller, \textit{supra} note 33 at 479.
\item \textsuperscript{82} \textit{Brown}, 131 S. Ct. at 2738.
\item \textsuperscript{83} \textit{Id}.
\item \textsuperscript{84} \textit{Am. Amusement Mach}, 244 F.3d at 577.
\end{itemize}
The concurrence by Justice Alito in *Brown*, joined by Chief Justice Roberts, and the dissent by Justice Breyer delved much more substantially into the arguments made by those focusing on the “interactive” element of video games. Justice Alito, while agreeing with the decision as applied, disagreed with the Court’s hasty “conclusion that new technology is fundamentally the same as some older thing with which we are familiar.” In stressing a need for caution, Justice Alito acknowledged and forewarned of the coming future development and expansion of video gaming into technology “virtually indistinguishable” from real life, including “virtual reality shoot-em-ups” that will “actually feel the splatting blood from the blown-off head” of a victim.

Justice Alito stressed the significance of the distinction between this “interactive” element found in video games and that “interactive” element found in other mediums such as books or print cited by the majority.

Justice Breyer also contributed to this discussion by re-emphasizing the conclusion of over 114 different psychological studies asserting a correlative linkage between violent video games and subsequent aggressive or violent behavior. Justice Breyer’s main point in doing so was to stress the evidence suggesting a profound difference between mediums that require passive reception of ideas, mediums such as books, T.V., and radio.

---

85 *Brown*, 131 S. Ct. at 2742 (Alito, J., concurring).
86 *Id.* at 2761 (Breyer, J., dissenting).
87 *Id.* at 2742 (Alito, J., concurring) ("[T]his Court should proceed with caution. We should make every effort to understand the new technology.")
88 *Id.* at 2748.
90 *Id.* at 2750 (“But only an extraordinarily imaginative reader who reads a description of a killing in a literary work will experience that event as vividly as he might if he played the role of the killer in a video game. To take an example, think of a person who reads the passage in Crime and Punishment in which Raskolnikov kills the old pawn broker with an axe . . . Compare that reader with a video-game player who creates an avatar that bears his own image; who sees a realistic image of the victim and the scene of the killing in high definition and in three dimensions; who is forced to decide whether or not to kill the victim and decides to do so; who then pretends to grasp an axe, to raise it above the head of the victim, and then to bring it down; who hears the thud of the axe hitting her head and her cry of pain; who sees her split skull and feels the sensation of blood on his face and hands. For most people, the two experiences will not be the same.")
91 *Id.* at 2772-2778 (Breyer, J., dissenting); *but see id.* at 2778-2779 (noting 34 psychological studies arguing against a linkage between violent video games and subsequent violence behavior).
and the video game medium that requires active involvement, self-identification, incentivized reward payments, and “acting out” of horrific violence. 92

Various commentators have weighed in on the “interactive” element debate both before and after the Brown decision. 93 Several scholars reject the fear regarding the “interactive” nature of video games as a recreation of a generational attack on new cultural forms of expression and individuality 94; these scholars often cite to court opinions discussing former technological jumps that conclude such mediums receive the same First Amendment analysis as those mediums recognized before it.95 Others

92 Id. at 2768-2769 (“Some of these studies take care to explain in a common-sense way why video games are potentially more harmful than, say, films or books or television. In essence, they say that the closer a child’s behavior comes, not to watching, but to acting out horrific violence, the greater the potential psychological harm.”) 93 See Wuller, supra note 33; Mott, supra note 33. 94 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, 30 (2002) (“Beneath the legal issues of strict scrutiny and whether violence should be lumped together with obscenity lies the heart of the American Amusement Machine case - one generation’s efforts to control both the culture and the cultural artifacts of another generation.”); Luis Acevedo, Speech, Violence, and Video Games: Is Grand Theft Auto Worthy of First Amendment Protection? 76 Rev. Jur. U.P.R. 421, 438 (2007) (“Like rock-and-roll in the 1950’s, and literary novels in the 1850’s, the actual video game debate can be framed as a battle between generations.”); Brief for the Cato Institute as Amici Curiae Supporting Respondents at 15-16, Schwarzenegger v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729 (2011) (No. 08-1448), Briefs LEXIS 1814 (“While critics of cheap fiction and movies and radio and comics claimed that each of those new mediums presented a unique potential for harm, the only real difference is the method of depiction.”); Harold Schechter, SAVAGE PASTIMES at 130 (St. Martin’s Press, 2005) (“That today’s antipop crusaders denounce movie and video violence because it is visual -- while their counterparts in the 1930s attacked radio crime shows because they were transmitted aurally -- and Victorian reformers deplored the dime novel because it was written in a sensational, subliterite style -- leads one to conclude that it doesn't really matter what the medium is. The real issue is that there will always be people who are incensed by violent entertainment, whether it is transmitted via sound or image, print or pixel; and that the current uproar over popular culture is simply part of a never-ending cycle of outrage that will undoubtedly go on into the future, when today’s controversial cinematic and video shoot-'em-ups will come to seem as harmless as the average episode of The Shadow or Captain Midnight.”) 95 See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (examining the medium of motion pictures and holding that the “basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary.”)
emphasize the interactive ability of video game content as heightening its First Amendment protection, not weakening it. Proponents of the criticism targeting the “interactive” element focus on the need of modern video game systems, an example being the Xbox Kinect (which uses a camera to ensure the character’s action on screen mirrors that of the individual playing), in requiring “actual facilitation of action” by the user player, because this technology moves the player into a direct “decision-making” position of action, “unlike a passive observer in a movie watching . . . you’re the one who decides whether to pull the trigger or not and whether to kill or not.” These proponents suggest that the actual facilitation of action requirement needed by modern video game should be sufficient under Brandenburg to qualify as “incitement.” As noted by Lindsay Wuller in her recent article summarizing these arguments, however, very few courts have “considered whether participating in a video game rises to the level of incitement.”

96 Brief for Id Software LLC as Amici Curiae Supporting Respondents at 27, Schwarzenegger v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729 (2011) (No. 08-1448), Briefs LEXIS 1818 (“The nature of the interactivity set out in [the] complaint . . . tends to cut in favor of First Amendment protection, inasmuch as it is alleged to enhance everything expressive and artistic about Mortal Kombat: the battles become more realistic, the thrill and exhilaration of fighting is more pronounced.”) (citing Wilson v. Midway Games, 198 F. Supp. 2d 167, 181 (D. Conn. 2002)); Brief for Respondents at 33, Schwarzenegger v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729 (2011) (No. 08-1448), Briefs LEXIS 1711 (“California fundamentally distorts bedrock First Amendment principles when it suggests that video games are entitled to lesser protection because their interactivity increases the impact of their expression on the viewer. Pet. Br. 55. Plainly, the Government is not entitled to regulate speech on the ground that it is particularly effective at conveying its message.”)

97 Wuller, supra note 33 at 488 (“According to one of its developers, its purpose is to remove the last barrier between you and the entertainment you love . . . by making you the controller.”)


100 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”)

101 Jones, supra note 98.

102 Wuller supra note 33 at 481.
These arguments are likely to be even more pronounced in a world of VR gaming where the “ultimate goal is to have the player forget [they are] playing a game and instead have the graphics and experience seem so real that [they] cannot tell where the game ends and reality begins.” That world is already upon us. And where studies before showed a possible correlation between the interactive component of video games and a learned psychological behavior or attitude, it is only likely that additional studies in the future will show the same result, or possibly even a greater correlation.

