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QUARTERLY REPORT

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The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcadowel@doe.state.in.us.

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VIDEO GAMES, POPULAR CULTURE, AND SCHOOL VIOLENCE

“The freedom of one is often the concern of another,” federal district court judge Hoeveler wrote in the influential Zamora v. CBS, Inc., 480 F.Supp. 199, 203 (S.D. Fla. 1979). “It has been so and shall be as the nation grows. Indeed, the complexity of our developing society has spawned collisions of these concerns and freedoms much more frequently than in past years.... However, as much of a concern as those which cause us to review the extent of our freedoms, is the danger of finding contemporary justifications in the excesses of the moment.”

Nowhere have these “collisions of concerns” become more evident than in the search for reasons behind increased violence in the schools and in the various communities where students reside. Although certain “contemporary justifications in the excesses of the moment” have zeroed in on limiting access to video games and movies by minors, these exercises have been dealt setbacks in recent legal decisions for two general reasons: (1) social scientists have not been convincing in establishing a nexus between video game and movie violence and school violence; and (2) the free speech clause of the First Amendment militates against limiting any speech unless the speech comes within seven (7) distinct categories.

Video Games and School Shootings

On March 4, 2002, Lewis T. Babcock, Chief Justice of the Colorado federal district court, issued Sanders et al. v. Acclaim Entertainment, Inc. et al., 188 F.Supp.2d 1264 (D. Colo., 2002), the latest case evolving from the April 20, 1999, school shootings at Columbine High School in Littleton, Colorado. The Sanders case is a wrongful death action brought by the wife and stepchildren of William Sanders, the lone teacher killed by Dylan Klebold and Eric Harris. Klebold and Harris reportedly were interested in violent video games and pornography. They also had viewed the movie *The Basketball Diaries*, where a student massacres his classmates with a shotgun.

Judge Babcock, who has handled the other Columbine-related actions as well, found against the plaintiffs on their various claims, which included negligence and strict liability. The plaintiffs’ complaint and Judge Babcock’s decision are nearly identical to an earlier decision reached in James et al. v. Meow Media, Inc., 90 F.Supp.2d 798 (W.D. Ky. 2000). James involved the estates of three high school students shot to death by 14-year-old Michael Carneal at Heath High School in McCracken Co., Kentucky, on December 1, 1997. Carneal—as is alleged of Klebold and Harris—was an avid video game enthusiast, visited pornographic internet sites, and viewed *The Basketball Diaries*. In both cases, the plaintiffs allege the manufacturers and distributors of the violent video games made “violence pleasurable and attractive, and disconnected the violence from the natural consequences thereof,” essentially training Klebold, Harris, and Carneal “how to point and shoot a gun in a fashion making [them] extraordinarily effective killer[s] without teaching [them] any of the constraints or responsibilities needed to inhibit such a killing capacity.” James, 90 F.Supp.2d at 801; Sanders, 188 F.Supp.2d at 1269. The plaintiffs also claimed in both cases that the defendants knew or should have known that their products would result in “copycat violence,” creating an “unreasonable risk of harm” due the influence such products will have on minors.

However, both federal district courts found that the violence visited upon others in these two school shootings were not foreseeable consequences of the defendants' actions. The lack of foreseeable consequences negates any duty to the plaintiffs. Both courts rely upon an earlier decision by the 6th Circuit Court of Appeals, Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990), where the manufacturer of *Dungeons & Dragons*, a well known role-playing game (RPG), was sued after a student who was an avid player committed suicide. The student's suicide was not a foreseeable danger. To impose liability based on the plaintiffs' legal theories would require manufacturers and distributors to attempt to ascertain the mental condition of every prospective player of their games. Under such a burden, the only practical way to prevent a "mentally fragile" person from playing such games is not to sell the games at all. "Tragedies such as this simply defy rational explanation, and courts should not pretend otherwise." Watters, 904 F.2d at 383-84, quoted in James at 90 F.Supp.2d at 807. The actions of Klebold, Harris, and Carneal were not "normal responses" to video game playing. Further, no one was injured while Klebold, Harris, and Carneal were playing any of the video games such that any tort theory could apply that would impose a duty upon the manufacturers and distributors to the injured plaintiffs. "The actual use of the movie and video games, then, did not result in any injury." Sanders, 188 F.Supp.2d at 1277. To the extent that such video games create subjective "subliminal messages," strict liability will not attach because such intangible thoughts, ideas or messages are not "products" for the purpose of applying strict liability.

A manufacturer or distributor of video games and movies cannot be liable for not anticipating and preventing "the idiosyncratic, violent reactions of unidentified, vulnerable individuals to their creative works." Sanders, 188 F.Supp.2d at 1275

The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a "mentally fragile" individual would be to refrain from selling it at all.

Sanders, Id., quoting Watters, 904 F.2d at 381.

The video game and movie defendants "had no reason to suppose that Harris and Klebold would decide to murder or injure their fellow classmates and teachers.... Nor, for that matter, did the [defendants] have any reason to believe that a shooting spree was a likely or probable consequence of exposure to their movie or video games." Sanders, 188 F.Supp.2d at 1272.

The district court in Sanders addressed inherent First Amendment constitutional issues while the James court steadfastly refused to do so. The Sanders court found that the creation and distribution of video games, movies, television, books, visual art, and song are integral components of "a society dedicated to the principle of free expression.... Accordingly, the creation of such works significantly contributes to social utility." Sanders, 188 F.Supp. 2d at 1274. Characterizing the creative work as "violent" does not alter the social utility analysis. Id. "Setting aside any personal distaste, as I must, it is manifest that there is social utility in expressive and imaginative forms of entertainment even if they contain violence." Id. "Finding that these Defendants owed Plaintiffs a duty of care

would burden these Defendants' First Amendment rights to freedom of expression." Sanders, 188 F.Supp.2d at 1275.

The Sanders court rejected any distinction between "entertainment" and "information" for the purpose of First Amendment analysis. The premise that "entertainment" is not protected by the First Amendment "is directly contrary to the Supreme Court's teaching that the distinction between information and entertainment is so minuscule that both forms of expression are entitled to First Amendment protection." Sanders, 188 F.Supp.2d at 1279, citing Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

Whether expressive content of speech is protected by the First Amendment is subject to Brandenburg v. Ohio, 395 U.S. 444 (1969). Under Brandenburg, "even speech that expressly advocates criminal activity cannot be the basis for liability, unless the speech is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" Id., citing Brandenburg, 395 U.S. at 447. The court disagreed that Brandenburg should be limited to "marginalized political speakers," noting that Brandenburg is not limited to political speech. The district court also maintained that "imminent lawless action" is a strict requirement and would not substitute a "tendency to lead to violence" or "advocacy of illegal action at some future time" tests. Sanders, 188 F.Supp.2d at 1279-80 (citations omitted). "Plaintiffs' Complaint is devoid of any allegation that the Movie and Video Game Defendants had any intent, let alone a specific intent, to assist and encourage anyone to engage in acts of criminal violence." Sanders, 188 F.Supp.2d at 1280.

