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Citation:

Ilana Lubin, Challenging Standard Concepts of Tradition, Science and Technology in 2006: Why Laws Prohibiting the Sale of Violent Video Games to Minors Should Be Ultimately Upheld, 13 *Cardozo J.L. & Gender* 173 (2006)

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Thu Feb 7 21:41:27 2019

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CHALLENGING STANDARD CONCEPTIONS OF TRADITION, SCIENCE AND TECHNOLOGY IN 2006: WHY LAWS PROHIBITING THE SALE OF VIOLENT VIDEO GAMES TO MINORS SHOULD BE ULTIMATELY UPHELD

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I. INTRODUCTION

Retail video games represent over \$10 billion in sales and appeal primarily to the age fourteen to thirty-four male demographic.¹ A 2005, in classroom, survey of 657 students in grades four through twelve students in their classrooms, representing both public and private schools in rural, suburban, and urban schools reported that 87% of eight to seventeen year old children play video games at home. Of these children, 70% report playing “M-rated” games, a marking determined by the Entertainment Software Rating Board to indicate that a game is recommended for ages seventeen and older due to mature sexual themes and intense violence.² Almost two-thirds, 61%, of children report owning their own “M-rated” games, up from 56% in 2003, while 45% of children owning “M-rated” games report that they purchased them themselves, a statistic that went up from 37% in 2003. Additionally, 60% of children, 75% of boys and 35% of girls, list at least one “M-rated” game as their favorite.³ Thus, it is not surprising that of the twenty-seven rated games among the thirty most popular games ranked on the popular website gamespot.com, thirteen are rated “M,” including games by the names of “F.E.A.R.,” “Sniper Elite,” “Grand Theft Auto III,” “Grand Theft Auto San Andreas,” and “Brothers in Arms: Earned in Blood.” In fact, the fourth most popular game due for release in Spring 2006, “Halo 3,” is the latest among a genre of games known as “first person shooter game[s].”⁴

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¹ Mark Friedler, *Playing the Video Game Consumer*, Nov. 3, 2004, <http://www.imediainconnection.com/global/5728.asp?ref=http://www.imediainconnection.com/content/4525.asp> (last visited Mar. 9, 2006).

² National Institute on Media and Family, *MediaWise Video Game Report Card 6*, Nov. 29, 2005, available at http://www.mediafamily.org/research/report_vgrc_2005.shtml.

³ *Id.*

⁴ GAMESPOT Most Popular Games, http://www.gamespot.com/misc/top100_pop.html?tag=gs_inav_toppop (last visited Mar. 9, 2006). See

As of February 2006, Washington, California, Michigan, and Illinois have passed laws banning the sale of “violent” video games to minors. However, only those passed in California and Michigan remain standing, albeit prohibited from enforcement due to preliminary injunctions.⁵ According to media law expert Cathy Kirkman, the laws’ advocates face an “uphill battle,” which includes proving that violent video games have an adverse effect on developing children.⁶ Nonetheless, Kirkman concedes that similar to litigants who claimed they had been hurt by smoking, “advocates can keep trying for regulations as the research improves.”⁷ Thus, proponents of violent video game legislation remain persistent. Despite recent setbacks, similar legislation was introduced in the Florida State Senate, while both Utah and Iowa are reported to be contemplating similar legislation.⁸ In fact, the Wall Street Journal reported “about half of the 50 states are considering proposals that would restrict sales of violent video games to minors or levy fines on businesses that sell the games to children.”⁹

Moreover, on December 16, 2005, U.S. Senators Hillary Clinton, Joseph Lieberman, and Evan Bayh held a press conference regarding legislation that they plan to introduce at the federal level. Their proposed legislation essentially codifies the video game industry’s voluntary rating system and fines retailers who sell games rated “mature,” “adults only,” or “rating pending” to children under 17.¹⁰ The federal legislation is a timely follow-up to the recently approved Children and Media Research Advancement Act (CAMRA).¹¹ CAMRA proposes to allocate \$90 million to enable the National Institute of Child Health and Human Development “to examine the role and impact of electronic media in children’s and adolescents’ cognitive, social, emotional, physical, and behavioral development; and provide for a report to Congress containing the empirical evidence and other

also Team Xbox, <http://games.teamxbox.com/xbox-360/1353/Halo-3/> (last visited Mar. 9, 2006).

⁵ Associated Press, *Illinois Governor Sets Sights on Violent Video Games*, Dec. 16, 2004, available at <http://www.firstamendmentcenter.org/news.aspx?id=14556>; Brendan Sinclair, *Illinois Game Laws Overturned*, GAMESPOT, (2005), available at <http://www.gamespot.com/news/6140739.html>; Lynda Gledhill, *Judge Blocks Ban on Sale of Violent Video Games to Minors*, S.F. CHRON., available at

<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/23/MNG6DGCJ9J1.DTL&hw=violent+video+games+gledhill&sn=002&sc=866>

⁶ Nicole C. Wong, *Law Curbing Violent Video Games is Blocked*, MERCURY NEWS, Dec. 23, 2005, available at <http://www.mercurynews.com/mld/mercurynews/news/13472764.htm>.

⁷ *Id.*

⁸ Lisa Baertlein, *Florida Bill Takes Aim at Violent Video Games*, PC MAGAZINE, Oct. 27, 2005, available at <http://www.ferrago.com/portal.cluster/561434>.

⁹ Christopher Conkey, *Court Lifts Curbs on Kids Buying Violent Video Games*, THE WALL STREET JOURNAL ONLINE, Dec. 17, 2005, available at

http://online.wsj.com/public/article/SB113478739471725454-5vhZ_684mXx2q9iQr9idz1jBlzY_20061217.html?mod=blogs.

¹⁰ *Id.*

¹¹ James Brightman, *CDC to Examine Effect of Video Games on Children*, GAMEDAILYBIZ, <http://biz.gamedaily.com/industry/feature/bizarticles.asp?id=12069> (last visited Mar. 9, 2006).

results produced by the research funded through grants under [the] Act.”¹² Representative Melissa Hart, one of the four representatives who introduced the House Bill, noted that “[t]he advent of new technologies, such as cell phones, video games, and audio playback devices present new and wide-ranging challenges in understanding how different forms of media influence our children.”¹³ Indeed, legislative counsel to the American Civil Liberties Union conceded that if research reveals that playing violent video games is harmful to children, “there’s going to be a problem.”¹⁴ Thus, Speaker Pro Tempore of the California Legislature, Leland Yee, a child psychologist who wrote the California video game legislation, said it best when he called the preliminary injunction staying enforcement of California’s law “a temporary pause,” and stated simply that “common sense will prevail....”¹⁵ Clearly, the urgency characterizing the consideration and enactment of state and federal legislation as well as the recent approval of CAMRA are acknowledgments that advances in technology evoke complexities that prevent video games from being easily categorized for the purposes of regulation. This truth, intertwined with an ever-increasing scientific understanding of the human brain, sets the stage for a new round of legal challenges.

Part I of this Note examines the most persuasive Supreme Court decision that applies to the regulation of violent video game sales, *Ginsberg v. State of New York*.¹⁶ Additionally, Part I will evaluate the federal cases that struck down legislation, which included similar prohibitions to the legislation presently being scrutinized by the federal courts. Part II will focus on the rapid advances in science and technology that distinguish the current state and federal regulations from the ones of the past. First, it will describe the video games on the market and the rating system applied to them. Second, it will include an analysis of the scientific developments regarding child and adolescent brain and moral development, and the relationship between violent video games and aggressive behavior. Third, it will review the legislation enacted by Illinois, Michigan, Florida, and California, comparing their potential for sustainability. This Note argues that the reach of previous federal court decisions is limited because of the highly specific, factual nature of each case. Given that scientific and technological advancements will intensify, it is time for the courts to allow the prohibition against the sale of excessively violent video games to minors. Such an approval may promote cultural integrity while preserving essential First Amendment rights.