It is important to note how these studies (examining VR interaction) do not yet exist. And when they do, it is likely that they will suffer from the same correlation-causation flaw as current studies. The vital logic to note about the treatment of scientific studies establishing a correlation between violent video game content and violent behavior by courts is that while these studies almost always show “some effect,” that effect is usually “small and indistinguishable from effects produced by other media.” Notably, many of the articles cited by critics of video games acknowledge themselves how a multitude of factors contribute to the development of violent / aggressive behavior; violent / aggressive depictions from violent video games are just one source contributing to that development.

Additionally, the problem with focus on video games because of their “interactive” nature will be even more troublesome when the VR movement becomes mainstream – it will not be just video gaming that gets a VR update, but movies, T.V., and photographs. All of these mediums will begin to feel as immersive and interactive as video games do now, and all of the mediums currently depict varying levels of violence.

---

103 Wuller, supra note 33 at 489.
104 See discussion supra Part I.
105 Brown, 131 S. Ct. at 2739.
106 Id. noting the self-admittance of methodological problems by many studies cited by Respondents) (citing Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 964 (9th Cir. 2009).
107 Zeitchik, supra note 29.
The Court should not, and likely would not, disregard over a century of protection for these technological mediums simply because they seem more real. As suggested by the Brown Court in mentioning its decision in Stevens, despite how close to “committing” the action VR technology may one day cause users to feel, it still ultimately will be a “depiction” - depictions are mere ideas, even the negative ones.

Of course, certain content common to video gaming could arise more immediate concerns when considering just how immersive VR technology is aiming to be. One of those content areas that would likely be challenged is “terroristic speech,” particularly when the “interactive” component of a VR video game may require actual simulation of terrorist activities.

**Potentially Problematic Content: “Terroristic Speech”**

“There’s No Good or Bad Side.
Just Two Sides Holding Different Views.”110

It is important to begin this section on “terroristic speech,”111 as noted by Steven Morrison in Terrorism Online, by acknowledging that, “One Man’s Terrorist is Another Man’s Freedom Fighter.”112 This statement is often construed to mean many things, but the quote highlights the fluid social imagery concerning who is labeled as a “terrorist,” how such individuals and / or organizations operate, and what their motivations

111 The author of this article defines “terroristic speech” as speech falling under the Homeland Security Act’s definition of “terrorism” - a) any activity that involves an act that i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and ii) is a violation of the criminal laws of the United States or any State or other subdivision of the United States; and b) appears to be intended i) to intimidate or coerce a civilian population, ii) to influence the policy of a government by intimidation or coercion, or iii) to affect the conduct of a government by mass destruction, assignation, or kidnapping. 6 U.S.C. §101(16) (Supp. III 2009).
may be. The social imagery surrounding the term “terrorist” can and has changed in response to political events, as evidenced to such change within the American historical consciousness (“terrorist” changing in meaning from a reference to labor activists to Communists to Muslim individuals over time). And while harm committed against innocents can never be condoned, coming to understand and even emphasize with the larger socio-political narratives and backgrounds underlying would-be “terrorists” around the world is key to being able to challenge the institutional regimes, political disagreements, and/or social realities that drive the emergence of “terroristic” tendencies in the first place.

Within the larger modern U.S. context, who, how, and what a “terrorist” is often is defined explicitly by individuals engaged in defending national security. Because this is a political process, one driven by political machinations, courts should be even more cautious than usual in moving to restrict “terroristic speech.” This caution is even more necessary when considering, post September 11, 2001, concern over “terroristic speech” has dramatically risen, in particular concern over “terroristic speech” online.

In August 2004, U.S. Deputy Secretary Paul Wolfowitz testified before the House Armed Services Committee regarding post-9/11 recommendations on how to deny terrorist sanctuaries. Wolfowitz testified specifically about one type of sanctuary in particular: the Internet. To ensure that terrorists are left without refuge, Wolfowitz recommended the U.S. prosecute anyone who drafts a Web site providing

113 Morrison, supra note 112 at 966-973.
115 Morrison, supra note 112 at 969 (“Because the national security of the United States is a necessary element for declaring an organization an FTO, and because the Secretary of State has general discretion to declare an organization an FTO, the designation is, in part, a political move.”)
116 See id. at 974 (“Today the mujahedeen in Afghanistan are fighting against the latest invader – the United States. In a little over twenty years, the freedom fighters have become terrorists or, at best, insurgents. In similar fashion, the George W. Bush Administration abruptly changed its official opinion of anti-Russian Chechen fighters from freedom fighters to terrorists, apparently in favor of encouraging better relations with Russia.”)
118 Id.
information to terrorists. Although concern regarding “terroristic speech” on the Internet had been raised before his recommendation, Wolfowitz’s testimony pushed forward a new wave of concern by commentators in examining the scope and extent of the dangers of the Internet and the use of such technology by “terrorists” (primarily framed as Al Qaeda).

The rhetoric used by these commentators framed the Internet as “a safe haven for terrorist communication, training, and planning.”121 Because of the vast and constantly changing nature of the Internet, much of it significantly unsupervised,122 “terrorists” were believed to have a medium to: 1) engage in psychological warfare,123 2) disseminate advice and communication,124 3) fundraise and market themselves,125 and 4) recruit followers and “terrorist sympathizers” into supporting their radical ideology.126 Some commentators even discussed how video games are used

119 Id.
120 See id. (“[T]he versatility of the Internet has created a place where terrorists can hide, disseminate plans, and collect information effortlessly.”); Jarret M. Brachman, High Tech Terror: Al-Qaeda’s Use of New Technology, 30 SUM Fletcher F. World Aff. 149 (2006); Jody R. Westby, Countering Terrorism with Cyber Security, 47 Jurimetrics J. 297 (2007).
121 Mattison, supra note 117.
122 Id.
123 Id. (noting the release of footage by Al Qaeda onto the Internet showing their leaders to be alive and well in addition to footage depicting various attacks on U.S. operations); Brachman, supra note 120 at 154 (noting the release of attack videos of the renowned “Sniper of Fallujah” against U.S. soldiers); Westby, supra note 120 at 304 (noting the release of video footage showing the beheadings of U.S. contractors).
124 Mattison, supra note 117 (noting “all of the information a terrorist needs to plan an attack can be accessed with just a few minutes of Internet access,” including step-by-step instructions for deploying a chemical weapon and instructions on how to make belts for suicide bombers); Brachman, supra note 120 at 152 (discussing Al Qaeda resources such as the “Encyclopedia of Preparation . . . a voluminous training manual for everything from kidnapping official to building nuclear devices”); Westby, supra note 120 at 305-306 (identifying various instructional materials, propaganda publications, and philosophical jihadist treaties available online).
125 Brachman, supra note 120 at 155 (highlighting the Internet campaign of the Army of the Victorious Group - “The winner will fire three long-range missiles from any location in the world at an American army base in Iraq, by pressing a button with his own blessed hand, using technology developed by the jihad fighters, Allah willing.”)
126 Mattison, supra note 117 (“[T]errorists are able to shape ‘their own image and that of their foes.’”) (citing Ariana Eunjung Cha, From a Virtual Shadow, Messages of Terror, WASH. POST, October, 2, 2004, at A1); Brachman, supra
by Al Qaeda to cultivate ideological and radical support amongst Muslim youth, especially because of their required interactive connection with the human user. News articles were quick to spread this concern by linking terrorism to simulated war games such as Call of Duty that included missions orchestrating mass attacks on civilians. Despite the demise of organizational leadership within Al Qaeda in recent years, a result of U.S. drone strikes, the concerns regarding “terroristic speech” on the Internet have not diminished.

note 120 at 150-151 (“One can even pledge allegiance to Osama bin Laden by filling out an online form.”)