Although the James court declined to apply First Amendment analysis to its dispute, based upon past chastisement by the 6th Circuit for having done so where the matter could be decided based on state law, the James court at 90 F. Supp.2d at 818-819 did quote the following from its original decision in TSR, Inc. v Watters, 715 F. Supp. 819, 822 (W.D. Ky. 1989), *aff'd on other grounds*, 904 F.2d 378 (6th Cir. 1990):

The theories of liability sought to be imposed upon the manufacturer of a role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms. It cannot be justified by the benefit Plaintiff claims would result from the imposition. The libraries of the world are a great reservoir of works of fiction and nonfiction which may stir their readers to commit heinous acts of violence or evil. However, ideas expressed in one work which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness. As was stated by the second Mr. Justice Harlan,¹ "one man's vulgarity is another man's lyric." Atrocities have been committed in the name of many of civilization's great religions, intellectuals, and artists, yet the first amendment does not hold those whose ideas inspired the crime to answer for such acts. To do so would be to allow the

¹Two U.S. Supreme Court Justices were named "John M. Harlan." The first served from 1877 to 1911. The second, John Marshall Harlan, served from 1893 to 1905.

freaks and misfits of society to declare what the rest of the country can and cannot read, watch and hear.

Social Scientists and Empirical Data

These three cases, however, involved terrible tragedies. While the Sanders court and the James court were dissecting under state tort laws whether there were any legal responsibilities and duties of the makers and distributors of video games and movies to those injured by subsequent violent acts of students who used these “products,” the 7th Circuit Court of Appeals faced head-on the question of whether video games deserve any type of First Amendment consideration at all.

Early decisions did not view video games as a form of protected speech under the First Amendment. See, i.e., America’s Best Family Showplace Corp. v. City of New York, 536 F.Supp. 170 (E.D. N.Y. 1982), Malden Amusement Co. v. City of Malden, 582 F.Supp. 297 (D. Mass. 1983), and Rothner v. City of Chicago, 929 F.2d 297 (7th Cir. 1991). But as the video game genre has grown, so has the judicial understanding of this “art form.”

The 7th Circuit Court of Appeals revisited the issue in American Amusement Machine Association et al. v. Kendrick et al., 244 F.3d 572 (7th Cir. 2001), *cert. den.*, 122 S. Ct. 462 (2001). Kendrick began when the City of Indianapolis passed an ordinance attempting, *inter alia*, to restrict public access by minors to violent video games. “Graphic violence” was defined in the ordinance as a “visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration [disfigurement].” In many respects, “graphic violence” was linked with “obscenity” so that a “community standard” could be applied.

The ordinance brackets violence with sex, and the City asks us to squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity, which is normally concerned with sex and is not protected by the First Amendment, while the plaintiffs insist that since their games are not obscene in the conventional sense, they must receive the full protection of the First Amendment. Neither position is compelling.

244 F.3d at 574. The 7th Circuit noted that “[v]iolence and obscenity are distinct categories of objectionable depiction.” Id. But merely because violent imagery is not “on the list of expressive forms that can be regulated on the basis of their content” does not mean that, under some conditions, such imagery could be regulated.² Id. What is “obscene” is generally what is considered offensive. It does not affect anyone’s conduct. Rather, it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity. It doesn’t inflict any “temporal harm,” which

²The court provided an example at 575: “The most violent game in the record, ‘The House of the Dead,’ depicts zombies being killed flamboyantly, with much severing of limbs and effusion of blood; but so stylized and patently fictitious is the cartoon-like depiction that no one would suppose it ‘obscene’ in the sense in which a photograph of a person being decapitated might be described as ‘obscene.’”

is the concern of the ordinance with respect to video games. “Offensiveness is the offense.” At 574-75.

The Indianapolis ordinance was based on the belief that violent video games cause temporal harm (as distinguished from “spiritual harm” presumed from obscene material) “by engendering aggressive attitudes and behavior, which might lead to violence.” Offensiveness was not the basis upon which the city sought to regulate violent video games. At 575. To support this premise, Indianapolis introduced “a pair of empirical studies by psychologists which found that playing a violent video game tends to make young persons more aggressive in their attitudes and behavior, and also in a larger literature finding that violence in the media engenders aggressive feelings.” At 574.

The court acknowledged that “[p]rotecting people from violence is at least as hallowed a role for government as protecting people from graphic sexual imagery.” *Id.* For this reason, a person can be punished for uttering so-called “fighting words” that are likely to cause a breach of the peace (that is, cause violence).³ However, in order to engage in such “content based” regulation, the city would have to demonstrate that minors playing such violent video games are incited to “breaches of the peace” because of such activities. “But this is to use the word ‘incitement’ metaphorically.” *Id.*

[N]o showing has been made that games of the sort found in the record of this case have such an effect. Nor can such a showing be dispensed with on the ground that preventing violence is as canonical a role of government as shielding people from graphic sexual imagery. The issue in this case is not violence as such, or directly; it is violent images; and here the symmetry with obscenity breaks down. Classic literature and art, and not merely today’s popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial. The notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity.

At 575-76. The court noted that child welfare issues are implicated, with one subset concerned with any potential psychological harm to a child exposed to violent images while another subset would implicate a broader societal concern for the consequences flowing from a child incited or predisposed to commit violent acts through exposure to violent images. “The grounds [for such regulation] must be compelling and not merely plausible. Children have First Amendment rights. [Citations omitted.] This is not merely a matter of pressing the First Amendment to a dryly logical extreme.” 244 F.3d at 576-77. There was no proof that this “incitement to breaches of the peace” has occurred or was occurring, or that such games have such an effect. Government regulation might actually result in more harm.

³The most famous quotation in this regard is derived from Schenck v. United States, 249 U.S. 52 (1919), when Justice Oliver Wendell Holmes, Jr., wrote: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”

The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

At 577. “Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault are aware. To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.” *Id.* The court provided several literary examples where the application of the city's ordinance, which would require the presence of an adult when a child played arcade games, would be absurd. Should a parent be present when a child reads *The Odyssey* “with its graphic depictions of Odysseus's grinding out the eye of Polyphemus [the cyclops] with a heated, sharpened stake, killing the suitors, and hanging the treacherous maidservants”? Or Dante's *The Divine Comedy* with its graphic “tortures of the damned”? Or *War and Peace*, the stories of Edgar Allen Poe, or the various movies made from the classic novels of Mary Wollstonecraft Shelley (*Frankenstein*) and Bram Stoker (*Dracula*)? *Id.*

The fact that a video game may be “violent” or “interactive” will not alter a First Amendment analysis. That video games might be interactive is a “superficial, in fact erroneous” basis for regulation. “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.” *Id.*

The court noted that the video games submitted by the city as depicting “graphic violence” were, in fact, stories in and of themselves. One of the video games involved relentless attacks by zombies. The court noted the game was based substantially on a cult movie classic “Night of the Living Dead.”

Self-defense, protection of others, dread of the “undead,” fighting against overwhelming odds—these are all age-old themes of literature, and ones particularly appealing to the young. “The House of the Dead” is not distinguished literature. Neither, perhaps, is “The Night of the Living Dead,” George A. Romero's famous zombie movie that was doubtless the inspiration for “The House of the Dead.” Some games, such as “Dungeons and Dragons,” have achieved cult status; although it seems unlikely, some of these games, perhaps including some that are as violent as

those in the record, will become cultural icons. We are in the world of kids' popular culture. But it is not lightly to be suppressed.

At 577-78. The city, as noted *supra*, relied upon social science to establish that games such as "The House of the Dead" and "Ultimate Mortal Kombat 3" are dangerous to public safety. At 578. However, these games, the court noted, "are culturally isomorphic with (and often derivative from) movies aimed at the same under-18 crowd." *Id.* The court was unpersuaded by the evidence supplied by the social scientists whose studies the city relied upon.

Those studies do not support the ordinance... The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the *interactive* character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments.