¹² S. 579, 109th Cong. §2 (2005), available at <http://theorator.com/bills109/s579.html> (last visited Nov. 20, 2005).

¹³ Press Release, Congressman Edward J. Markey, Lawmakers Call for Closer Watch on the Impact of Media on Children (Oct. 24, 2005), available at http://www.house.gov/markey/Issues/iss_telecom_pr051024.pdf.

¹⁴ Brightman, *supra* note 11.

¹⁵ Wong, *supra* note 6.

¹⁶ See *Ginsberg v. State of N.Y.*, 390 U.S. 629 (1968).

I. JUDICIAL HISTORY

The Supreme Court addressed the limits of the First Amendment in *Ginsberg v. State of New York*.¹⁷ *Ginsberg* involved a challenge to a New York criminal obscenity statute prohibiting the sale to minors of “material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.”¹⁸ The appellant and his wife, operators of a stationary store, asserted that the scope of constitutional freedom of expression—which includes a citizen’s right to read or see material concerned with sex—is not age-dependent.¹⁹ In upholding the New York Supreme Court, Appellate Term ruling affirming the legislature’s power to employ variable concepts of obscenity, the Court held that obscenity is not within the area of protected speech.²⁰ It continued by stating:

The concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the state’s exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare, and morals of its community by barring the distribution of books recognized to be suitable for adults.²¹

The Court reasoned that the state has the power to adjust the definition of obscenity to accommodate social realities because “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.”²² It stated that the well-being of children was within the state’s constitutional power to regulate, and simultaneously acknowledged that because the care and nurture of children first resides with the parents, the law did not bar a parent from buying the prohibited material for their children.²³ Finally, the Court emphasized the state’s independent interest in the well being of youth given the knowledge that “parental control of guidance cannot always be provided.”²⁴ Thus, the Court ultimately upheld the statute based on the premise that it could not say that it was “not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.”²⁵

Ginsberg upheld the power of the state to adjust the definition of obscenity as applied to minors, but did not extend that power to adopt regulations for minors that would be classified as protected speech within the purview of the First

¹⁷ *Id.*

¹⁸ *See id.* at 631.

¹⁹ *Id.* at 635.

²⁰ *Id.*

²¹ *Ginsberg*, 390 U.S. at 636 (quoting *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75 (1966)).

²² *Id.* at 638.

²³ *Id.* at 639.

²⁴ *Id.* at 640 (quoting *People v. Kahan*, 15 N.Y.2d 311 (1965)).

²⁵ *Id.*

Amendment.²⁶ However, the reasoning employed by the Court as to the state's power over children conveys important policy implications regarding the implementation of regulatory laws prohibiting the sale of violent video games to children. Notably, the *Ginsberg* Court constructed a common-sense framework when it simultaneously conceded greater control to the state to protect children and avoided infringement on parental choice. Moreover, Michigan State University Law Professor Kevin W. Saunders suggests, "it is interesting that the Court... allowed these restrictions, despite the lack of scientific evidence of harm to children.... The Court recognized this, but nonetheless found the New York legislature's concern to be rational."²⁷ Additionally, Saunders cites the Court's more recent approval of FCC requirements that indecent material be broadcast only in the hours when children are less likely to be in the audience, noting that such a restriction would also impact adults.²⁸

Most importantly, Justice Stewart's concurring opinion in *Ginsberg* highlights the underlying foundation of First Amendment restrictions as applied to minors. Justice Stewart analogized freedom of speech as a guarantee for a society that provides the freedom to choose. He concluded:

[w]hen expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees... I think a State may permissibly determine that, at least in some precisely delineated areas, a child... is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.²⁹

Justice Stewart's opinion conveys the general intuitive consensus at the time—without citing scientific support—that a child is incapable of making the same types of mature decisions as adults. In essence, he proposes that when a child's limited decisional capacity will impair his decision-making ability, First Amendment guarantees are appropriately limited. It is on this basis that he believed the New York State obscenity law was legitimate. Today, scientific proof confirms Justice Stewart's opinion. A child's brain is less developed than an adult brain,³⁰ and as a result, a child cannot accurately perceive the consequences of his

²⁶ *Video Software Dealers Assoc. v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004); *Interactive Digital Software Ass'n. v. St. Louis County, Mo.*, 329 F.3d 954, 958 (8th Cir. 2003); see also *Am. Amusement Machine Ass'n. v. Kendrick*, 244 F.3d 572, 574-6 (7th Cir. 2001).

²⁷ Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 705 (2005).

²⁸ *Id.*

²⁹ *Ginsberg*, 390 U.S. 629 at 650.

³⁰ Elizabeth Cauffman, *The Adolescent Brain: Excuse Versus Explanation*, in 1021 ANNALS OF THE N.Y. ACAD. OF SCI., ADOLESCENT BRAIN DEVELOPMENT: VULNERABILITIES AND OPPORTUNITIES

actions in the same way as an adult.³¹ Moreover, a child's sense of right and wrong also develops over time.³² Thus, it is on this basis that regulations prohibiting the sale of violent video games also gain support.

Aside from laboratory studies and scientific experiments that illustrate a correlation between violent video games and aggressive behavior in children,³³ the state should impose regulations limiting a child's participation in an act based on the underlying assumption that a child cannot fully comprehend the implications of the game in which he or she is participating.³⁴ More importantly, in a due process analysis the Supreme Court analyzes legislation infringing the freedom of speech or other fundamental rights under a strict scrutiny standard. The strict scrutiny standard requires that "the state establish that it has a compelling interest that justifies and necessitates that law in question."³⁵ In past cases, states asserted prevention of aggressive behavior in children as the compelling state interest and correctly continue to do so as the research advances. However, states may also want to assert a more "common sense" compelling interest. Specifically, a "common sense" interest includes the notion that a child or adolescent should be protected from the potentially dangerous consequences that could result from an underdeveloped decision making ability.³⁶

Early federal cases adhered to the principle that video games are not *per se* protected under the First Amendment. Courts consistently upheld video game

160, 160-61 (Ronald E. Dahl & Linda Patia Spear ed., N.Y. Acad. of Sci. 2004).

³¹ David J. Kupfer and Hermi R. Woodward, *Adolescent Development and the Regulation of Behavior and Emotion*, in 1021 ANNALS OF THE N.Y. ACAD. OF SCI., ADOLESCENT BRAIN DEVELOPMENT: VULNERABILITIES AND OPPORTUNITIES 320, 320 (Ronald E. Dahl & Linda Patia Spear ed., N.Y. Acad. of Sci. 2004).

³² Saunders, *supra* note 27, at 700-704.

³³ See discussion *infra* Part II.B.III.

³⁴ Regulations banning sales of violent video games to minors do not prevent parents from buying the games for their children. Moreover, California Speaker Pro Tempore Leland Lee, a child psychologist who wrote the California statute stated, "the industry already recognizes that these are inappropriate materials for children. . . . The problem is their voluntary system just doesn't work. There are so many holes in it that any kid can walk into a video game store and purchase these games. This bill is to give a little more teeth to the voluntary program that the industry has established." Wong, *supra* note 6.

³⁵ BLACK'S LAW DICTIONARY 670 (2d Pocket ed., 1991).

³⁶ In *Moe v. Dinkins*, the United States District Court for the Southern District of New York analyzed a Domestic Relations Law requiring parental consent for marriage of minors between ages of fourteen and eighteen under the rational relation test. It did so because "the compelling state purpose necessitated by application of the strict scrutiny test would cast doubt on a network of restrictions that the States have fashioned to govern marriage and divorce." However, the court stated:

[S]tate interests advanced to justify the parental consent requirement of Section 15 include *the protection of minors from immature decision-making* and preventing unstable marriages. The State possesses paternalistic power to protect and promote the welfare of children who lack the capacity to act in their own best interest. . . . The State interests in mature decision-making and in preventing unstable marriages are legitimate under its *parens patriae* power.

Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981) (citing *Addington v. Texas*, 441 U.S. 418 (1979) (emphasis added)).

regulations, finding that in order to gain protected status, forms of entertainment, namely video games, must be designed to communicate or express some idea or information.³⁷ State courts followed suit, holding that video games were not a form of speech protected under the First Amendment and that they did not impart any information to the user and did not communicate any idea.³⁸ However, the opinions in both *Marshfield* and *Walker* foreshadowed the tides of change as each case acknowledged the potential for the creation of video games containing sufficient creative and expressive elements to qualify for First Amendment protection.³⁹

While recent federal cases invalidated state regulations pertaining to the sale of violent video games to minors, the cases failed to articulate a bright-line standard articulating whether the sale of violent video games to minors can be regulated. Therefore, invalidation based on ad-hoc analyses has created a gaping hole to be filled by the enactment and proposal of recent state and federal legislation. The shortcomings in four recent decisions lead to the conclusion that even if the most recent legislation is invalidated, defeat will provide an even clearer framework for constructing a statute that will ultimately pass constitutional muster.

In *American Amusement Machine Ass'n v. Kendrick*, manufacturers of video games sought to enjoin an Indianapolis ordinance enacted in 2000 that sought to limit the access of minors to video games that depict violence.⁴⁰ The ordinance forbade any operator of five or more video game machines in one place to allow a minor unaccompanied by a parent, guardian, or other custodian to use "an amusement machine that is harmful to minors;" required the use of appropriate warning signs; and required that such machines be separated by a partition from the other machines in the location so that their viewing areas could be concealed from people who stood on the other side of the partition. Operators of fewer than five games in one location were subject to all but the partition restriction. Monetary penalties, in addition to suspension and revocation of the right to work the machines, were specified as remedies for violations of the ordinance.⁴¹

On appeal, the Seventh Circuit reversed the determination by the lower court that denied a preliminary injunction.⁴² The lower court denied the injunction based on the reasoning that the ordinance would only violate the First Amendment if the city lacked a reasonable basis for believing the ordinance would protect children from harm. It found a reasonable basis for the ordinance existed based on

³⁷ *Am.'s Best Fam. Showplace Corp. v. City of N.Y., Dept. of Bldgs.*, 536 F.Supp. 170 (E.D.N.Y. 1982).

³⁸ See *People v. Walker*, 354 N.W.2d 312 (Mich. Ct. App. 1984); *Wen & Liz Realty Corp. v. Bd. of Zoning Appeals of Town of Hempstead*, 463 N.Y.S.2d 493 (1983); *Kaye v. Planning and Zoning Comm'n. Town of Westport*, 472 A.2d 809 (Conn. Super. Ct. 1983); *Marshfield Fam. Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605 (Mass. 1983).

³⁹ Kurtis A. Kemper, Annotation, *First Amendment Protection Afforded to Commercial and Home Video Games*, 106 A.L.R. 5th 337 (2003).

⁴⁰ *Am. Amusement Mach. Ass'n.*, 244 F.3d at 573.

⁴¹ *Id.*

⁴² *Id.*

the results of psychological studies.⁴³ On appeal, Judge Posner held, “[the] studies do not support the ordinance. There is no indication that the games used in the studies are similar to those in the record or to other games likely to be marketed in game arcades in Indianapolis.”⁴⁴ Undoubtedly, Posner’s analysis begs the question: what if the games studied were similar to the one in the case at bar? Moreover, Posner concedes, “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.”⁴⁵

The specific games at issue in *Kendrick* were “House of the Dead” and “Ultimate Mortal Kombat 3.”⁴⁶ “House of the Dead” depicted zombies “being killed flamboyantly, with much severing of limbs and effusion of blood.”⁴⁷ However, the court maintained that it was “so stylized and patently fictitious in 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.’”⁴⁸ Indeed, Posner noted “it will not turn anyone’s stomach” and added “self defense, protection of others, dread of the ‘undead,’ fighting against overwhelming odds—those are all age-old themes of literature, and ones particularly appealing to the young...”⁴⁹ Comparatively, the court described “Ultimate Mortal Kombat 3” as “a feminist violent video game... depicting a woman as fully capable of holding her own in violent combat with heavily armed men. It thus has a message, even an ‘ideology’ just as books and movies do.”⁵⁰

The main flaw with Posner’s argument is not his standards, but the effect of time. Technological and scientific advancement made over the past six years has been breathtaking—the pervasiveness of high definition, broadband, WIFI, and open-source software technology in conjunction with animation technology that simulates real people and an overall increase in gore and the lascivious nature of video games. Thus, today’s games are remarkably realistic and do, in fact, turn many peoples’ stomachs. The images do not appear to be fictitious or cartoon-like as they were in “House of the Dead.” It is doubtful that the game “Grand Theft Auto: San Andreas” which was pulled by the retailer from the shelves in the Summer of 2005 due to hidden sex scenes, would be considered “feminist.”⁵¹ Indeed, in *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, video game suppliers did not challenge the provision of the Missouri ordinance restricting

⁴³ See generally *Am. Amusement Machine Ass’n v. Kendrick* 244 F.3d 572 (7th Cir. 2001).

⁴⁴ *Am. Amusement Machine Ass’n.*, 244 F.3d at 578 (alteration in original).

⁴⁵ *Id.* at 579.

⁴⁶ *Id.* at 577-578.

⁴⁷ *Id.* at 575.

⁴⁸ *Id.*

⁴⁹ *Am. Amusement Machine Assoc.*, 244 F. 3d at 577.

⁵⁰ *Id.* at 578.

⁵¹ Reuters, *California Bars Violent Video Game Sales to Minors*, Oct. 2005, available at http://www.findarticles.com/mi_zdpcm/is_200510/ai_n15666170 (last visited Nov. 20, 2005).

minors' access to video games with strong sexual content.⁵² As video games are embracing new extremes, courts must re-examine and address the continuously evolving content of the games.

In denying the injunction, Posner addresses two classic arguments raised by the City of Indianapolis in *Kendrick* for the validation of ordinances restricting violent video games: 1) the obscenity exemption should be extended to include violence, and 2) video games require a different analysis than other forms of entertainment because they are interactive.⁵³ Regarding the request to extend the obscenity exception, Posner stated, "the notion of forbidding violence itself, but pictures of violence, is a novelty, whereas the concern with pictures of graphic sexual conduct is the essence of the traditional concern with obscenity."⁵⁴ However, Posner sets forth the proposition that offensive video games may not deserve First Amendment protection:

The main worry about obscenity, the main reason for its proscription, is not that it is harmful, which is the worry behind the Indianapolis Ordinance, but that it is offensive. A work is classified as obscene not upon proof that it is likely to affect anyone's conduct but upon proof that it violates community norms regarding the permissible scope of sexual or sex-related activity.⁵⁵

Posner also implies that a game involving sex may have different implications because "violent video games played in public places are a tiny fraction of the media violence to which modern American children are exposed... the video games at issue do not involve sex."⁵⁶ Finally, the court speaks to a long history of violence in books, poems, and fairytales and posits that children should not be shielded from violence as "it would leave them unequipped to cope with the world as we know it," further characterizing the argument that video games are interactive as "superficial."⁵⁷ Judge Posner stated:

All literature (here, broadly defined to include movies, television, and the other photographic media, and popular as well as high brow 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 joy and sufferings as the reader's own.⁵⁸

However, this now antiquated definition of interactivity posited by Posner in 2000, aptly demonstrates his failure to account for the effects of time. Ironically, a

⁵² See generally *Interactive Digital Software Ass'n. v. St. Louis County, Mo.*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002).