Brachman, supra note 120 at 157 (“While players may understand that such games are based on fiction, the act of playing them arguably increases their propensity to accept ideologies that consist of extreme goals, such as the establishment of a global Islamic caliphate.”)

Id. at 158 (“Different from other tools such as pamphlets, books, or websites, video games allow for two-way engagement – both intellectual and physical – in a simulated world. Players strike keys or click buttons to shoot, syncing physical action with intellectual and visual cues. Repeated play reinforces the connection between thought and action, between intent and implementation.”); but see Michael Peck, Al Qaeda’s Goofy Video Game Provokes Laughter, Not Terror (March 13, 2013), http://www.forbes.com/sites/michaelpeck/2013/03/13/al-qaedas-goofy-new-video-game-provokes-laughter-instead-of-terror/.


Brachman, supra note 120 at 149 (“Despite the considerable resources that the United States has dedicated to combating jihadi terrorism since the attacks of September 11, 2001, its primary terrorist enemy, al-Qaeda, has mutated and grown more dangerous. Al-Qaeda today is no longer best conceived of as an organization, a network, or even a network-of-networks. Rather, by leveraging new information and communication technologies, Al-Qaeda has transformed itself into an organic social movement, making its virulent ideology accessible to anyone with a computer.”) (quoting statement of Donald Rumsfeld); Robert O’Harro, Jr., Spies’ Battleground Turns Virtual, Wash. Post, February, 6, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/02/05/AR2008020503144.html (“Unfortunately, what started out as a benign environment where people would congregate to share
Amongst the commentators, a few articles went forward and discussed how surveillance and cyber security techniques must be better funded and implemented in order to combat the spread of “terroristic speech” on the Internet. Although only recently known by the public, some of these recommendations pushing for increased surveillance of the Internet (including virtual gaming worlds) were actually implemented in the real world, with very limited success. Other commentators such as Lisa Ugelow and Lance Hoffman examined the legal mechanisms supporting the expansion in cyber surveillance and security, particularly highlighting changes in U.S. policy since 9/11. And, notably, at least one commentator challenged the increase in surveillance and monitoring as an encroachment on valued free speech by Muslim-Americans, particularly noting the value in recruitment speech and aspirational speech aimed at generating sympathy towards individuals or groups labeled as “terrorists” by the U.S. government. That same commentator, Steven Morrison, was actually one of the few voices that challenged the concerns brought up regarding “terroristic speech” on the Internet, doing so by breaking down

information or explore fantasy worlds is now offering the opportunity for religious / political extremists to recruit, rehearse, transfer money, and ultimately engage in information warfare or worse with impunity”); Lisa Ugelow and Lance J. Hoffman, Fighting on a New Battlefield Armed with Old Laws: How to Monitor Terrorism in the Virtual World, 14 U. Pa. J. Const. L. 1035, 1036 (March 2012) (“Terrorists have become quite sophisticated in carrying out their terrorism plans, and it seems like the rest of the world is always reacting defensively to the newest terrorism means.”)

Westby, supra note 120; Ugelow and Hoffman, supra note 132.

Mazzetti and Elliot, supra note 36; Gross, supra note 36.

Ugelow and Hoffman, supra note 132 (discussing the increased use of various sources of law, including expanded exceptions to the warrant clause of the Fourth Amendment, the Wiretap Act, Foreign Intelligence Surveillance Act, the Communications Assistance for Law Enforcement Act, and National Security Letters, since 9/11 in order to monitor, track, and restrict suspected terrorist activity on the Internet, and how such sources of law could be used to prosecute individuals found to have engaged in “terroristic” speech).

Morrison, supra note 112 at 970-971 (“[B]y targeting speech to uncover terrorism, the government is chilling speech that contains great value. The central theory in favor of robust speech rights is that free speech leads society to the truth about issues of public importance. However critical of the government and sympathetic to terrorist organizations, some speech involving terrorism does contain a true value that may not be heard if it is chilled and or prohibited.”)

Id. at 985.
basic psychology of internet based communication users. Ultimately, Morrison proposed that rather than focusing on how the Internet causes people to adopt extreme views through terroristic propaganda, the focus should be on how people with already extremist views use the Internet to further their already entrenched beliefs and ideologies.

What is missing in all this commentary is an assessment of an actual First Amendment challenge against government regulations attempting to restrict “terroristic speech” uncovered on the Internet, including within video gaming, after surveillance measures have already been implemented. While this analysis may seem straightforward in some respects, the making of explicit threats against the President of the United States being one example, many of the actions cited by commentators as “terroristic speech” – publication of bomb-making materials, teaching users how to operate anonymously online, or endorsing / supporting a particularly idealistic interpretation of the War on Terror in order to “change minds” in support of Al Qaeda – fall into a much less clear category. An analysis of the potential First Amendment doctrines that would apply to “terroristic speech” online, particularly within video games, is needed at this critical junction, particularly in light of the development of hyper-realistic VR video games that may require actual simulation of terrorist activities.

Predicting the First Amendment Analysis on Virtual Reality “Terroristic Speech” Video Games

138 Id. at 992-1000 (discussing the closed and secret nature of most material found on the Internet, the mediating control of authorities managing and restricting certain messages, the lack of trust and the presence of physical isolation interfering with the effect of propaganda material, and the self selecting nature of online communities and individuals who actively search for them).

139 Id. at 998-999.

140 Holder v. Humanitarian Law Project only addressed terroristic speech in real-life, outside of the context of the Internet. While a separate Supreme Court analysis is needed for the Internet context, this article will use the Court’s deliberation in Holder as a starting point.


142 Although not VR compatible, “terroristic speech” content games have already been produced and are not beyond the realm of possibility in the future. See e.g. Lara Crigger, Virtual Jihadi (July 31, 2008), http://www.1up.com/features/virtual-jihadi; Derek Gildea, Eye of the Beholder: Special Force 2 and the Propaganda Game (March 26, 2013), http://takefiveblog.org/2013/03/26/the-eye-of-the-beholder-special-force-2-and-the-propaganda-game/.
"Nothing is True, Everything is Permitted."¹⁴³

Assessing a First Amendment challenge must always begin by re-emphasizing the high regard courts give to the freedom of speech. Judge Learned Hand once framed the importance of the right of free speech in the United States by stating that it "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."¹⁴⁴ This logic can be traced even further back, depicted by Justice Brandeis in Whitney v. California as the following:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.¹⁴⁵

As the Court has already held video games (as a medium) to be a form of "speech,"¹⁴⁶ it would be expected that the Court would grant video games this utmost weight and protection under the First Amendment.

Of course, the Supreme Court has also recognized that not all speech is equal, that some statements or acts, even if done in an expressive manner, will not be protected. These exception areas are “well-defined and narrowly limited classes of speech,”¹⁴⁷ areas including: obscenity.¹⁴⁸

¹⁴⁶ Brown, 131 S. Ct. at 2733.
¹⁴⁸ Roth v. United States, 354 U.S. 476, 484-485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”); Miller v. California, 413 U.S. 15, 23-24 (1973) (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment . . . We
defamation, fraud, incitement, and speech integral to criminal conduct (sometimes referred to as “criminally instructional speech”). In terms of the exception categories most likely applicable to online “terroristic speech,” this article will focus on speech likely to incite an imminent lawless action, as discussed in Brandenburg, and speech integral to criminal conduct / criminal instruction speech.