At 578-79 (emphasis original).⁴ The video games in the record were composed of "cartoon characters, that is, animated drawings. No one would mistake them for photographs of real people... The idea that a child's interest in such fantasy mayhem is 'morbid'—that any kid who enjoys playing 'The House of the Dead' or 'Ultimate Mortal Kombat 3' should be dragged off to a psychiatrist—gains no support from anything that has been cited to us in defense of the ordinance." At 579.⁵

Popular culture is far more pervasive in its depiction of violence than video games. "Violent video games played in public places are a tiny fraction of the media violence to which modern American children are exposed. Tiny—and judging from the record of this case, not very violent compared to what is available to children on television and in movie theaters today." *Id.* The city's ordinance was aimed at "a children's world of violent adventures," the court observed. "Common sense says that the City's claim of harm to its citizens from these games is implausible, at the best wildly

⁴The court noted that "passive" entertainment can be interactive as well. "When Dirty Harry or some other avenging hero kills off a string of villains, the audience is expected to identify with him, to revel in his success, to feel their own finger on the trigger. It is conceivable that pushing a button or manipulating a toggle stick engenders an even deeper surge of aggressive joy, but of that there is no evidence at all." 244 F.3d at 579.

⁵In Zamora v. CBS, Inc., 480 F.Supp. 199, 206-07 (S.D. Fla. 1979), discussed *infra*, that court also rejected any inherent "incitement" in depictions of violence, although the study of the effects of such programming continues. "One day, medical or other sciences with or without the cooperation of programmers may convince the F.C.C. [Federal Communications Commission] or the Courts that the delicate balance of First Amendment rights should be altered to permit some additional limitations in programming."

speculative. Common sense is sometimes another word for prejudice, and the common sense reaction to the Indianapolis ordinance could be overcome by social scientific evidence, but has not been. The ordinance curtails freedom of expression significantly and, on this record, without any offsetting justification, ‘compelling’ or otherwise.” Id.

The court added at 579-80 that the ordinance does not conform with First Amendment principles and would be enjoined. “We have emphasized the ‘literary’ character of the games in the record and the unrealistic appearance of their ‘graphic’ violence. If the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be), a more narrowly drawn ordinance might survive a constitutional challenge.”

Popular Culture, Individual Tragedies, and Liability

Although the 7th Circuit discounted the studies of the social scientists, there remains a generalized perception that popular culture has tragic consequences. The following are representative of recent legal challenges in this area.

1. Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990), which heavily influenced the school-shooting cases in James and Sanders, *supra*, was a wrongful death action brought against the manufacturer of “Dungeons & Dragons” (D&D) by a parent following the suicide of her son, an avid player. The 6th Circuit described D&D as a “parlor game.” The 7th Circuit, in American Amusement Machine Ass’n v. Kendrick, 244 F.3d 572, 578 (7th Cir. 2001), described it as having “achieved cult status,” even though D&D was not involved in that case. See *supra*. D&D is one of first major role-playing games (RPG). Players assume roles and engage in a number of adventures in an imaginary ancient world. Unlike the video RPG games, such as the *Final Fantasy* series, D&D is a board game. Roles are not acted out in any physical sense. The child in this case was described as a “devoted” D&D player, so much so that “he lost control of his own independent will and was driven to self-destruction.” At 380. The parent claimed that the manufacturers of D&D owed a duty of care to warn that the game could cause psychological harm to “fragile-minded children” and that her son’s self-inflicted gunshot wound was a direct and proximate result of the defendant’s failure to discharge this duty. The court disagreed. The general duty on manufacturers and suppliers of products on the market is to warn of dangers known to them but not known to persons whose use of the product might reasonably be anticipated. Although it was foreseeable the child would play the game, it was not foreseeable that he would commit suicide. “[I]f Johnny’s suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to defendant TSR.” At 381. There is no evidence D&D is dangerous or that the manufacturer had knowledge of any dangers associated from its marketing the product. There is no reason to believe that players of D&D would become more susceptible to murder or suicide than non-players. At 382. D&D “is a ‘let’s pretend’ game, not an incitement to do anything more than exercise the imagination.... We are not dealing here with the kind of violence or depravity to which children can be exposed when they watch television, or go to the movies, or read the fairy

tales of the Brothers Grimm, for example.” *Id.* The court would not impose a duty on a manufacturer or distributor of a product where it would have to attempt to ascertain the subjective mental condition of each and every prospective player. “The only practicable way of insuring that the game could never reach a ‘mentally fragile’ individual would be to refrain from selling it at all,” an absurd result. At 381. The defendant exercised ordinary care and did not breach any duty toward the player of its game. The child was not known to be suicidal; he was not delirious or psychotic; he was not acting under an irresistible impulse or incapable of realizing what he was doing; and he was not in the care or custody of the defendant. “The fact is, unfortunately, that youth is not always proof against the strange waves of despair and hopelessness that sometimes sweep seemingly normal people to suicide, and we have no way of knowing that Johnny would not have committed suicide if he had not played Dungeons & Dragons.” At 384.

2. Zamora v. Columbia Broadcasting System, 480 F.Supp. 199 (S.D. Fla. 1979) involved a legal challenge to the three major television networks and their television programming. The plaintiff alleged that he had, over a ten-year viewing period, “become involuntarily addicted to and ‘completely subliminally intoxicated’ by [his] extensive viewing of television violence” such that he became “impermissibly stimulated, incited, and instigated’ to duplicate the atrocities he viewed on television,” thus developing a “sociopathic personality” whereby he “became desensitized to violent behavior” becoming a danger to himself and others. He ultimately shot and killed his 83-year-old neighbor. At 200. He claims the networks owed a duty to him not to provide such programming, and that the breach of this duty was the proximate cause of his developing the sociopathic personality with the resulting death of his neighbor. The court refused to impose a duty (a standard of care) because there was no valid legal basis for doing so and such a duty would be against public policy. To impose such a duty would require the networks to anticipate a minor’s alleged voracious intake of violence on a voluntary basis with the consequent engagement in violent, criminal activity. Not only would the court not find that such a “duty” existed, even should the court consider doing so, First Amendment considerations would dictate otherwise. Such a judicially created duty would, in effect, result in a “prior restraint” of the dissemination of expression protected by the First Amendment. The Plaintiff has not stated there was any particular program that caused his reaction, nor does he indicate how or whether he was “incited” or “goaded into unlawful behavior by a particular call to action.” At 204. The right of a broadcasters “to disseminate should not be inhibited by those members of the public who are particularly sensitive or insensitive.” At 205. Creating a duty to avoid violent programming whereby a “susceptible minor” would view such violence and react unlawfully “would place broadcasters in jeopardy for televising Hamlet, Julius Caesar, Grimm’s Fairy Tales; more contemporary offerings such as *All Quiet On the Western Front*, and even *The Holocaust*, and indeed would render John Wayne a risk not acceptable to any but the boldest broadcasters.” At 206. “[T]he imposition of civil responsibility for damages would have an impact upon and, indeed, act as a restraint on the defendants’ exercise of their asserted first amendment rights.” At 203.