⁵³ *Id.*

⁵⁴ *Am. Amusement Machine Ass'n.*, 244 F.3d at 575-576.

⁵⁵ *Id.* at 574.

⁵⁶ *Id.* at 579.

⁵⁷ *Id.* at 577.

⁵⁸ *Id.*

1993 *Webster's Dictionary* defines interactivity as “of, or relating to, or allowing two-way electronic communications (as between a person and a computer).”⁵⁹ Moreover, interactivity as applied to video games may be said to connote control—the player maintains controls over a specific character that interacts with obstacles set forth by the video game. In contrast, when one empathizes with a character in a book or movie, one does not control the character’s actions or bear the consequences that result. Instead, as an observer, one has the ability to intellectualize the actions committed by the characters. Saunders makes a creative analogy:

It is like the difference between being in a play’s audience and being on stage. The audience may empathize; the actor interacts. The interactivity of a flight simulator is a different experience, and is more likely to lead to a desired response in actual flight than reading a flight manual or a book on flying.⁶⁰

Moreover, spokesperson and cover athlete Lawrence Taylor for the video game, “Blitz: The League,” agrees that interactivity creates a new form of entertainment, “it’s almost like watching a movie, but you’ve got control. You can make your own movie because there are so many different aspects of the game. *It’s different than anything else I’ve seen.*”⁶¹ Thus, even where the court tries to characterize the “Choose Your Own Nightmare” books as a medium similar to video games, it ignores the lack—and effect—of realistic images and content.⁶² Lastly, Posner leaves open the possibility for future regulations to survive a constitutional challenge:

We have emphasized today the ‘literary’ character of the games in the record and the unrealistic appearance (cartoon image) 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 games in the record appear to be) a more narrowly drawn ordinance might survive a constitutional challenge.⁶³

In 2002, the Connecticut District Court held in *Wilson v. Midway Games, Inc.* that the First Amendment precluded claims of negligent and intentional infliction of emotional distress in a product liabilities case where the mother of a son who was stabbed by a friend sued the manufacturer of “Mortal Kombat.”⁶⁴ In *Wilson*, the court once again denied the possibility that “interactivity”

⁵⁹ WEBSTER’S NEW ENCYCLOPEDIA DICTIONARY 525 (1993).

⁶⁰ Saunders, *supra* note 26, at 709.

⁶¹ Jon Robinson, *Lawrence Taylor: Getting Blitzed*,

<http://sports.ign.com/articles/620/620576pl.html> (last visited Nov. 20, 2005) (emphasis added).

⁶² Interactive Digital Software Ass’n., 329 F.3d 954 at 957-958.

⁶³ Am. Amusement Mach. Ass’n. v. Kendrick, 244 F.3d 572, 579-80 (7th Cir. 2001).

⁶⁴ See generally *Wilson v. Midway Games, Inc.* 198 F. Supp. 2d 167 (D.Conn. 2002).

distinguishes video games from other forms of entertainment. Instead, the court identified “[t]he pictorial representation that evokes the viewer’s response [as] the essence of the claimed product, regardless of whether that representation is viewed passively, as in a motion picture or is controlled by the viewer.”⁶⁵ However, the court misses the point that one is not a “viewer” of a video game but a “player.” Controlling the movements and responses of the image on screen in combination with realistic imagery is what evokes the player’s reactions to a video game. The majority also claimed that video games were analogous to the internet—an interactive medium that receives First Amendment protection.⁶⁶ It is interesting that the court conceded that there might be some distinguishing value in interactivity in order to make this analogy.⁶⁷ Also, in terms of regulatory action, an important distinction between the internet and video games is that there are protections provided for computers that allow parents, guardians, or caretakers to control a child’s use of the internet even when they are not able to monitor the child directly.⁶⁸ Placing a “duty of care” on retailers would be the most effective way of preventing children from accessing games on their own.

Additionally, the court believed that the mother’s allegations that the game presented a problem-solving technique and encouraged players to “act out” the violence they saw on screen as demonstrative of the fact that her suit targeted:

Expressive elements of the game: its plot (i.e. the fact that advancing to different levels of the game requires increased violence), its characters (all of which are alleged to be violent), and the visual and auditory milieu in which the story line is played out (one character’s ‘finishing move’ or method of killing opponents is ‘tearing off his opponents head leaving his spinal cord dangling.’)⁶⁹

In its attempt to undermine the plaintiff’s argument, the court seems to stretch the term “plot.” Literature typically encompasses a plot structure that includes an introduction, rising action, climax, falling action, and resolution. While many works of literature may not adhere to this exact formula, it is questionable whether the need for increasing levels of violence to advance to the next round constitutes a “plot.”⁷⁰

Most importantly, *Wilson* concedes that not all video games implicate the First Amendment, stating that protection can be determined based on the content specific to each game:

⁶⁵ *Id.* at 174.

⁶⁶ *Id.* at 180.

⁶⁷ *Id.*

⁶⁸ Microsoft’s Xbox 360 includes controls for parents to limit what types of games can be played. Wong, *supra* note 6.

⁶⁹ *Id.* at 181.

⁷⁰ Patricia Schulze, Teaching Plot Structure Through Short Stories, http://www.readwritethink.org/lessons/lesson_view.asp?id=401 (last visited Oct. 6, 2006).

While video games that are merely digitalized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected by the First Amendment... the inquiry must be content specific... Because a pinball machine is not protected speech, a video game that only simulated a pinball machine would not be protected speech. Conversely, comic books and movies are protected speech, so interactive versions of the same genre are also protected, even though they are labeled, 'games.' In short, the label 'video game' is not talismanic, automatically making the object to which it is applied either speech or not speech.⁷¹

In the court's acknowledgment that there is no one feasible category for all video games, it admits that they are an entity unto themselves. Thus, it is quite realistic to expect video games to command an alternative analysis as to whether they deserve First Amendment protection.

In *Interactive Digital Software Ass'n*, the United States Court of Appeals for the Eighth Circuit reversed the district court's dismissal of an action brought by purveyors of video games to enjoin enforcement of an ordinance making it unlawful for any person knowingly to sell, rent, or make available graphically violent video games to minors, or to "permit the free play of" graphically violent video games by minors, without parent or guardian consent.⁷² The district court not only determined that video games were not speech entitled First Amendment protection, but also concluded that even if they did qualify for such protection, the ordinance would survive the strict scrutiny test by being narrowly tailored to advance a compelling government interest.⁷³ The Eighth Circuit evaluated the ordinance in a dramatically different light.

First, the court emphasized that there was no reason to disqualify video games from First Amendment protection simply because they are interactive entertainment.⁷⁴ The court noted that action-packed movies such as "The Matrix" or "Charlie's Angels" can be easily fast-forwarded on a VCR or DVD player, making increased viewer control irrelevant in distinguishing video games.⁷⁵ Furthermore, it asserted that the "psychological well-being of minors" does not constitute a compelling state interest because St. Louis County, "must demonstrate the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."⁷⁶ The Eighth Circuit rejected the study cited by the District Court indicating that playing

⁷¹ *Wilson*, 198 F. Supp. 2d at 181.

⁷² *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, (*Interactive II*), 329 F.3d 954, 955 (8th Cir. 2003).

⁷³ *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, (*Interactive I*), 200 F. Supp. 2d 1126 (E.D. Mo. 2002).

⁷⁴ *Interactive II*, 329 F.3d at 957.