Even if speech does not fall into a non-protected category of speech, and thus warrants full First Amendment protection, a regulation may still survive scrutiny under the First Amendment depending on the interest asserted by the government and the means chosen to fulfill that interest. In particular, the Supreme Court’s decision in Holder v. Humanitarian Law Project suggests that “terroristic speech,” at least in some regards, may be regulated under the government interest of “national security”; at the very least, it is likely that any government argument for the limitation of online “terroristic speech” would use the Holder precedent as a justification for their regulation. This article will thus also examine the narrow decision in Holder and predict whether it should similarly apply to the context of online “terroristic speech” within video games.

**Brandenburg: The “Incitement” Test**

“It's Time to Kick Ass and Chew Bubble Gum… and I'm All Outta Gum.”

In creating one of the most commonly used non-protected speech categories to challenge particularly inflammatory speech, the Court in Brandenburg laid out the following test: “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe

acknowledge, however, the inherent dangers of undertaking to regulate any form of expression . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct.”


Brandenburg, 395 U.S. at 444.

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.”)

Brandenburg, 395 U.S. at 447.

Holder, 561 U.S. at 36-38.

advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Since Brandenburg, commentators and legal scholars have struggled over just how to interpret this broad and far-reaching language, nowadays commonly referred to as the test for “incitement” speech. It is interesting to note that, while the text of the test is extremely protective of speech (protecting even speech that may heighten the risk of a criminal act), courts have been rather hesitant to extend the scope of Brandenburg too far.

Brandenburg itself involved an Ohio statute that criminalized the act of “advocate[d] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.” A Ku Klux Klan leader was prosecuted under this statute for stating, “We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengenance taken.” Despite the implicit threat found within this statement, the Court noted, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action," and struck down the Ohio statute as unconstitutional for criminalizing mere advocacy.

The only other major decision to apply the “incitement” test at the Supreme Court level occurred in Hess v. Indiana. Hess involved a statement by a university anti-war demonstrator, “We’ll take the fucking street later,” that was found to be “nothing more than advocacy of illegal action at some indefinite future time.” Because the element of

---

156 Brandenburg, 395 U.S. at 447 (emphasis added).
158 Id. at 4 (“The Brandenburg test endures, in theory; but, as Professor Rabban has written, “[I]t is easy to doubt the efficacy of this standard during possible future outbreaks of widespread hostility to dissenters.”) (citing David M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205, 1352 (1983)).
159 Brandenburg, 395 U.S. at 444-445.
160 Id. at 446.
161 Id. at 448 (citing Noto v. United States, 367 U.S. 290, 297-298 (1961)).
162 Id. at 448-449.
164 Id. at 107-108.
“imminent” lawless action was lacking, the Court rejected the argument by the State that the words had a “tendency to lead to violence.”

Because of the lack of substantial Supreme Court precedent on the strict application of the Brandenburg test, many commentators have had trouble predicting the exact scope, intent, and application of the test as applied to various situations. Lower courts are also divided, especially when the facts of Brandenburg (involving pure political speech, a unique type of speech usually granted additional First Amendment protection) are often fairly distinguishable from more common incidents such as cases involving criminal instruction or cases involving “unintentional incitement” arising from suggestive technological mediums.

The “unintentional incitement” cases are particularly applicable to any medium involving online content as the cases focus on behavior by viewers/listeners modeled on suggestions or depictions included in music, films, T.V., and magazines. In each of these cases, the defendants prevailed on First Amendment grounds under Brandenburg. One of the most well known cases from this category is Herceg v. Hustler Magazine,

---

165 Id. at 109.
166 Rohr, supra note 157 at 65-75 (noting scholars disagreeing and/or arguing on whether the “incitement test” should apply solely to statements directly urging illegal action, whether the imminent element should be removed, whether there should be an intent element to the test, whether the context of the setting, private or public, changes the application of the test, whether factors such as availability of alternative means of expression or the inclusion of disclaimers should be relevant, and whether there should be a knowledge element added to the test regarding the ability of the speaker to know whether a recipient of the speech might act on the suggestion.) (citing Martin H. Redish, Freedom of Expression: A Critical Analysis 185-186 (1984); Kent Greenawalt, Speech, Crime, and the Uses of Language 206 (1989); David Crump, Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test, 29 Ga. L. Rev. 1 (1994); S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg, 41 Wm. & Mary L. Rev. 1159 (2000)).
167 Anthony Jude Picchione, Tat-Too Bad for Municipalities: Unconstitutional Zoning of Body-Art Establishments, 84 B.U. L. Rev. 829, 835 (2004) (noting that among pure speech, "pure political speech is frequently described as the most important" and, with few exceptions, its regulation is subject to strict scrutiny).
168 Rohr, supra note 157 at 29-32.
169 Id. at 29-30.
170 Id. at 30, n.142 (citing Andrew B. Sims, Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach, 34 Ariz L. Rev. 231, 235-255 (1992)).
In a case involving the death of a teenager inspired by Hustler magazine to engage in “autoerotic asphyxiation,” the court, in applying Brandenburg to the Hustler magazine article, held that “no fair reading of it can make its content advocacy, let alone incitement to engage in the practice.” Additionally, although not recognized by the Supreme Court, in cases involving recorded musical works suggesting homicidal actions, lower courts have found that the “creator of the music had not intended to inspire the commission of a homicide,” suggesting a intent requirement being applied in addition to the ordinary Brandenburg test, at least for certain mediums.

In terms of its application to video gaming, the only case that has substantively considered whether or not inflammatory content depicted in video games qualifies under Brandenburg was James v. Meow Media, Inc., a case involving a high school shooting by Michael Carneal, an avid FPS gamer, in Paducah, Kentucky. Although ultimately ruling on state law grounds, the Sixth Circuit in Meow Media did briefly evaluate the case under Brandenburg and found: 1) Meow Media did not “intend to produce violent actions” by the people who played their video games; 2) respondents failed to prove any advocacy of “imminent” lawless action; and 3) the causal connection between video games and violent behavior was too tenuous and unforeseeable to support a theory of liability.

The Meow Media dicta confirms with the concerns raised by commentators predicting the Court’s consideration of online “terroristic

---

172 Id. at 1021.
173 Id. at 1023-1024 (the court also noting that “[H]erceg and Andy suggest that a less stringent standard than the Brandenburg test be applied in cases involving non-political speech that has actually produced harm. Although political speech is at "the core of the First Amendment," the Supreme Court generally has not attempted to differentiate between different categories of protected speech for the purposes of deciding how much constitutional protection is required. Such an endeavor would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality. If the shield of the First Amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as "bad," all free speech becomes threatened." (emphasis added).
175 James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002).
176 Id. at 698-699.
“STEP INTO THE GAME”

speech” (outside of the video game context) – the perceived biggest obstacle to overcome in establishing “incitement” speech is the “imminent” requirement\(^{177}\) (and, should the Supreme Court explicitly recognize it, an intent element).\(^{178}\) Notably, some commentators have suggested that the obstacles regarding imminence can be overcome due to the current concerns and context of a War on Terror.\(^{179}\)

Based on the precedents available, however, it seems that inflammatory content within video games, including content that depicts “terroristic speech,” would generally be recognized as failing to rise to the level of “incitement” as laid out under the \textit{Brandenburg} test. This is good news for VR video game developers. Anything depicted on a VR video game simulator, even if the interaction is fully immersive and involved inflammatory content such as “terroristic speech,” would likely fall within the “unintentional incitement” category of cases involving media depictions of violence and / or harm that led to corresponding behavior.\(^{180}\)

As most video game developers merely have the intent of providing entertainment (similar to T.V. producers, authors, and song writers), having no intent to encourage or produce imminent lawless action, the Court should follow the logic of these lower court cases and find inflammatory VR video game content protected, not falling into the non-protected “incitement” category, due to a clear lack of intent.\(^{181}\)

\(^{177}\) Mattison, \textit{supra} note 117 (suggesting that terroristic speech online, including “bomb-making instructions,” would fail the imminence requirement of \textit{Brandenburg} and therefore suggesting a change in the Court’s interpretation of “imminent”); Morrison, \textit{supra} note 112 at 989 (“[\textit{B}randenburg protects online recruitment speech because such speech likely does not incite or intend to incite imminent lawless action.”)