3. In Sakon v. Pepsico, Inc., 553 So.2d 163 (Fla. 1989), the 11th Circuit Court of Appeals certified a question of law to the Florida Supreme Court regarding the duty owed by a television advertiser to its targeted audience of young viewers where, without adequate warnings, a commercial was aired that depicted a dangerous activity in a manner likely to induce a young viewer to imitate the activity. At 164. In this case, the advertiser was a soft-drink manufacturer who broadcast an advertisement showing young people riding their bicycles down a path and up a ramp that was placed on the embankment, eventually landing safely in the water, a maneuver known as “Lake Jumping.” The advertisement was broadcast in such a fashion to have maximum exposure to young viewers. There were no warnings in the commercial that “Lake Jumping” should not be attempted. The Plaintiff, a 14-year-old boy, attempted the stunt and broke his neck. The complaint had been dismissed previously as an impermissible limitation on the exercise of free speech under the First Amendment. Pepsico argued successfully that its advertisement did not fall into one or more of the seven recognized exceptions: (1) obscene material; (2) “fighting words”; (3) defamation; (4) invasion of privacy; (5) disruption of the classroom; (6) incitement of imminent lawless activity; and (7) solicitation of illegal activity. Pepsico argues that there should be no different analysis for speech generally when compared to commercial speech. However, the court observed that “commercial speech, such as that at issue here, is clearly differentiated from noncommercial speech and is afforded only a limited measure of protection.” At 165. “[T]elevision programs, whether news or entertainment, are easily differentiated using common sense from advertisements which merely solicit a commercial transaction or state information relevant thereto.” At 166. The court would not adopt Pepsico’s “absolutist view” of the First Amendment, noting there is nothing that would prevent a state from recognizing a cause of action for false, deceptive, or misleading advertising. Id. Nevertheless, under these facts, a majority of the Florida Supreme Court found that Pepsico was not legally liable. The product being advertised—a soft drink—had nothing to do with the Lake Jumping activity. It didn’t encourage others to engage in Lake Jumping; rather, it encouraged viewers to drink its product. Sakon’s accident was not a foreseeable consequence of Pepsico’s advertisement. “The logical corollary to recovery in this case would be that advertisers and broadcasters would be subject to liability because children sought to duplicate acts of violence which they saw on television. There would be a total absence of any standard to measure liability.” Id. The commercial did not contain false, misleading, or deceptive advertising. The foreseeability of Sakon’s injury from watching this commercial “was no more real than would be the foreseeability that persons attending the circus would undertake performance of acts done by the entertainers, whether on high wires, playing with animals or swallowing a sword.” At 167. Pepsico had no duty to warn nor was there a breach of any duty owed by the defendant to the plaintiff. Id.
4. Byers v. Edmondson, 712 So.2d 681 (La. App. 1998) runs counter to the other cases preferring free speech protections over the imposition of any standard of care to consumers or viewers of products. The Plaintiff sued, among others, Time Warner, Inc., the makers and distributors of the movie “Natural Born Killers,” after she was shot during a convenience store robbery and left a paraplegic. She alleged that her shooters, who were imitating the characters “Mickey and Mallory” from the movie, had been influenced to go on a crime

spree by this film, which portrayed “individuals who commit such violence as celebrities and heroes...” At 684. The trial court dismissed the claim, but the appellate court found the allegations fell within one of the exceptions to protected free speech (“incitement to imminent lawless activity”) and stated a cause of action for intentional tort against the producers of the movie. The appellate court found that Time Warner owed a duty to the Plaintiff because the movie was marketed without any warning to viewers “of the potential deleterious effects that repeated viewing of the film could have on teenage viewers,” even though Time Warner knew or should have known that repeated viewings of the film might incite some people to commit violent acts. In addition, the film glorified the type of violence visited upon the Plaintiff. In short, there was a duty owed that either required Time Warner not to produce the film in the form in which it was released or to protect her from viewers who would imitate the violent acts or crimes committed by the film’s two main characters. Although usually there must be a “special relationship” established before any such duty is owed, the appellate court found that the film’s producers could be liable for their misfeasance if it is proven at trial that they released a film “which was *intended* to cause its viewers to imitate the violent imagery.” At 687 (emphasis original). If the intent can be proven, then the injuries to the Plaintiff were “imminently foreseeable, justifying the imposition of a duty upon the Warner defendants liable for the damages inflicted on innocent third parties...by viewers of the film imitating the violent imagery depicted in the film.” At 688. The appellate court noted that it was not finding or imposing such a duty, adding that the plaintiff’s complaint was sufficiently stated as to require further attention at the trial court level. The Plaintiff alleged the Warner defendants acted intentionally. But she also alleged that Warner’s actions constituted an “incitement to imminent lawless activity,” speech that is not protected by the First Amendment. At 689. The court cautioned that “mere foreseeability or knowledge that the [movie] might be misused for a criminal purpose is not sufficient for liability. Proof of intent necessary for liability in cases such as the instant one will be remote and even rare, but at this stage of the proceeding we find that Byers’ cause of action is not barred by the First Amendment.” At 691-92.

MILITARY RECRUITERS AND EDUCATIONAL RECORDS

The expansive No Child Left Behind Act of 2001 (NCLB) has a number of interesting provisions that appear in isolation throughout the federal education law. Sec. 9528 is one such example. The intent is to provide greater access to high school students’ names, addresses and telephone numbers by recruiters for the armed forces. This provision amends the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g as implemented through 34 CFR Part 99, which is designed to protect the confidentiality of “personally identifiable information” with respect to a student by preventing disclosure to third parties without first obtaining the written permission of the parent or

the student, if the student is at least 18 years of age.⁶ “Directory information” can be disclosed to third parties without prior consent.

“Directory information” is information “that would not generally be considered harmful or an invasion of privacy if disclosed.” §99.3 “Personally identifiable information” is “information that would make the student’s identity easily traceable.” §99.3. This would include “[t]he student’s name...[or] the address of the student or student’s family.” Oddly enough, “directory information” includes “the student’s name, address, [and] telephone listing...” *Id.*⁷ The NCLB requires public school districts and private schools receiving federal financial assistance under the NCLB to “provide military recruiters the same access to secondary school students as is provided generally to post secondary educational institutions or to prospective employers of those students.” However, a student or the student’s parent may request that this information “not be released without prior written parental consent.” Affected schools are to notify parents and students of this option.⁸

The Family Policy Compliance Office (FPCO) of the U.S. Department of Education indicated that similar language was included in the National Defense Authorization Act for Fiscal Year 2002. “Typically, recruiters are requesting information on junior and senior high school students that will be used for recruiting purposes and college scholarships offered by the military,” the FPCO wrote in a memo released on April 10, 2002, explaining changes to FERPA and the Protection of Pupil Rights Act (PPRA) occasioned by the NCLB.

During the 2000 session of the Indiana General Assembly, the Access to High School Student Information by Military Organizations Act was passed (P.L. 81-2000, adding I.C. 20-10.1-29 *et seq.* to the Indiana Code). Unlike the NCLB, the Indiana law is directed only to public schools. It declares that a student’s name, address, and telephone number (if listed or otherwise published) will be considered “directory information,” and that military recruiters are entitled to access to the high school campus and the “directory information” in order to inform “students of educational and career opportunities available in the armed forces....” This was subject to the right of the student or the student’s parent to submit “a signed, written request to a high school at the end of the student’s sophomore year that indicates the student or the parent...does not want the student’s

⁶There are a number of exceptions to the general requirement that written consent must be first obtained. These are found at 34 CFR §99.31(a).

⁷This cross-over of identical items in the definitions for “directory information” and “personally identifiable information” has caused problems. See, for example, Palmyra Area Sch. Dist. v. Palmyra Area Education Assoc., 644 A.2d 267 (Pa. Cmwlth. 1994), where the school district, by policy, declared names and addresses of parents and guardians to be “personally identifiable information” and not “directory,” but the bargaining unit used a mailing list obtained from teachers to send copies of its newsletter to the parents and guardians.