⁷⁵ *Id.*

⁷⁶ *Id.* at 958.

violent video games “[does] in fact lead to aggressive behavior in the immediate situation... that more aggressive thoughts are reported and there is frequently more aggressive behavior,” stating that this vague generalization “falls far short of a showing that video games are psychologically deleterious.”⁷⁷ Moreover, the court rejected the County’s reliance on *Ginsberg*, noting that because the challenged ordinance in *Ginsberg* was subject only to a rational relation test. Thus, the court could determine that it was rational for the legislature to conclude that “parents and others... who have this primary responsibility for children’s well-being are entitled to the support of laws to aid discharge of that responsibility.”⁷⁸ In *Interactive*, the court ultimately held that the “government cannot silence protected speech by wrapping itself in the cloak of parental authority.”⁷⁹

In rejecting the psychological studies cited by the lower court and the “compelling government interest” posited by the state, the Eighth Circuit left room for future video game ordinances to survive based on further study. Notably, the court’s false equation of viewer control of a DVD to player control of video games is both unpersuasive and easily defeated by recent scientific research. Indeed, the court implicitly concedes as much when stating, “[b]efore the County may constitutionally restrict the speech at issue here, the County must come forward with empirical support for its belief that ‘violent’ video games cause psychological harm to minors.”⁸⁰ Moreover, the court’s effort to distinguish *Ginsberg* in order to characterize the County’s interest as “broadly drawn” rather than “compelling” is misplaced.⁸¹ In *Ginsberg*, the court did not need empirical evidence to demonstrate that obscene material was harmful to children since the rational relation test was met as long as such assumptions were reasonable.⁸² In contrast, in the case where video games may fall within the purview of the First Amendment, empirical evidence must demonstrate a “compelling state interest” for the legislation.⁸³ Thus, the discussion in *Ginsberg* on the role of the state as applied to children asserts important policy concerns unrelated to whether a rational relation or strict scrutiny test was applied. This is further demonstrated in Justice Stewart’s concurring opinion, which references the ability of the state to control the legal voting age.⁸⁴

The recent decision by Judge Lasnik in *Video Software Dealers Ass’n v. Maleng* limits its own holding that a statute penalizing the distribution to minors of video games where physical harm is caused to law enforcement officers violated

⁷⁷ *Id.* at 958-959.

⁷⁸ *Id.* (quoting *Ginsberg*, 390 U.S. at 639).

⁷⁹ *Id.* at 960.

⁸⁰ *Interactive II*, 329 F.3d at 959.

⁸¹ *Id.* at 960.

⁸² *Ginsberg*, 390 U.S. at 641-642.

⁸³ *Interactive II*, 329 F.3d at 959.

⁸⁴ *Ginsberg*, 390 U.S. at 650 (Stewart, J. concurring).

First Amendment strict scrutiny and was unconstitutionally vague.⁸⁵ Lasnik made a plea for further scientific research and maintained that additional research supporting a narrower, clearer statute may ultimately pass constitutional muster.⁸⁶ Judge Lasnik acknowledged that “the unique characteristics of video games, such as their interactive qualities, the first-person identification aspect, and the repetitive nature of the action, makes video games potentially more harmful to the psychological well-being of minors than other forms of media.”⁸⁷ However, the regulation could not withstand strict scrutiny because the statute was over-inclusive and vague, and there was no showing that video games that trivialize violence against law enforcement officers led to actual violence against law enforcement officers.⁸⁸ Perhaps foreshadowing future holdings regarding the most current legislation, Lasnik announced:

[g]iven the nationwide, on-going dispute in this area, it is reasonable to ask whether a state may ever impose a ban on the dissemination on video games to children under 18. The answer is ‘probably yes’ if the games contain sexually explicit images, and ‘maybe’ if the games contain violent images, such as torture or bondage, that appeal to the prurient interest of minors. State attempts to regulate ultra-violent video games that have no sexual component have failed for a number of reasons, including those set forth above. While the Court cannot give advisory opinions on cases or controversies not before it, future attempts to regulate video games on the basis of their content will be analyzed under a framework such as the Court has undertaken here. Key considerations will be:

- Does the regulation cover only the type of depraved or extreme acts of violence that violate community norms and prompted the legislature to act?
- Does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint and statute? and
- Do the scientific studies support the legislative findings at issue?⁸⁹

II. THE CONTROVERSY TODAY

A. *The Ratings System and Video Game Technology*

The Interactive Digital Software Association founded the Entertainment Software Rating Board in 1994 due to increasing concern over violence in video games. The Board voluntarily rates more than 1,000 games per year.⁹⁰ The

⁸⁵ Video Software Dealers Ass’n. v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

⁸⁶ *Id.* at 1188-1190.

⁸⁷ *Id.* at 1188.

⁸⁸ *Id.* at 1188-1190.

⁸⁹ *Id.* at 1190.

⁹⁰ Josh Zelman, *Video Game Ratings System Helps Holiday Gift Givers*, CNN HEADLINE NEWS,

ratings system includes ratings such as “EC” for Early Childhood, “E” for Everyone, “T” for Teen, “M” for Mature, “AO” for Adult Only, and “RP” for Rating Pending. Games rated “T” may contain violent content and/or suggestive themes, while games rated “M” for mature may contain sexual themes or more intense violence. Games rated “AO” are simply not for persons under 18.⁹¹

In entering judgment in favor of videogame manufacturers, distributors, retailers, and a software association, Judge Lasnik makes clear, “that this is not to say video games presented to the court are unobjectionable. To the contrary, many of them promote hateful stereotypes and portray levels of violence and degradation that are repulsive.”⁹² Such controversial games include opportunities for a male player to score points by getting into a car and having sex with a prostitute, and scoring additional points when he beats and kicks her to get his money back.⁹³ Other games feature males shooting females, and even provide actual video footage of strippers.⁹⁴ In the game “Narc,” the cop character can consume the drugs he confiscates and the illicit substances such as marijuana, LSD, speed, ecstasy, and crack can enhance or diminish his performance. For instance, “[c]rack, after the distinct sound of someone huffing on a pipe, gives players a one-shot-one-kill skill. Your crack-head character suddenly becomes an expert marksman.”⁹⁵ In July 2004, Great Britain’s largest electronics store pulled the violent video game, “Manhunt,” after claims that it sparked the murder of a fourteen-year-old boy by a friend.⁹⁶ In the game, the player takes on the role of a convicted murderer ordered by a demented film director to kill people in as gruesome a fashion as possible. It awards extra points to players for carrying out murders in a particularly extreme and bloody way, while victims plead to be spared on behalf of their wives and children.⁹⁷ While “Narc” is banned in Australia, “Manhunt” is banned in New Zealand. Both are rated M for mature, and designers of both games stress that the games are for adults.⁹⁸

Nov. 26, 2003, available at <http://www.cnn.com/2003/TECH/11/26/gln.game.esrb.ratings/index.html>.

⁹¹ *Id.*

⁹² Video Software Dealers Ass’n. v. Maleng, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004).

⁹³ Brad Wright, *Sounding the Alarm on Video Game Ratings*, <http://archives.cnn.com/2002/TECH/fun.games/12/19/games.ratings/index.html> (last visited Nov. 20, 2005).

⁹⁴ *Id.*

⁹⁵ Alex Walker, *Players Can Get ‘High’ in ‘Narc’ Video Game*, <http://www.cnn.com/2005/TECH/fun.games/04/22/narc/index.html> (last visited Nov. 20, 2005).

⁹⁶ *Retailer Pulls ‘Murder’ Video Game*, <http://www.cnn.com/2004/WORLD/europe/07/30/uk.manhunt.storeban/index.html> (last visited Nov. 20, 2005).

⁹⁷ *Id.*

⁹⁸ Walker, *supra* note 95; see also Wright, *supra* notes 93-94.