\(^{179}\) Michael C. Shaughnessy, \textit{Praising the Enemy: Could the United States Criminalize the Glorification of Terror Under an Act Similar to the United Kingdom’s Terrorism Act 2006?} 113 Penn. St. L. Rev. 923 (2009); ANTHONY LEWIS, \textit{FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT} 25 at 162 (2008); \textit{but see Dennis v. United States}, 341 U.S. 494, 520 (1951) (Frankfurter, J., concurring) (“Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of a restriction may depend on the circumstances in which it is invoked. The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are.”)

\(^{180}\) Rohr, \textit{supra} note 157 at 29-32.

\(^{181}\) Id. at 32.
Additionally, as noted in the dicta of Meow Media, video game content (even the inflammatory kind) ordinarily fails to rise to the level of invoking “imminent” lawless action, even if a link between the content of the game and actual behavior could be empirically proven\textsuperscript{182} and the Court refused to consider the intent of the developers. Because video games are designed for the home, particularly VR video systems requiring cameras, body suits, and / or movement trackers (such as the Omni treadmill), any stimuli to a player from a video game would occur in a safe setting that would likely require time and planning in order to commit lawless conduct.

Unfortunately, falling into the “incitement” category of non-protected speech is only one of the challenges VR video game developers would have to look out for – with technology built on physical manipulation and total immersion, critics could credibly assert the idea that requiring players to do certain motions simulating criminal and / or violent activities carries a heightened risk of actually instructing individuals on how to commit those criminal and / or violent acts.

\textbf{Criminal Instruction Speech}

\textit{“Do a Barrel Roll!”}\textsuperscript{183}

Cases dealing with “criminal instruction speech”\textsuperscript{184} or “criminally instructional speech”\textsuperscript{185} are a complicated offshoot of cases in light of Brandenburg that the Supreme Court has not yet explicitly addressed. Despite a lack of explicit recognition by the Court as its own independent doctrine, some commentators stress and emphasize the distinction between encouraging listeners to commit certain acts versus telling listeners how to do certain acts, thus the label in order to categorize these cases separate from Brandenburg “incitement” cases.\textsuperscript{186} Others see this category of cases as a sub-category of Brandenburg, testing the true extent and scope of the

\textsuperscript{182} Meow Media, 300 F.3d at 698-699.
\textsuperscript{183} “Do A BARREL ROLL,” \url{http://knowyourmeme.com/memes/do-a-barrel-roll} (last visited May 9th, 2014).
\textsuperscript{184} Rohr, \textit{supra} note 157 at 39-46.
\textsuperscript{186} Id. at 1987-1995 (noting that “incitement” is time-sensitive, requiring a risk of “imminent” lawless action, while the timing for criminal instruction speech is irrelevant) (citing \textit{Stewart v. McCoy}, 537 U.S. 993, 995 (2002) (Stevens, J., opinion regarding denial of certiorari) (“While the requirement that the consequence be ‘imminent’ is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function.”)
language “mere abstract teaching”\textsuperscript{187} that courts are willing to allow.\textsuperscript{188} Lower courts have been similarly split on how exactly \textit{Brandenburg} applies, or if it applies, to cases involving detailed instruction on how to commit criminal acts.

In \textit{United States v. Barnett},\textsuperscript{189} the defendant made a set of instructions entitled “Synthesis of PCP – Preparation of Angel Dust,” instructions later sold to manufacturers of the drug.\textsuperscript{190} During his motion to suppress evidence of the instructions, Barnett attempted to argue “he had a first amendment right ‘to disseminate and exchange this information through the mails even if the recipients use the same for unlawful purposes.’”\textsuperscript{191} The court rejected this argument, stating:

\begin{quote}
The First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction . . . To the extent . . . that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the First Amendment does not provide a defense as a matter of law to such conduct.\textsuperscript{192}
\end{quote}

In so holding, the court did not even address the “incitement” test in \textit{Brandenburg}, seemingly finding there to be a distinction between advocacy directed to producing imminent lawless action and detailed instruction on how to commit lawless action.\textsuperscript{193}

The logic of \textit{Barnett}, failing to even address whether criminal instruction speech falls under \textit{Brandenburg}, contrasts with the logic of the District Court of Maryland and the Fourth Circuit in \textit{Rice v. Paladin Enterprises, Inc.}\textsuperscript{194} \textit{Paladin} is one of the most notorious “criminal instruction” cases, a case involving the publication of the book “Hit Man:

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{187}] \textit{Brandenburg}, 395 U.S. at 448.
\item[\textsuperscript{188}] Rohr, supra note 157 at 39-46.
\item[\textsuperscript{189}] \textit{United States v. Barnett}, 667 F.2d 835 (9th Cir. 1982).
\item[\textsuperscript{190}] Id. at 838.
\item[\textsuperscript{191}] Id. at 842.
\item[\textsuperscript{192}] Id. at 842-843.
\item[\textsuperscript{193}] Rohr, supra note 157 at 40-41.
\end{itemize}
\end{footnotesize}
A Technical Manual for Independent Contractors." The book is a detailed instructional manual on how to become, hire, and be hired as a contract killer. At trial, families of several homicide victims alleged the book aided and abetted the commission of the homicides by providing James Perry the knowledge on how to plan, execute, and cover-up his murders. Paladin, believing itself to be protected under the First Amendment, stipulated to having:

[A] marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes . . . knowledge that their publication would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications . . .

Paladin also stipulated to “the sole issue to be decided by the Court [in assessing Paladin’s motion for summary judgment] is whether the First Amendment is a complete defense, as a matter of law.”

District Court Judge Williams granted Paladin’s motion for summary judgment, first noting that “The First Amendment bars the imposition of civil liability on Paladin unless Hit Man falls within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment.” The only class of non-protected speech that Judge Williams found applicable was Brandenburg’s “incitement” class. Judge Williams explicitly rejected the creation of another category of unprotected speech, mainly “speech that aids and abets murder.” In applying Brandenburg, Judge Williams framed the analysis

---

195 REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (Paladin Press 1983) (“The kill is the easiest part of the job . . . It takes no great effort to pull a trigger or plunge a knife. It is being able to do so in a manner that will not link yourself or your employer to the crime that makes you a professional.”)
197 Id.
198 Rohr, supra note 157 at 41.
199 Rice, 128 F.3d 233 at 241.
200 Rice, 940 F. Supp. at 840-841 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942)).
201 Id. at 841.
202 Id. at 842-843 (distinguishing United States v. Barnett and United States v. Buttorff as cases where the defendant was actually charged with aiding and
as “The Court must decide, therefore, whether Hit Man merely advocates or teaches murder or whether it incites or encourages murder.”