⁸These requirements do not apply to a private secondary school “that maintains a religious objection to service in the Armed Forces if the objection is verifiable through the corporate or other organizational documents or materials of that school.”

directory information to be provided” to a military recruiter. A school must notify parents and students of the this option and comply with this request.

Although the state law attempted to define “directory information” and permit greater access, public schools expressed concern that the state law did not satisfy the requirements of FERPA. At issue was 34 CFR §99.37.

Under §99.37, a public school may disclose “directory information” without first obtaining written and dated permission from a parent or eligible student; however, the public school must first provide public notice to parents of students in attendance at the public school or eligible students in attendance at the public school of the following:

- The types of “personally identifiable information” the public school has designated as “directory information” (in this case, the student’s name, address, and telephone number);
- The right of a parent or eligible student to refuse to let the public school release such “directory information”; and
- The period of time within which a parent or eligible student has to notify the public school, in writing, that he or she does not authorize the release of such information about the student.

Although the Indiana law, at I.C. 20-10.1-29-3(b), has a provision similar to §99.37(a)(2),(3) that permits a parent, guardian, or custodian of a student to submit to a public high school a signed, written request at the end of a student’s sophomore year that such “student directory information” not be released to military recruiters, FERPA requires that notice of this right—which is broader than that provided by the Indiana law—be provided in advance of releasing such information without regard to what year in school the student is enrolled or has completed. The NCLB language does not contain the “sophomore year” restriction either.⁹

The effect of the NCLB language would be that a student’s name, address, and telephone listing are, by law and for this purpose, “directory information,” and that parents or students who do not wish to have such “directory information” provided to military recruiters will need to indicate such a reservation in writing. This raises additional questions.

It is unlikely that an affected school will be able to have two distinct policies, with one policy complying with the NCLB and making available this information to military recruiters and

⁹Written consent permitting disclosure must be dated, specify the records that may be disclosed, the purpose of the disclosure, and the identity of the party or class of parties to whom the disclosure may be made. §99.30(a),(b). However, the right to refuse disclosure of “directory information” does not require the same specifications. The affected school is to notify parents and students of the right to refuse to permit disclosure and must indicate the “period of time within which a parent or eligible student has to notify the agency...in writing that he or she does not want any or all of those types of information about the student designated as directory information.” §99.37(a)(2), (3).

institutions of higher education while maintaining a separate policy that declares such information “personally identifiable information” and refusing to make it available to all others. If recruiters from the armed forces are to have such access, how can those opposed to military service be denied the same access? Past First Amendment cases may be instructive, although these cases deal more with access to a limited public forum rather than access to certain information.

In San Diego Committee Against Registration and the Draft v. Grossmont Union High School Dist., 790 F.2d 1471 (9th Cir. 1986), the school board was found to have violated the First Amendment when it excluded from its high school newspapers advertisements from the plaintiffs, an anti-draft organization involved in promoting alternatives to compulsory military service. The school board did accept advertisements from military recruiters. The court noted that the school board did not have to accept advertisements from any source; but once it did, it created a “limited public forum” that would then be open generally to the public. “Speech” can be commercial, political, artistic, or other types. The school board’s policy was to permit members of the general public to advertise in the high school newspaper “as long as their speech consists of advertisements offering goods, services, or vocational opportunities to students. Because the newspapers are open to the entire public for discussion of these limited topics, the Board has also created a limited public forum...” 790 F.2d at 1476. Commercial speech, the court added at 1478, can also have elements of political speech as well. The school board could not engage in content-based or viewpoint-based discrimination, nor could the school board present only one side of a highly controversial issue. At 1481.

Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989) involved a school board that prohibited an organization of peace activists from participating in the school district’s “career day,” although military recruiters were permitted to do so. The court found this violated the First Amendment, adding that “the government may enforce content based restrictions only if necessary to serve a compelling state interest and narrowly tailored to serve that interest.” 888 F.2d at 1318. These restrictions must be reasonable in time, place, and manner. The total ban of the group—rather than limiting what it had to say—was what the court found unreasonable. “[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject... [O]nce the School Board determines that certain speech is appropriate for its students, it may not discriminate between speakers who will speak on the topic merely because it disagrees with their views.” At 1324.

In Clergy and Laity Concerned v. Chicago Board of Education, 586 F. Supp. 1408 (N.D. Ill. 1984), the school board permitted military recruiters to visit schools but denied the same access to antiwar activists. Even though schools are not traditional open forums where viewpoint discrimination is *per se* unconstitutional, many cases have held that the state’s obligation of viewpoint neutrality applies to discriminatory access restrictions imposed in public schools without justification based upon a substantial state or governmental interest. 586 F.Supp. at 1412, 1413. “When a restriction has the effect of favoring the expression of a particular point of view, the First Amendment is plainly offended, and such a restriction is subject to strict scrutiny.” At 1411.

THE PARTICIPATION RULE: STUDENT-ATHLETES AND OUT-OF-SEASON SPORTS

The Indiana Case Review Panel¹⁰ recently entertained two cases of first impression involving the Indiana High School Athletic Association's "Participation Rule," Rule C-15-2.2. The "Participation Rule," also known informally as the "60 percent rule," is directed at team sports (baseball, basketball, football, soccer, softball, and volleyball). The rule addresses the number of players from a member high school team who can also participate on a non-school team out of season (this does not apply to summer). Soccer is limited to six members from the same team, while baseball is limited to five, basketball to four, football to six, softball to five, and volleyball to three. Participation has to be during non-school time; fees (if any) cannot be paid by a member school; students cannot receive instruction from their member school coaches; member schools cannot organize, supervise, or operate athletic practices; and member schools cannot provide school-owned uniforms for use by students in non-school contests.

The two disputes before the CRP (In the Matter of A.D., **CRP Cause No. 012402-16**, and In the Matter of R.S., **CRP Cause No. 013002-17**) involved two students from the same high school soccer team who wanted to play for a non-school soccer team. Unfortunately, if both players were permitted to play for this team, there would be eight players from the same high school team, a team that was already one of the better soccer teams in Indiana. The rationale for the rule included ensuring that students have the opportunity to engage voluntarily in non-school sponsored sports without interfering with academic development. The IHSAA specifically wants to discourage "the exploitation of student athletes by over-zealous individuals and organizations who attempt to impose an obligation on the student to participate in their programs at any cost." The IHSAA noted that there has been an increase in the "commercialism of high school athletes," where prospective students are show-cased in a "market place" where they can display their "athletic wares." This, in turn, has a denigrating effect upon the high school experience, undermines confidence in the high school coaches, and "gives the students an exaggerated notion of the importance of their own athletic prowess rather than reinforcing the idea that athletic ability is an endowed talent which students should use for the pleasure and satisfaction that they may derive from athletic competition."¹¹

The coach of the soccer club, an assistant soccer coach from an Indianapolis university, acknowledged that R.S. would have made the team but for the Participation Rule. A.D. had not tried out for the team due to an automobile accident. R.S. had previously played for the club team but he was then enrolled in a different public school. His family had moved into this public school

¹⁰The Case Review Panel (CRP) was created by the Indiana General Assembly through P.L. 15-2000 to review adverse student eligibility decisions of the Indiana High School Athletic Association (IHSAA) when a parent or guardian has requested such review. The statutory provisions are found at I.C. 20-5-63 *et seq.* Also see "The IHSAA: 'Fair Play,' Student Eligibility, and the Case Review Panel," **Quarterly Report** January-March 2000.