B. Scientific Developments

i. Background

Elizabeth Cauffman Ph.D. provides a concise summary of the overwhelming and rapid advances made regarding our knowledge of the brain over the last three decades. She explains,

The view of adolescence as a period of significant neurological change is surprisingly new. In the 1980s, the most commonly held view was that adolescents were victims of 'raging hormones' and that this was the reason for observed increases in risk taking and anti-social behavior in adolescence. In the 1990s, this popular view was supplanted (or supplemented, perhaps) by the notion that adolescent misbehavior has its roots much earlier in childhood. Brain development was believed to be completed by age four, and it was suggested that the promotion of positive development during the first four years was thus of paramount importance. In the present decade, we are learning that brain development in fact continues through adolescence and possibly beyond spaces the adolescent experience is influenced by the path of previous development, by hormonal changes, by continuing neurological change, and by environmental influences. Our ever-improving understanding of the relations between these factors also brings an opportunity to more effectively promote positive developmental outcomes among youth. Instead of treating the vulnerabilities of adolescence as an excuse for anti-social behavior, we should view our findings as providing an explanation that may enable more effective means of encouraging healthy development.⁹⁹

Based on this premise, Ronald E. Dahl, M.D., Professor of Psychiatry and Pediatrics, believes that as with the "0-3 campaign," which led policy makers to protect infants and toddlers due to an increased awareness of brain plasticity during the earlier years of life, there are "parallel opportunities regarding interdisciplinary approaches focusing on puberty and adolescent brain development."¹⁰⁰ As such, if scientific study can demonstrate an immaturity of neural systems that affect decision-making or abilities to regulate emotional affect in adolescence, it can offer objective approaches to questions from the legal driving age to the age at which a person is free to make "potentially self-destructing choices such as body piercing, tattoos, acting in pornographic films, or gambling."¹⁰¹ Thus, Dahl emphasizes "there is a *need* for a social context that can provide the appropriate amount of

⁹⁹ Cauffman, *supra* note 30.

¹⁰⁰ Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities: Keynote Address*, in 1021 ANNALS OF THE N.Y. ACAD. OF SCI., ADOLESCENT BRAIN DEVELOPMENT: VULNERABILITIES AND OPPORTUNITIES 1 (Ronald E. Dahl & Linda Patia Spear ed., N.Y. Acad. of Sci. 2004).

¹⁰¹ *Id.* at 19-20.

support to adolescents.”¹⁰² Indeed, because the brain is not completely developed in adolescence, it may be a time where steps can be taken to promote positive development.¹⁰³

ii. The Adolescent Brain

Ronald Dahl defines adolescence as “that awkward period between sexual maturation and the attainment of adult roles and responsibilities.”¹⁰⁴ Ironically, during this developmental period characterized by physical strength and resilience, overall morbidity and mortality rates increase 200% because of trauma related to “difficulties in the control over behavior and emotion.”¹⁰⁵ Adolescents display better reasoning and decision-making skills than children, and older teenagers often perform at or near adult levels in their abilities to cognitively understand the consequences of risky behavior.¹⁰⁶ Yet, a major developmental disjunction emerges during adolescence. Changes that are linked more strongly to puberty than age in adolescent development, such as romantic motivation, sexual interest, emotional intensity, changes in sleep and appetite, risk for affective disorders in females, increase in risk taking, novelty seeking, and sensation-seeking are occurring earlier because the onset of puberty is earlier. However, aspects of cognitive development including reasoning, logic, and capacities for self-regulation of emotions and drives are developing slowly, continuing much longer after puberty ends.¹⁰⁷ In fact, the ability to integrate cognitive and affective components of behavior, or in other words, the ability to exert self-control over one’s emotions via modification or inhibition in order to fulfill long term goals, involve neurobiological systems that are among the last region of the brain to fully mature.¹⁰⁸ Thus, Dahl argues “despite cognitive improvements, adolescents are prone to erratic spaces and spaces *emotionally influenced* behavior, which can lead to a periodic disregard for the risks and consequences.”¹⁰⁹

David J. Kupfer and Hermi R. Woodward assert that “response suppression—the ability to control behavior according to instruction or rational

¹⁰² *Id.* at 22 (emphasis added).

¹⁰³ Cauffman, *supra* note 30, at 160.

¹⁰⁴ Dahl, *supra* note 100, at 9.

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 17.

¹⁰⁸ *Id.* at 18.

¹⁰⁹ Dahl, *supra* note 100, at 3. Dahl points out that,

While these patterns of emotional changes at puberty are evident to some degree in most adolescents, it is important to acknowledge the wide range of individual differences during this period of development. For some adolescents, this tendency to activate strong emotions and an affinity for excitement can be subtle and easily managed. In others, these inclinations toward high intensity feelings can lead to emotionally charged and reckless adolescent behaviors, and at times to impulsive decisions by (seemingly) intelligent youth that are completely outrageous.

Id. at 8.

understanding spaces is less likely to be accomplished consistently during adolescence,” as the ability to follow through with planned choices is continuing and increases for most people in later adolescence and into adulthood.¹¹⁰ This gradual maturity/integration of cognitive and affective functions does not take place on an “automatic time line or else every individual would mature at the same rate. Rather, it is:

more likely that continued synaptic pruning and myelination during adolescence is driven by experience of adolescence, or, in other words, by the continued ‘practicing’ of response patterns in the face of everyday life and decision making that is required during this transition. In healthy individuals, emotion and cognition become increasingly integrated as adolescents ‘practice’ by living through the emotional and practical consequences of some bad decisions and by experiencing exhilaration of having succeeded at producing a desired outcome through response planning and behavioral control.¹¹¹

The authors cite a presentation by Dr. Ann Masten that “focused on how contexts need to be viewed, not as dynamic ‘outside’ forces... but as shapers of the very experiences that provide the practice grounds for emergent regulatory skills,”¹¹² and conclude that the “emergence of adolescent regulatory skills and their maturation to adult levels requires a solid foundation.”¹¹³

Data derived from an ongoing longitudinal pediatric brain magnetic resonance imaging study conducted at the Child Psychiatry Branch of the National Institute of Mental Health reveals the on-going development of the adolescent brain. The sample includes 329 healthy brain scans from ninety-five males and sixty-six females during two-year intervals. Findings recorded by Jay N. Geidd, M.D., stated that white matter indicates myelinated axons—fibers of neurons that carry messages to other neurons.¹¹⁴ They can be (1) *projectural*, connecting the brain to the spinal cord (2) *associational*, connecting one type of brain part to another, (3) *commissural*, connecting similar parts of the brain in the left and right hemispheres. The amount of white matter in the brain generally increases throughout childhood and adolescence. The white matter increases are roughly linear, and the slope of increase is approximately the same in the four major lobes of the brain (frontal, temporal, parietal, and occipital).¹¹⁵

¹¹⁰ Kupfer and Woodward, *supra* note 31.

¹¹¹ *Id.* at 321.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ BRYAN KOLB & IAN Q. WHISHAW, AN INTRODUCTION TO BRAIN AND BEHAVIOR, G-1 (Worth Publishers 2001).

¹¹⁵ Jay N. Geidd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, in 1021 ANNALS OF THE N.Y. ACAD. OF SCI., ADOLESCENT BRAIN DEVELOPMENT: VULNERABILITIES AND OPPORTUNITIES 77, 80 (Ronald E. Dahl & Linda Patia Spear ed., N.Y. Acad. of Sci. 2004).

iii. The Relationship Between Violent Video Games and Aggressive Behavior

In July 2000, six major organizations of health professionals found conclusive scientific evidence linking the media and real world violence. In a joint statement, the American Psychological Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, the American Academy of Family Physicians and the American Psychiatric Association concluded “well over 1,000 studies... point overwhelmingly to a causal connection between media violence and aggressive behavior in some children.”¹¹⁶ Importantly, Prof. Craig Anderson, expert on effects of violent video games, notes that “violent video games are significantly associated with: increased aggressive behavior, thoughts, and affect; increased physiological arousal; and decreased prosocial (helping) behavior. Average effect sizes for experimental studies (which help establish causality) and correlational studies (which allow examination of serious violent behavior) appear comparable.” Importantly, “meta analyses reveal that violent video game effect sizes are larger than the effect of second-hand tobacco smoke on lung cancer, the effect of lead exposure to I.Q. scores in children, and calcium intake on bone mass.”¹¹⁷

Also in 2000, Professors Craig Anderson and Karen Dill conducted both a demographic study as well as a lab study assessing the effects of violent video games. The demographic sample included 227 university students. The students were asked about their present and past exposure to video games generally and to violent video games specifically, and were tested for irritability, physical and verbal aggression, anger, hostility and history of delinquent acts. Anderson and Dill concluded that violent video game play was more strongly correlated with delinquency than was nonviolent video game play.¹¹⁸

Because the correlation study did not answer the question as to whether more violent people choose to play violent games, the laboratory study was able to isolate potentially damaging variable. In the laboratory study, one hundred university students were divided into four groups by sex and irritability level—low or high. The members of each of the four groups were then divided into two groups and asked to play either “Wolfenstein 3D”, a violent game, or “Myst,” a non-violent game. After playing the game three times, participants were told that they would participate in a competitive reaction time test.