Interestingly, Judge Williams analogized the case to those cases “involving violent movies and television programs that were alleged to have caused physical injury or death,” noting that despite those cases not involving depictions in a “how-to” format, those depictions were still in a format allowing easy imitation. In all of these cases, (note these cases as the “unintentional incitement” cases discussed above) courts found the speech to have failed the Brandenburg test. Judge Williams concluded that, even after Paladin had stipulated to targeting would-be criminals and knowing would-be criminals would use their publication to execute crimes, their publication, similar to these other cases, failed to qualify as “incitement” due to a lack of intent or tendency of producing “imminent” lawless actions.

abetting, while here only legal liability is being sought against Paladin Press) (citing United States v. Barnett, 667 F.2d 835 (9th Cir. 1982); United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978)).

Id. at 845-846 (rejecting the contention that Brandenburg only applies to “political speech” cases).

Id. at 846 (citing DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982) (parents of a deceased minor brought wrongful death action against NBC after their son hanged himself while imitating a hanging stunt he observed on the Johnny Carson Show); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (court reversed jury's award of damages in a wrongful death action against a magazine publisher for adolescent's death allegedly caused by article which described practice of autoerotic asphyxia); Yakubowicz v. Paramount Pictures Corp., 404 Mass. 624 (Mass. 1989) (wrongful death action by father of boy slain by person who had just seen the film The Warriors, which depicted scenes of gang violence, dismissed despite the fact that the perpetrator uttered a line from the film while committing the homicide); Zamora v. C.B.S. Inc., 480 F. Supp. 199 (S.D. Fla. 1979) (fifteen-year-old unsuccessfully sued television networks for violent programming that allegedly caused him to commit criminal acts); Olivia N. v. NBC, Inc., 126 Cal. App. 3d 488 (Ct. App. 1981) (girl raped with bottle by teenaged girls imitating similar incident depicted on television drama, Born Innocent, could not state valid cause of action)).
Justice Luttig, writing for the Fourth Circuit Court of Appeals, disagreed with the analysis of Justice Williams. Specifically, Justice Luttig found that “speech, which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct, may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes.” The court thus noted a distinction between criminal instruction speech, in general, and criminal instruction speech being challenged for providing vitally necessary information to the commission of conduct prohibited under criminal law; because Hit Man was key to commission of the homicides by Perry, the normally protected speech acts by Paladin fell into the category of aiding and abetting and was therefore liable. In regards to the Brandenburg analysis, Justice Luttig unequivocally stated that “[T]his book constitutes the archetypal example of speech which, because it methodically and comprehensively...
prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct, finds no preserve in the First Amendment. In supporting his assertion, Justice Luttig emphasized how the language in Brandenburg merely protects “mere abstract teaching” and “mere advocacy” of the “moral propriety or even moral necessity for a resort to force and violence,” not “teaching” of how to commit that violence in its entirety. The court therefore found the type of speech used in Hit Man, “instruction in the methods of terror or other crime,” as falling outside the province of protected speech, instead falling into a category of speech long recognized as being able to “incite” imminent lawless violence.

Interestingly, the decision in Paladin added one additional section aimed at addressing concerns from “major networks, newspapers, and publishers” concerning the “far-reaching chilling effects on the rights of free speech and press.” The basic premise of these concerns was simple: because many mediums depict detailed instructions on how to carry out violent or criminal activities, a decision against Paladin could serve as a decision against all of these producers under “aiding and abetting” statutes. In response to these concerns, Justice Luttig highlighted the highly unusual stipulations made by Paladin in regards to its intent and knowledge regarding the use of its publication. Paladin’s stipulations meant the publication was used as intended; “copycat” imitators of depictions by other medium producers who never stipulated to having intent and knowledge of its use to further a crime would merely be individuals who have “misused” the producer’s depiction. The court even noted how its

213 Rice, 128 F.3d 233 at 256.
214 Brandenburg, 395 U.S. at 448.
215 Rice, 128 F.3d 233 at 263–264 (acknowledging the lack of clarity in Brandenburg and attempting to clarify the intent of the Court in choosing the words it did).
216 Id. at 264 (notably, this discussion lacks an acknowledgment of the Brandenburg “imminent” element).
217 Id. at 265.
218 Id.
219 Id. at 265-267 (“In only the rarest case, as here where the publisher has stipulated in almost taunting defiance that it intended to assist murderers and other criminals, will there be evidence extraneous to the speech itself which would support a finding of the requisite intent; surely few will, as Paladin has, "stand up and proclaim to the world that because they are publishers they have a unique constitutional right to aid and abet murder." Appellant's Reply Br. at 20. Moreover, in contrast to the case before us, in virtually every "copycat" case, there will be lacking in the speech itself any basis for a permissible inference that the "speaker"
decision would not, depending on the context, apply to all producers of criminal instruction materials generally.220

In terms of online “terroristic speech,” it would thus seem that the overall logic of Barrett and Paladin, were it to be extended by the Supreme Court, would require a casual linking of the online subject content to the actual commission of a crime. Barring the commission of a crime, criminal instruction speech – including terroristic bomb-making instructions – cannot be targeted for restriction or liability indiscriminately.221

The requirement of a relationship between the criminal instruction to an actual commission of a crime is also a response to the argument that VR video gaming is unique because it will require actual physical simulation and body movement in order to operate. This “interactive” argument fails to recognize that the “criminal instruction” doctrine, were it to be extended by the Court, would likely be limited to allowing liability or restriction of speech only after a crime has been committed using that criminal instruction speech.222 Not before. The Supreme Court in Brown intended to assist and facilitate the criminal conduct described or depicted. Of course, with few, if any, exceptions, the speech which gives rise to the copycat crime will not directly and affirmatively promote the criminal conduct, even if, in some circumstances, it incidentally glamorizes and thereby indirectly promotes such conduct.

220 Id. at 266 (“A decision that Paladin may be liable under the circumstances of this case is not even tantamount to a holding that all publishers of instructional manuals may be liable for the misconduct that ensues when one follows the instructions which appear in those manuals. Admittedly, a holding that Paladin is not entitled to an absolute defense to the plaintiffs’ claims here may not bode well for those publishers, if any, of factually detailed instructional books, similar to Hit Man, which are devoted exclusively to teaching the techniques of violent activities that are criminal per se. But, in holding that a defense to liability may not inure to publishers for their dissemination of such manuals of criminal conduct, we do not address ourselves to the potential liability of a publisher for the criminal use of published instructions on activity that is either entirely lawful, or lawful or not depending upon the circumstances of its occurrence.”); but see Dennis v. United States, 341 U.S. 494, 581-582 (1951) (Douglas, J., dissenting) (“If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filing of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other sedition conduct should be beyond the pale along with obscenity and immorality.”)

221 See Department of Justice, supra note 212; Kendrick, supra note 185 at 1979-1984.

222 See Department of Justice, supra note 212; Kendrick, supra note 185 at 1979-1984.
already stressed this distinction when the Court reaffirmed the lack of American tradition forbidding the “depiction” of inflammatory material versus laws against “committing” the acts depicted.\textsuperscript{223} Depictions on how to make a bomb, even if completely immersive and involving actual hands-on simulation through a VR video game, are not equivalent to acts involving the actual commission of a crime.