¹¹IHSAA's By-Laws for the 2001-2002 School Year, Rule 15.

district for reasons later accepted by the CRP as justifying the application of the Hardship Rule (see **Updates**, *infra*, for discussion of the Hardship Rule). A.D. did not state a case that would have permitted his playing for the non-school club. Even in R.S.'s situation, the CRP permitted him to join the soccer club, but only six members from the high school could play in any given game. One of them would have to sit out a game. This upheld the ideals of the Participation Rule while applying the Hardship Rule.

Testimony during the two hearings indicated that high school students want to participate on certain soccer clubs as a means of “being seen” by potential college recruiters. In Indiana, the high school soccer season corresponds roughly with the college season, which prevents college coaches from seeing high school students in action as much as they can when the soccer clubs are competing (essentially, off-season). There was also conflicting testimony as to how many other states have similar “Participation Rules” that attempt to dictate non-school participation. R.S. and A.D. testified that there were only three states. The IHSAA conceded that a majority of the states do not have such rules, but there may be between 15-20 states that do so. The CRP indicated in its written decisions that the number of states that did so or did not do so was immaterial. The IHSAA stated a sufficient rational basis for its rule.¹²

The exact number of states is not known. However, there are at least four reported cases addressing this issue from four different states (Texas, New York, Colorado, and Ohio). Surprisingly, three of the four cases involve non-school soccer clubs. In each case, the courts determined that there existed a rational basis for the limitations on outside athletic competition.

1. University Interscholastic League v. North Dallas Chamber of Commerce Soccer Assoc., 693 S.W.2d 513 (Tex. App. 1985) involved a rule of the University Interscholastic League (UIL) that declares ineligible public high school contestants who have previously played on their high school varsity soccer teams in the event they play or practice with a non-school soccer team between the first day of school and November 12, the start of the interscholastic soccer season in Texas. UIL is an organization similar to the IHSAA. There are no such restrictions after the soccer season ends (usually around February 2nd) or during the summer. Various private soccer clubs sought and obtained an injunction, preventing the UIL from enforcing its rule. The Texas Court of Appeals reversed, noting that the rule applies only to those students likely to make varsity squads. These same students are the ones “most likely to be subjected to coaching pressure, one of the evils that the rule is designed to prevent.” 693 S.W.2d at 517. The rule also gives the affected students more time to pursue other activities during the two-month period prior to the beginning of the soccer season. This, in turn, promotes “a better, more well-rounded, more academically oriented education.” *Id.* In addition, the rule also bears a reasonable relationship to the objective of “preventing a competitive advantage to the school teams whose members also play club soccer. There is evidence that additional organized practice under competent soccer club coaches will increase the ability of the individuals participating.” At 517-18. These

¹²All decisions of the CRP are available on-line at www.doe.state.in.us/legal/.

objectives (prevention of competitive advantage, reduction of coaching pressure, and encouragement of students to participate in other school activities) “are legitimate state objectives, and the classification drawn by the rule are reasonable in light of its objectives.” At 518.

2. In the Matter of Eastern New York Soccer Assoc. v. New York State Public High School Athletic Assoc., 490 N.E.2d 538 (N.Y. 1986), also involved a challenge by private soccer clubs and student athletes, attempting to prevent the enforcement of a rule that prevented participation on non-school soccer teams once interscholastic competition began. A student who did so would become ineligible. The court was not persuaded that the rule interfered with a parent’s right to control the upbringing of the parent’s child, including the right to determine whether a child can physically and academically contend with simultaneous participation in school and non-school competition. The rule is rational and does not violate any fundamental constitutional right of family autonomy.
3. In Zuments v. Colorado High School Activities Assoc., 737 P.2d 1113 (Colo. App. 1987), five student-athletes challenged a rule that proscribed “outside competition.” They sought to participate in interscholastic swimming competition as well as non-school competition. The appellate court disagreed that the rule implicated any constitutional rights to freedom of association, due process, and equal protection. Applying a “rational basis” test, the court found the “outside competition” rule (1) assured fairness to other students who may wish to participate on the school team, (2) provided balance between school teams, (3) provided balance with respect to the individual student’s participation in athletics, (4) promoted team loyalty, and (5) ensured that student-athletes do not endanger their well-being by over-extensive athletic competition and stress. “Under the outside competition rule, student athletes are not prohibited from associating and practicing with other teams. The rule merely requires that during a high school sport’s season, students must choose between competing on their school team or competing on non-school teams. We do not find this to be an impermissible burden on their constitutional right of freedom of association.” 737 P.2d at 1116.
4. Burrows et al. v. Ohio High School Athletic Assoc., 891 F.2d 122 (6th Cir. 1989) also involved student athletes and independent soccer leagues. They sued seeking an injunction after the OHSAA, an organization similar to the IHSAA, amended a by-law that would prevent students from participating on their high school team’s fall soccer teams if they played for an independent team the preceding spring. The rationale for the amendment (and similar regulations directed toward “team oriented” sports such as football and basketball but not individual sports, such as golf, tennis, swimming, and track and field) was to prevent the unfair development of “power squads” (where team members played together as a team year round) and to promote more involvement in other school activities, including other sports. There is no constitutional right to play interscholastic soccer, the court noted at 125. Accordingly, the court rejected the plaintiffs’ “right to association” and “equal protection” arguments. There was a rational basis for the classification of student-athletes into team and individual sports. Further, there were articulated reasons for the implementation of the rule.

COURT JESTERS: PORK-NOY'S COMPLAINT

SPAM is one of the great mysteries of life. The original “mystery meat,” over five billion cans have been sold since SPAM hit the market in 1937.

One of the great mysteries of law is why SPAM sued the Muppets for infringement and dilution of its trademark.

In Hormel Foods Corp. v. Jim Henson Productions, Inc., 73 F.3d 497 (2nd Cir. 1996), the makers of SPAM sued to enjoin the Muppets from releasing its film, *Muppet Treasure Island*, with a character named “Spa’am,” the high priest of a tribe of wild boars that worships Miss Piggy as its Queen Sha Ka La Ka La. The court (the real one, not Miss Piggy’s) acknowledged that the “similarity between the name ‘Spa’am’ and Hormel’s mark is not accidental,” adding that “Henson hopes to poke a little fun at Hormel’s famous luncheon meat by associating its processed, gelatinous block with a humorously wild beast.” 73 F.3d at 501.

Hormel is “not amused. They worry that sales of SPAM will drop off if it is linked with ‘evil in porcine form.’” The court found this to be somewhat Fozzie thinking. “Spa’am, however, is not the boarish Beelzebub that Hormel seems to fear.” Expert testimony revealed that “Spa’am is a comic character who ‘seems childish rather than evil.’ [Citation omitted.] Although he is humorously threatening in his first appearance, he comes to befriend the Muppets and helps them escape from the film’s villain, Long John Silver.”¹³

Hormel was not to be deterred. It expressed concern “that even comic association with an unclean ‘grotesque’ boar will question the purity and high quality of its meat product.” Id.

The court questioned whether Hormel was remotely aware of the generally held impression that SPAM is...well...the source of humor for many pundits, even if the source of its “meat” remains mysterious.

[B]y now Hormel should be inured to any such ridicule. Although SPAM is in fact made from pork shoulder and ham meat, and the name itself supposedly is a portmanteau word for spiced ham, countless jokes have played off the public’s unfounded suspicion that SPAM is a product of less than savory ingredients.