If a participant lost, he or she would be subjected to a noise blast at an intensity and duration said to be determined by the competitor but actually set by the experimenters. Prior, to each trial, the subjects set the duration and intensity of the noise blast his or her opponent would

¹¹⁶ Saunders, *supra* note 27, at 11.

¹¹⁷ Craig Anderson, *Violent Video Games: Myths, Facts, and Unanswered Questions*, <http://www.apa.org/science/psa/sb-andersonpr.html> (last visited Feb. 12, 2006).

¹¹⁸ Saunders, *supra* note 27, at 12.

hear, if the participant won the trial, and after each trial the participant was show the level supposedly set by his opponent.¹¹⁹

Anderson and Dill concluded that subjects who played the violent game delivered *significantly* longer noise blasts after losing than those subjects who played the non-violent game.¹²⁰ More importantly, they concluded that the demographic and laboratory results together supported a claim of causation. They stated, “[i]n a sense, violent video games provide a complete learning environment for aggression, with simultaneous exposure to modeling, reinforcement, and rehearsal of behaviors. This combination of learning strategies has been shown to be more powerful than any of those methods used singly.”¹²¹

Moreover, longitudinal studies can shed light on the possibility that violent children choose violent games by assessing levels of aggressiveness at the beginning and at the end of these studies. When recent studies conducted in 2003 controlled for aggressiveness, a correlation between violent video games and aggressiveness remained. However, the studies were administered over short time periods and standing alone and might only account for short-term affects of violent video games.¹²²

Finally, researchers studying video game players in the process of playing via positron emission technology, found that game playing resulted in the “release of dopamine, a neurotransmitter believed to be involved in learning and attention, sensorimotor integration, and... reinforcement of behavior. While reinforcement of behavior may produce a positive effect for some games, reinforcement of behavior from violent video games would speak to the effects found by social scientists.”¹²³ Clearly, laboratory studies and surveys in conjunction with ever-evolving scientific study of brain development lead to the conclusion that a child’s exposure to violent video games has negative effects on a developing brain.

iv. Current Legislation: Illinois, Michigan, Florida, and California

The strict scrutiny standard applies to legislation that potentially threatens “fundamental rights” such as free speech. It requires that in order to remain valid, the government must demonstrate that a restriction is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest.¹²⁴ Additionally, there is an exception to the strict scrutiny standard as applied to free speech rights for material with sexual content that is not obscene for adults but that

¹¹⁹ *Id.* at 12-13.

¹²⁰ *Id.* *But see* Entertainment Software Ass’n. v. Blagojevich, 404 F. Supp. 2d 1051, 1060 (N.D. Ill. 2005) (In his testimony for defendants “Dr. Anderson stated, however, that the difference between the two groups was a matter of milliseconds.”) (emphasis added).

¹²¹ Anderson, *supra* note 117.

¹²² Saunders, *supra* note 27, at 15.

¹²³ *Id.* at 18.

¹²⁴ Entertainment Software Ass’n v. Blagojevich, 404 F. Supp. 2d 1051, 1071-1072 (N.D. Ill. 2005); *see also* 16A AM. JUR. 2D *Constitutional Law* § 387 (2005).

is obscene for children. In these cases, a lesser “rational basis” standard of review is applied.¹²⁵

In *Entertainment Software Ass’n v. Blagojevich*, Judge Matthew F. Kennelly defended violent video games on First Amendment grounds.¹²⁶ He disregarded scientific evidence suggesting causal links between violent video games and violent behavior, stating “[w]ith these limited findings, it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games.”¹²⁷ Interestingly, he pointed out that while the legislative record in support of the Illinois statute contained seventeen scholarly articles asserting a causal connection between media violence and aggressive behavior—all of the articles were somehow connected to Craig Anderson.¹²⁸ Moreover, Kennelly determined that *Kendrick* governed his opinion and as such, he likened video games to the “Choose Your Own Adventure” books as well as television, and dismissed any notion that video games might constitute a new, separate medium.¹²⁹ Kennelly also declared the language of the Illinois statute “unconstitutionally vague,” focusing on the statute’s failure to make clear what falls into the category of “human”—as some video game characters depict humans while others are aliens or zombies— and what constitutes “serious physical harm,” as both terms were used to define “violent video game.”¹³⁰

In contrast, both the California and Michigan statutes, currently blocked by temporary injunctions, are more specific when it comes to defining terms, avoiding some of the pitfalls encountered by the Illinois statute.¹³¹ While this certainly does not mean that these statutes will pass constitutional muster, the differences among the statutes illustrate that with each ruling, legislatures may respond by crafting a new statute adhering to the concerns set forth by the courts. It will only take one statute to pass muster, and the other states will inevitably follow suit.

Specifically, the California statute, AB 1179, is quite comprehensive and appears to have influenced an almost identical Florida statute.¹³² Written by Speaker Pro Tempore and child psychologist Leland Yee,¹³³ the bill outlines the

¹²⁵ Senate Staff Analysis and Economic Impact Statement, Commerce and Consumer Services Committee, January 10, 2006, available at http://www.flsenate.gov/Session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&Year=2006&BillNum=0492 (last visited February 12, 2006).

¹²⁶ See generally *Entertainment Software Ass’n*, 404 F. Supp. 2d at 1051.

¹²⁷ *Id.* at 1074; Jane Pinckard, *Judge Blocks Illinois Violent Game Law: Control is Properly Accorded to Parents, Not the State*, <http://cheats.lup.com/do/newsStory?cId=3146053> (last visited February 13, 2006).

¹²⁸ *Entertainment Software Ass’n*, 404 F. Supp. 2d at 1058.

¹²⁹ *Id.* at 1056, 1072, 1075-1076.

¹³⁰ *Id.* at 1077.

¹³¹ See generally *Ginsberg v. State of N.Y.*, 390 U.S. 629 (1968).

¹³² See generally SB 492 (Fl. 2006), available at http://www.flsenate.gov/Session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&Year=2006&BillNum=0492 (last visited February 12, 2006).

¹³³ Wong, *supra* note 6, at 1.

state's compelling interest, includes a specific definition of "violent video game" as well as specific provisions providing for how the regulation shall be administered and for judicial review. Notably, it makes numerous references to the "game as a whole," as the Illinois Sexually Explicit Video Game Law was found unconstitutionally vague because it allowed a game to be regulated based on one scene.¹³⁴

First, it sets forth the compelling state interest when it states:

- (a) Exposing minors to depictions of violence in video games... makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.
- (b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.
- (c) The state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.¹³⁵

Second, it defines "violent video game" as:

[A] ["violent"] video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

- (A) Comes within all of the following descriptions:
 - i. A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest in minors.
 - ii. It is patently offensive to prevailing standards in the community as to what is suitable for minors.
 - iii. It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.
- (B) Enables the player to virtually inflict serious injury upon *images of a human beings or characters with substantially similar human characteristics* in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.¹³⁶

Finally, it provides for judicial review indicating "[t]he provisions of this title are severable. If any provision of this title or its application is held to be invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application."¹³⁷

The Michigan statute addresses the compelling state interest, albeit in less

¹³⁴ Entertainment Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1080 (N.D. Ill. 2005).