Additionally, as noted in \textit{Paladin}, restriction of criminal instruction material (such as terroristic instruction) within the content of a video game would require some form of intent element to aid in the actual commission of a crime and knowledge that such aid was being given. This type of holding would be necessary in order to avoid the slippery slope raised by those producers of various violent and criminal speech depictions in \textit{Paladin},\textsuperscript{224} a necessity even more important to consider in light of the fact that the VR movement will not be limited to video gaming.\textsuperscript{225} Because this technology will simulate depictions in such a “real” and immersive way, and because everything from crime dramas to news programs contains detailed instructions on how to commit crimes, protecting all of these mediums (including video games) by requiring some element of intent to assist and / or knowledge of such assistance, as stipulated to by Paladin, would be the only way to ensure the continued protection of much of today’s and tomorrow’s technology.\textsuperscript{226}

Of course, even if a VR video game developer survives a challenge attempting to categorize certain inflammatory content as non-protected speech, thereby ensuring the full protection of the First Amendment, the State may still have an interest and means chosen suitable enough to regulate certain categories of speech. As evidenced in \textit{Holder}, “terroristic speech” is a category of speech that the State has a very high interest in regulating, even if the speech has only a marginal connection to the promotion and / or facilitation of actual terrorist activities.

\textbf{Holder: Regulating “Terroristic Speech”}

\textsuperscript{223} \textit{Brown}, 131 S. Ct. at 2734.
\textsuperscript{224} \textit{Rice}, 128 F.3d 233 at 265.
\textsuperscript{225} See discussion \textit{supra} Part 1.
\textsuperscript{226} For more information on “Criminally Instructional Speech,” including a proposed test synthesizing various commentator theories and court opinions on the matter, see Kendrick, \textit{supra} note 185.
As noted in Holder v. Humanitarian Law Project (“HLP”), context, circumstances, and the specific speech being asserted are crucially important distinctions that must be made for the Court to address a First Amendment claim. Marking the first time the Supreme Court delved specifically into the question of what is terrorism, Holder provides the precedential cornerstone of any discussion regarding “terroristic speech” within the context of the First Amendment.

In Holder, a group of plaintiffs, including the Humanitarian Law Project, moved for a pre-enforcement review of 18 U.S.C. §2339B criminalizing the act of “knowingly provid[ing] material support or resources to a foreign terrorist organization.” The Court noted the current definition of “material support” as the following:

“[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities,

228 Holder, 561 U.S. at 33-35.
229 Said, supra note 114 at 1456-1457 (“[T]he Supreme Court had never before discussed its perceptions of what constitutes terrorism, preferring instead to place limits on ‘terrorist activity,’ without elaborating much further.”)
230 18 U.S.C. § 2339B(a)(1) (Current through PL 113-100, approved 4/18/14) (“Unlawful conduct.--Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism . . . .”) (emphasis added).
231 Holder, 561 U.S. at 8.
232 18 U.S.C. § 2339A(b)(2) (Current through PL 113-100, approved 4/18/14) (defining training as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.”)
233 18 U.S.C. § 2339A(b)(3) (Current through PL 113-100, approved 4/18/14) (defining expert advice or assistance to mean “advice or assistance derived from scientific, technical, or other specialized knowledge.”)
weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”

Plaintiffs were part of a group of organizations looking to provide humanitarian and political support, including training on humanitarian and international law, engaging in political advocacy, and teaching members how to petition representative bodies such as the U.N., to the Kurdistan Worker’s Party and the Liberation Tigers of Tamil Eelam, both organizations labeled as a “foreign terrorist organization” by the Secretary of State in 1997.

The Court first noted how both sides misrepresented the exact form of “speech” at issue in the case. Plaintiffs asserted that their intended speech was “pure political speech,” a form of speech deserving of the highest protections under the First Amendment; the State asserted that plaintiff’s intended speech was only conduct incidentally related to speech, not speech at all, and therefore deserving of a lower “intermediate” standard of scrutiny. The Court rejected both articulations of the speech at issue, instead framing the case as one where “The law here may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message.” In so holding, the court settled on the standard of scrutiny iterated in Texas v. Johnson for regulation of conduct related to communicative expression: “a more demanding standard.”

In applying this standard, the Court noted the strength and urgent interest of the Government in combating terrorism. The focus of the case was therefore on whether or not the means chosen, a ban on material support to organizations labeled as foreign terrorist organizations, was

---

236 See Picchione, supra note 167.
238 Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 189 (1997) (“[C]ontent-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”) (citing United States v. O’Brien, 391 U.S. 367, 377 (1968)).
239 Holder, 561 U.S. at 28.
240 Id. (citing Texas v. Johnson, 491 U.S. 397, 403 (1987)); see also Said, supra note 114 at 1499 (noting the Court failing to use the term “strict scrutiny.”)
241 Holder, 561 U.S. at 28.
“necessary to further that interest.” In addressing this dispute, the Court noted support given to legitimate activities of foreign terrorist organizations is not kept separate from the organization’s terrorist activities – any support “frees up other resources within the organization that may be put to violent ends.” The Court also noted that material support also helps grant legitimacy to these organizations, allowing them to “persist, to recruit members, and to raise funds.” These reasons, in the Court’s estimation, supported the means chosen by the State, a determination that also was justified through deference to the State on issues of national security. As applied to the specific activities plaintiffs were seeking to do, legal training, political advocacy, and teaching on how to interact with representative bodies, the Court found no violation of the freedom of speech and upheld the restriction of such activities under the material support statute. Despite all this, the Court noted in its final remarks that its decision as applied to plaintiff’s speech was narrow – “All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny.”

One future application of the material-support statute could be a targeting of VR video games involving “terroristic speech” content that is immersive enough to potentially provide “training” and / or “expert advice or assistance” to foreign terrorist organizations. An example of this kind of concern has already been asserted involving hyper-realistic war video games, critics suggesting such games are used as planning, strategy, and practice grounds for real attacks. These concerns would be backed by proponents turning to Holder as a supporting case in asserting the importance of national security concerns over ordinary First Amendment liberties.

Fortunately for video game developers, Holder realistically provides little to no support for a regulation of “terroristic speech” within the video game medium. Of most importance is the fact that §2339B requires a “knowingly” standard for material support – one must therefore actually know that a designated terrorist organization is receiving

242 Id.
243 Id. at 30.
244 Id.
245 Id. at 33-34.
246 Id. at 36-37.
247 Id. at 39.
the benefit of the support. Unlike the plaintiffs in *Holder*, organizations directly interacting and working with organizations labeled as foreign terrorist organizations, video games (like most mediums such as T.V. programs, and movies) are released worldwide with no knowledge of any specific individual or entity buying the product; while video game developers may acknowledge a target audience would be more interested in a particular game with a particular context, that knowledge is not equivalent to knowledge of a specific “designated” terrorist organization receiving the benefit of material support. §2339B should thus fail to apply because video game developers, even those making games involving “terroristic speech,” lack knowledge of the parties using their products.