Id. The court decided to relate a few SPAM anecdotes itself.

¹³The restaurant chain is not a party to this suit. Regrettably the court’s decision inadvertently reveals the plot of the movie, for those who have not seen it yet. By the way, Darth Vader is Luke’s father.

For example, in one episode of the television cartoon *Duckman*, Duckman is shown discovering “the secret ingredient to SPAM” as he looks on at “Murray’s Incontinent Camel Farm.” In a recent newspaper column, it was noted that “[I]n one little can, Spam contains the five major food groups: Snouts. Ears. Feet. Tails. Brains.” Mike Thomas, *Ready? Set? No!*, The Orlando Sentinel, June 25, 1995, at 30. In view of the humorous takeoffs such as these, one might think Hormel would welcome the association with a genuine source of pork.

*Id.*¹⁴ Hormel also worried that Henson’s Muppet merchandising machine may result in confusion between “Spa’am” and Hormel’s character, “SPAM-Man.”¹⁵ The judges thought this unlikely. “[T]he Muppets are familiar to television and motion picture audiences, and they are [in the words of the federal district court] ‘well known for parodies of brand names, trademarks, television programs, fictional characters, and celebrities,’” adding that people “who enjoy the Muppets are familiar with their brand of humor and are unlikely to think that the Muppets are sponsored by the products and celebrities who are the subject of their jokes.” At 502.

“Henson’s parody is not particularly subtle,” the court wrote at 503. The use of the name “Spa’am” is “simply another in a long line of Muppet lampoons.... [People] are likely to see the name ‘Spa’am’ as the joke it was intended to be.”

Hormel was not hog-wild about the decision, but it didn’t process the matter any further.¹⁶

¹⁴Literary references to SPAM abound, with none of them flattering. Even horror novelist Stephen King can’t resist. In a recent short story, the character states flatly: “‘Like mother used to make’ is what people say, but it can’t be my mother they say it about. My Ma couldn’t fry Spam.” “Everything’s Eventual,” *Everything’s Eventual*, Stephen King, Scribner, p. 218 (2002). Also, “Spam,” in computer language, refers to unwanted e-mail commercial messages (“junk e-mail”).

¹⁵“SPAM-Man, unheard of in these parts, is described as “a giant can of SPAM with arms and legs.” At 502. There is no indication whether this “gelatinous block” carries a congealed weapon.

¹⁶Hormel has decided that its product might have some “image” problems. In mid-June of 2002, Hormel had its grand opening in Austin, Minnesota, of its SPAM Museum, featuring a “SPAM Jam” attended by various celebrities and featuring the music of Booker T. and MGs, whose big hit “Green Onions” probably would go well with SPAM. There is no word whether SPAM-Man will be in attendance.

QUOTABLE . . .

People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

Circuit Judge Richard A. Posner in American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001), *cert. den.*, 122 S. Ct. 462 (2001), reversing the federal district court and enjoining a city ordinance aimed at preventing children from playing video games perceived as violent. The case is discussed in "Video Games, Popular Culture, and School Violence," *supra*.

UPDATES

Student-Athletes and School Transfers: Restitution, Hardship, Contempt of Court, and Attorney Fees

Quarterly Report April-June: 2001 reported on the continuing legal dispute between the Indiana High School Athletic Association (IHSAA) and Jessah Martin, a dispute that spawned four separate appeals to the Indiana Court of Appeals (with one later withdrawn). The dispute began when Martin left her parents' home and moved in with an assistant coach due to marked discord in the family. She sought counseling at a treatment facility. The treatment facility advised that she not return to the public school she had attended because of the turmoil and anxiety that was causing her. She enrolled in a nearby parochial school and sought full eligibility to play basketball. The public school officially opposed her transfer even though her coaches supported it. Described as a "very private and self-conscious" person, the "rumors, innuendoes, and embarrassing questions from other students" may have resulted in Post-Traumatic Stress Disorder. IHSAA v. Martin, 731 N.E.2d 1, 10 (Ind. App. 2000), *reh. den.*, *trans. den.* The IHSAA denied her full eligibility, applying its Transfer Rule, noting that her change of schools was not accompanied by a change in her family's residence.¹⁷ The IHSAA also determined that the facts in her case—which were not contradicted—did not support an application of the IHSAA's Hardship Rule.¹⁸

¹⁷See "IHSAA: 'Fair Play,' Student Eligibility, and the Case Review Panel," **Quarterly Report** January-March: 2000.

¹⁸The Hardship Rule allows the IHSAA to set aside the effect of any of its by-laws where strict enforcement in the particular case would not serve to accomplish the purpose of a particular by-law; the spirit of the by-law has not been violated; and there exists evidence demonstrating an undue hardship would result if the by-law were enforced.

Martin obtained an injunction against the IHSAA, but the parochial school, concerned that the IHSAA would apply its Restitution Rule against it, would not let her play.¹⁹ The court's injunction read in relevant part:

[T]emporarily ENJOINED AND RESTRAINED [IHSAA] from attempting to enforce, implement or carry out in any manner, directly or indirectly, the decision of the ... [IHSAA] to the effect that plaintiff, Jessah Martin, is ineligible to participate in varsity interscholastic athletics at and on behalf of [the parochial school] for a period commencing with her enrollment at [the parochial school].

Martin petitioned the trial court for a finding of contempt by the IHSAA because its threat of applying the Restitution Rule effectively denied her the injunctive relief the trial court had granted her. The IHSAA countered that the court's injunction did not specifically require it to waive the Restitution Rule. The trial court found the IHSAA in contempt, assessed a \$500-a-day fine, and eventually awarded attorney fees. The Indiana Court of Appeals upheld the trial court. On April 10, 2002, in two separate opinions, the Indiana Supreme Court reversed.

1. In IHSAA v. Martin, 765 N.E.2d 1238 (Ind. 2002), the majority of the Supreme Court agreed that the injunction was not so clear and certain in its language that there would be no question as to what the IHSAA must do or not do. The order made no mention of the Restitution Rule, much less indicate that it had to waive the rule. There is no existing legal precedence that would have put the IHSAA on notice that a court injunction would, by its very nature, enjoin application of the Restitution Rule. Further, although the trial court and the appellate court attempted to distinguish their respective holdings as not ruling on the validity of the Restitution Rule, the effect was still the same. No matter how the court action is styled, the IHSAA is being required to refrain from enforcing the Restitution Rule. "An attempt to enjoin enforcement of the restitution rule under a contempt action is no more permissible than a direct attack on the rule. Both were prohibited by the Reyes and Carlberg decisions." At 1242. Accordingly, the contempt finding was reversed and the fine vacated. There was a separate concurring opinion, agreeing the language of the injunction did not put the IHSAA on notice that it was not to enforce its Restitution Rule. However, it was the parochial school and not the IHSAA that prevented Martin from playing. The contempt threat directed to the IHSAA may have been misdirected. Two other of the five justices dissented, primarily because there is disagreement as to whether the Carlberg and Reyes decisions were correctly decided. The dissent also noted that the U.S. Supreme Court's decision in Brentwood Academy v. Tenn. Secondary Sch. Athletic Assoc., 531 U.S. 288, 121 S. Ct. 924 (2001), decided after Carlberg and Reyes, should have been considered in determining whether the Hardship Rule and Restitution Rule were applied unlawfully or were invalid in this case.