The Court should also more easily find any video game content, including fully immersive VR depictions of “terroristic speech,” to be more speech than conduct; at the very least, the Court would reaffirm the logic held in *Holder* that §2339B is only being triggered by conduct involving the communication of a message. The standard of review is thus, at a minimum, the same “demanding standard” applied in *Holder* – unlike *Holder*, however, in the context of video game content, any government regulation should fail. While the government interest, national security, would still meet the required level of significance, any means chosen in regards to video games would likely never be able to satisfy. This is because the limitation of any individualized video games, or even a genre of video games (such as video games supporting “terroristic speech”), would be tremendously underinclusive – there are too many mediums depicting the same content, including “terroristic speech,” in various forms for the Court to isolate one medium’s expression as particularly problematic. Even if the Court were particularly concerned with video games because of their “interactive” component and active engagement, the spread and growth of the VR movement means fully immersive versions

---

250 *Holder*, 561 U.S. at 16-17 (“To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism. . . .’ Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities.”) (citing 18 U.S.C. § 2339B(a)(1) (Current through PL 113-100, approved 4/18/14)).
251 *Id.* at 14-15.
252 See *Brown*, 131 S. Ct. at 2733.
253 *Holder*, 561 U.S. at 28.
254 *Id.*
255 See discussion *supra* Part 1.
of movies and T.V. depicting the same content should defeat the targeting of VR video games due to the underinclusive effect of such a means chosen. Depending on the makeup of the game and its narrative structure, the banning of a VR video game and / or genre would also be overinclusive. Developers have already shown an ability to make levels predicted to be inflammatory completely optional, with a disclaimer for players before the level,\textsuperscript{256} a means chosen that the Court should embrace before choosing to accept an outright prohibition.

Because of the considerable differences between the actions being challenged in Holder and any potential regulation of video game content, even if VR video game developers were to decide to create a video game that involved “terroristic speech,” content that may potentially provide some sort of physical and immersive “training” to players on how to engage in terrorist activities, it seems likely that the content of such speech would be protected and survive any limiting regulation. The Holder precedent would be inapplicable and thus, like the other challenges against VR video games depicting “terroristic speech,” the First Amendment claim should prevail.

What Does the Future of Virtual Reality Video Gaming Look Like?

“Finish Him”\textsuperscript{257}

Of course, defending “terroristic speech” content is a hard line to take. This article intentionally chose that hard line, suggesting that the up-and-coming medium of VR video gaming might one day spawn a game incorporating highly inflammatory “terroristic speech.” Such depictions likely fall on the far edge of the spectrum in terms of speech people are comfortable with, even more so than the concerns expressed by many regarding hyper-violence in today’s video game culture.\textsuperscript{258} Yet, even with the “terroristic speech” component, involving everything from instructions on bomb-making to anti-American “terrorist” recruitment messaging, the

\textsuperscript{256} NO RUSSIAN, \url{http://callofduty.wikia.com/wiki/No_Russian} (last visited May 8, 2014) (the level “No Russian” in Call of Duty, Modern Warfare 2, involving the killing of hundreds of civilians at an airport, having a built-in option to skip the mission at any time).


\textsuperscript{258} Note, the author did not use examples of hyper-violence itself because of the recent precedent in Brown, the opinion suggesting that future scientific and psychological studies establishing a stronger link between violent behavior and violent video games was necessary before the Court would entertain the challenge again.
Court should affirm the speech-protective logic of Justice Learned Hand and Justice Brandeis and hold that the First Amendment protects the freedom of video game developers in making VR video games with problematic content. The video game medium and its depictions have already been recognized as “speech” in Brown, fall into a category of “unintentional incitement” cases that ultimately fail Brandenburg, lack the requisite intent, knowledge, or connection to actual crimes required by the doctrine of criminal instruction, and are ultimately beyond the reach of Holder, even if justified by national security, due to a lack of knowledge of who plays video games, the underinclusive nature of targeting any sole video game / genre of video games in light of other mediums, and the overinclusive means chosen of banning the sale of a video game / genre of video games when less restrictive means are available.

That ultimate conclusion probably does not comfort critics of video games, particularly critics concerned about the “interactive” nature of video games and the significantly increased problems full VR immersion means in escalating the risk of learned psycho-social behaviors. However, this fact should: a vocal segment of the gaming community itself does not want hyper-realistic VR immersion video games centered on ultra-violent behavior or activities (including “terroristic activities”).

As noted in several Reddit posts by members of the larger video game community in discussing the Oculus Rift and its potential to make one feel “presence” (unable to discuss between the VR simulation and reality), the popularity of FPS games and games depicting a lot of gore are expected to decline when the killing and violence become too real. Many

260 Brown, 131 S. Ct. at 2733.
261 Rohr, supra note 157 at 29-32.
262 See discussion infra Part V, §2 – Criminal Instruction Speech.
263 See discussion infra Part V, §3 – Holder: Regulating “Terroristic Speech.”
264 Seatedmech, supra note 30.
265 Id. (“I’ve played a lot of hardcore FPS games all the way back to Doom and Wolf3D, and the more real they get, the less interested I am in them”; “I don’t think VR will be huge for FPS . . . I’m worried about what the effects of feeling gratified from killing an enemy will do to me once my body thinks I’m IN the game”; “I think there will still be a market for war games, but it will be much more subdued. It won’t be fast-paced, side-strafing, crazy-unreal COD style games where you kill entire armies, but episodic events centered around a tense hour or two being in hostile locations, attempting a rescue or escape, where the goal isn’t slaughter”; “But realistic murder a la Manhunt? No thanks”; “They said Doom was a murder simulator. Not really, guns were just an unrealistic game play element. In VR, one could actually make a murder simulator that truly desensitized. Things will get weird.”)
of these posts open with the sharing of stories, stories about playing shooters and other violent games as a kid; even these community members expressed reservations about a medium that will potentially make slaughter indistinguishable from the real thing. Several commentators appreciated the reality of post-traumatic stress disorder (PTSD) triggering events should VR immersive games be too graphic. And many posts talked about the VR video games they were hoping to see developed instead of shooters – games involving photorealistic “vacation” simulators, games involving paintball / lasertag / Nerf wars (replacing bullets and actual guns), games involving a lot of exploration and atmospheric integration of sounds and sights, games involving non-human enemies such as robots or ghosts, games involving flight, space, deep see diving, even games involving instant teleportation to see various parts of the Earth they are unable or currently incapable of affording to go see in real life. At the moment, there does not seem to be a lot of interest in the continued development of hyper-realistic violent video games (although almost inevitably, such interest will generate when the next great FPS is developed and popularized).

As the video game medium is, post-Brown, protected speech, and such status is unlikely to change despite fully immersive VR technology, even considering inflammatory content, critics of video games should treat this new shift in the community as an opportunity. While critics of the “interactive” element of video games have previously suggested restriction and limitation of graphic and violent content as the means to protect today’s youth, such challenges have failed due to the sanctity of the First Amendment. A better approach, one embodied by Brandeis’s theme of “the fitting remedy for evil counsels is good ones,” would be to develop a

266 Id. (As a video gamer myself, one who grew up playing violent video games such as Duke Nukem, Quake, and Diablo with my father, I agree with this sentiment. In my mind, the playing of a game that would, as Justice Alito suggested in Brown, allow me to feel the splatter of blood from a head-shot, hear the screams of fallen soldiers, and smell the decay from rotting corpses, would simply not be fun. Video games are treated by many as an escape and / or a tension reliever for stress and those type of negative sensory overloads would be neither.)

267 Id. (“It's only a matter of time till we start hearing reports of VR induced PTSD”; “While I doubt PTSD caused by VR will be something we will have to worry about for awhile, VR as a trigger for someone who has PTSD is a very real possibility. A video like this demonstrates what happens if you put someone with, "17 years of front-line combat experience" into a virtual reality combat setting”) (citing https://www.youtube.com/watch?v=B9ioVceVlwI#t=930).

268 Id.

269 Whitney, 274 U.S. 357, 375 (Brandeis, J. concurring).
gamer culture interested in other content. If not, then the only change in video game critics will ever likely see is the one all video gamers know well: a dreaded fade to black, superimposed with two small words . . .

“Game Over”\(^{270}\)