¹⁹The Restitution Rule requires a member school, *inter alia*, to forfeit victories, gate receipts, and trophies if a student participates while under a court order that is later vacated or overturned. The Indiana Supreme Court upheld the legality of the Restitution Rule in IHSAA v. Reyes, 694 N.E.2d 249 (Ind. 1997) and IHSAA v. Carlberg, 694 N.E.2d 222 (Ind. 1997).

2. In IHSAA v. Martin, 765 N.E.2d 1244 (Ind. 2002), decided the same day, the justices were unanimous that Martin is not entitled to attorney fees because the contempt finding by the trial court, upon which the attorney fees were based, was reversed by the earlier decision. These two decisions seemingly conclude this dispute.

***Miranda* Warnings and School Security**

In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), the U.S. Supreme Court established certain warnings that law enforcement officers must provide before questioning a suspect who is “in custody” or is deprived of his freedom in a significant way so as to believe he is “in custody” if any statements derived from this “custodial interrogation” are to be admissible in evidence in a subsequent criminal proceeding. “Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” Miranda, 384 U.S. at 444, 86 S. Ct. at 1612. Whether school-based questioning is a “custodial interrogation” that would require the giving of Miranda warnings prior to such interrogation can be affected by a number of factors, including:

1. Are school officials acting in conjunction with or at the behest of a law enforcement agency?
2. Is the student “in custody” or otherwise deprived of his freedom in the sense that he believed himself to be “in custody”?
3. Is the questioning directed at possible violations of school rules or at potential criminal activity?
4. If school security personnel are involved, do they have the same authority as municipal law enforcement personnel such that the roles are “constitutionally indistinguishable”?

Indiana has had two cases involving attempts by students to suppress statements made to school personnel that were later used in adjudication of delinquencies. See **Quarterly Report** July-September: 1999. In both cases, the Indiana Court of Appeals sustained the trial court’s denial of the students’ motions to suppress, finding that school officials had reasonable suspicions to conduct the searches and the concomitant questioning did not require the prior giving of Miranda warnings because the students were not “in custody” and the school officials were not “law enforcement.” There continue to be a number of similar disputes around the country.

1. In Re R.H., 791 A.2d 331 (Pa. 2002) involved a student who sought to suppress statements he made to a school police officer, claiming he should have received Miranda warnings. The trial court denied his motion and adjudicated him a delinquent for his participation in a break-in and the vandalization of a public high school classroom. A divided Pennsylvania Supreme Court reversed the delinquency adjudication, finding that the student was entitled to Miranda warnings prior to be questioned by the school police officer. R.H. was one of several students suspected of participating in the break-in and subsequent vandalizing of the classroom. The police officer escorted R.H. to a room and asked him to remove his shoe for comparison with a shoe print left in fire extinguisher residue. He then kept the shoe “as

evidence” and began to question R.H. about the break-in. R.H. was not allowed to leave the room. The interrogation lasted 25 minutes. During this interrogation, R.H. admitted his involvement. The school then called the municipal police department and the student’s mother. He was questioned again by the municipal police and then allowed to leave with his mother. He later unsuccessfully sought to suppress his statement to the school police officer, arguing that the school police are “constitutionally indistinguishable” from municipal police because they have the same powers while on school property, they wear uniforms, and they display badges, indicia of this authority. Because of this, he asserted, his Fifth Amendment privilege against self-incrimination was violated when he wasn’t provided with Miranda warnings prior to the “custodial interrogation.” Although the trial court and the appellate court disagreed, the Supreme Court did agree the statement should have been suppressed at trial. A person is considered “in custody” when he is physically denied freedom of action in any significant way or reasonably believes his freedom of action or movement is restricted by the interrogation. There is no dispute that R.H. was in custody. The principal question is whether a school police officer is a “law enforcement officer” as contemplated by Miranda. In Pennsylvania, a common pleas court may appoint school police officers to serve in school districts within the court’s jurisdiction. Such appointed police officers exercise the same powers on school property as the municipal police, including the right to arrest, issue citations, and detain individuals until local law enforcement is notified. The school police officer in this situation had received such an appointment. The judicial appointment elevated the constitutional status of the school police officer from a school official (where Miranda warnings would not be required) to a “law enforcement officer” with the authority to exercise law enforcement powers. The wearing of indicia of law enforcement (badges and uniforms) further support this perception, as well as the fact that the charges and punishment were not pursuant to school rules but the criminal code. R.H. should have received his Miranda warning prior to the interrogation. There were two separate concurring opinions and two separate dissenting opinions.

2. Brian A. v. Stroudsburg Area Sch. Dist., 141 F.Supp.2d 502 (M.D. Pa. 2001) also involved a Pennsylvania dispute, this time a high school sophomore who was expelled for making terroristic threats. (He authored a note that read: “There’s a bomb in this school. (Bang Bang!!) He sued, claiming deprivation of constitutional rights. The note was found by a teacher. The student was questioned by the assistant principal and a school police officer. The student denied writing the note. At some point, the assistant principal left the room, leaving the student alone with the school police officer. Eventually the student admitted to the school police officer that he wrote the note. He also offered that he was on probation in another state for blowing up a shed on school property. When the assistant principal re-entered the room, the student repeated his confession. The student was suspended from school and eventually expelled permanently when his parents would not withdraw him voluntarily from the school district. He sued, claiming, in part, a violation of his Fifth Amendment right against self-incrimination. The federal district court did not agree, finding that ‘Under the federal constitution, students facing disciplinary action in public schools are not entitled to *Miranda* warnings.’” 141 F.Supp.2d at 511.

3. In the Matter of L.A., 21 P.3d 952 (Kan. 2001) began when a school administrator received a tip via the local Crime Stopper that the 16-year-old L.A. had contraband in the headband of his baseball cap. The administrator had the school security guard escort L.A. to her office, along with his baseball cap and his book bag. The administrator advised L.A. of the tip she had received. He denied having any contraband. The administrator called L.A.’s mother, who consented to a search and remained on the telephone as L.A. was searched. (This was apparently one of at least three separate drug incidents involving L.A., all apparently occurring within a relatively short period of time.) Marijuana was found in his baseball cap, while pills were found in his coat pocket and book bag. L.A.’s mother was asked to come to the school. Local law enforcement was contacted. After a deputy sheriff and L.A.’s mother arrived, L.A. was read his Miranda rights. L.A. admitted to the deputy that the drugs were his. He was adjudicated a juvenile offender. L.A. moved to suppress the evidence, claiming the school officials should have provided him his Miranda rights, and their failure to do so tainted his later post-Miranda confession to the deputy sheriff. However, the court found that the search was reasonable in scope given the school setting. New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985). School officials need have only a reasonable suspicion that a student is violating a school rule or a law—and not probable cause—prior to a search such as the one L.A. was subjected to. In this case, the search was justified at its inception. “Information provided by an informant can serve as a basis for a reasonable suspicion that a student may be engaged in illegal activity.” 21 P.3d at 959. The search was reasonable under the Fourth Amendment. The court also disagreed that the questioning by the administrator and the security guard was a “custodial interrogation by a law enforcement officer” that would have required the giving of Miranda warnings. The security guard was employed by the school and not by law enforcement. His duties were all related to school functions. The questioning related to an investigation of possible violations of school policy. As such, the security guard was not required to provide L.A. Miranda warnings. Since there was no requirement to do so, the interrogation by school officials did not render inadmissible his subsequent confession to the deputy sheriff.

Date: _____

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Indiana Department of Education

The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at [<www.doe.state.in.us/legal/>](http://www.doe.state.in.us/legal/).

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