¹³⁵ 720 ILCS 5/12B-15.

¹³⁶ *Id.* (emphasis added).

¹³⁷ *Id.*

detail than the California law. Specifically, it states that over 1,000 studies indicate a causal connection between media violence and aggressive behavior in some children. It then lists the compelling state interest: to safeguard the physical and psychological well being of minors, to prevent violence, aggressive and asocial behavior in minors, and to alleviate the real-life harms perpetrated by minors who play ultra-violent video games. However, while the Michigan law addresses instructs that the game must be evaluated “as a whole” in considering whether it is harmful to minors, it lacks provisions describing how the law will be enforced and for judicial review.

As of February 13, 2005, District Court Judge Ronald Whyte issued a temporary injunction preventing the California law from going into effect. While he did not declare the statute unconstitutionally vague, he stated that the video game industry had a reasonable chance of winning its case based on the First Amendment rights of minors. Moreover, he questioned the evidence as to whether violent video games cause violent behavior and need to be regulated by the state. A spokesman for Governor Schwarzenegger said that the Governor looks forward to the full court hearing.¹³⁸

In Michigan, District Court Judge George C. Steeh issued a preliminary injunction to block the law stating that the law would be problematic in practice and “unlikely to pass strict scrutiny.”¹³⁹ Judge Steeh stated that the games were protected by free speech under the First Amendment, that the research presented was unlikely to illustrate a compelling interest in preventing a perceived “harm,” and that the law would be hard to enforce due to a lack of provision(s) indicating how retailers are supposed to know what video games are covered by the law.¹⁴⁰

III. CONCLUSION

Open gaps in each federal judicial opinion regarding violent video game statutes, as well as rapid advances in video game technology and scientific study, indicate that if advocates for violent video game legislation remain adamant, constitutional legislation is only a matter of time. Proponents may seek two avenues for support—arguing that extreme violence should be considered obscene and thus subject to a rational relation test, or that regulating extreme violence in video games meets the strict scrutiny standard.

No judge has offered a logical, as opposed to sentimental, reason as to why “community norms regarding the permissible scope of sexual or sex-related activity” are considered a relevant exception to free speech from why community norms regarding extreme levels of violence, grotesque, and lascivious content are irrelevant. Posner states, “violence has always been and remains a central interest

¹³⁸ Gledhill, *supra* note 5.

¹³⁹ Brendan Sinclair, *Michigan Game Law Temporarily Blocked*, November 9, 2005, available at <http://www.gamespot.com/news/6139517.html>

¹⁴⁰ *Id.*

of human kind and a recurrent, even obsessive theme of culture,” but so has sexual conduct.¹⁴¹ By analogy, it may also be argued that shielding children from exposure to sexual images would be “deforming” and “leave them unequipped to deal with the world as we know it.”¹⁴² The fact that children and teens who grow up with domestic abuse in the household, be it physical or sexual, may make them abusers in their relationships later in life demonstrates that there is truly no logical distinction between sexual and violent offensiveness.¹⁴³ Posner relies on tradition rather than factual distinction when he states, “the notion of forbidding violence itself, but pictures of violence, is a novelty, whereas the concern with pictures of graphic sexual conduct is the essence of the traditional concern with obscenity.”¹⁴⁴ Tellingly, he implies that this concern is not concrete when he states,

We have emphasized today the ‘literary’ character of the games in the record and the unrealistic appearance (cartoon image) 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 games in the record appear to be) a more narrowly drawn ordinance might survive a constitutional challenge.¹⁴⁵

Thus, such a fact-driven analysis is no different from how the courts ruled in similar cases, including the most recent decision from the district court in Illinois.¹⁴⁶ This method of adjudication is bound to give way to an ordinance that can survive strict scrutiny—as no bright line standard will ultimately prevent it. Moreover, a court should once and for all articulate exactly why sexual conduct constitutes “obscenity” but violent conduct does not.

States are also prepared to argue that their ordinances pass strict scrutiny. The California legislature seems to be in the best position to do this, given their narrowly drawn yet comprehensive ordinance. At the full court hearing contemplating a permanent injunction, California plans to argue that, “like the initially loose link between smoking and lung cancer, the data that exists should be treated as cause-and-effect due to public safety concerns.”¹⁴⁷

Evidence as to brain plasticity in childhood and adolescence indicates that experience in the early years forms patterns in the brain that will be retrieved later. When Daniel Hebb let lab rats run around in his home, an “enriched environment,”

¹⁴¹ *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

¹⁴² *Id.*

¹⁴³ See generally Tina de Benedictis et al., *Domestic Violence and Abuse: Types, Signs, Symptoms, Causes and Effects*, Nov. 9, 2004, http://www.helpguide.org/mental/domestic_violence_abuse_types_signs_causes_effects.htm (last visited Mar. 9, 2006).

¹⁴⁴ *Am. Amusement Mach. Ass’n*, 244 F.3d at 575-76.

¹⁴⁵ *Id.* at 579-80.

¹⁴⁶ See *Video Software Dealers Ass’n*, 325 F. Supp. 2d at 1185; *Interactive Digital Software Ass’n*, 329 F.3d at 958.

¹⁴⁷ Wong, *supra* note 6, at 2.

and compared their ability to solve mazes to rats that were left in cages, his conclusion that an “enriched environment” enhanced later learning laid the foundation for the Head Start program, providing academic experiences for disadvantaged pre-schoolers.¹⁴⁸ Now that we know such plasticity is present into adolescence, why should we deprive adolescents from supportive contexts? Moreover, given that research indicates a disjunct between an adolescent’s emotional and cognitive development, should not more support be demanded to protect those who have the intellectual freedom and the physical ability to place themselves in the riskiest of situations?

The fact that adolescents lack the ability to make adult-decisions and understand consequences is not new. Standing alone, that notion provided the underpinning for many legislative and judicial decisions including the legal driving, drinking, gambling, voting and marrying age.¹⁴⁹ However, courts are demanding more than, and in effect destroying, any notion of common sense when it comes to the regulation of violent video games. While studies illustrating the correlation between violent video games and aggressive behavior are becoming more abundant, courts should be forced to answer to some difficult questions. For instance, what rationally distinguishes *Ginsberg* from any of these cases? And, when will the scientific evidence be enough?

The California and Florida legislation as well as the approval of CAMRA demonstrate that we are on the right track toward judicial acceptance of laws that prohibit the sale of violent video games to minors. Moreover, the fact that about half of the fifty states are considering similar proposals in conjunction with ever developing scientific knowledge and rapid technological advances in game-playing indicates that advocates positions will only expand. With each failed statute, a new one will be constructed to fill in the voids.

If the courts refuse to acknowledge the scientific age in which we live, perhaps

¹⁴⁸ KOLB & WISHAW, *supra* note 114, at 514.

¹⁴⁹ *In re Stanford*, 537 U.S. 968, 969-970 (2002) states:

The participation of juveniles in a substantial number of activities open to adults is either barred completely or significantly restricted by legislation. All States but two have a uniform age of majority, and have set that age at 18 or above No State has lowered its voting age below 18 Nor does any State permit a person under 18 to serve on a jury Only four States ever permit persons below 18 to marry without parental consent Thirty-seven States have specific enactments requiring that a patient have attained 18 before she may validly consent to medical treatment Thirty-four States require parental consent before a person below 18 may drive a motor car. . . . Legislation in 42 States prohibits those under 18 from purchasing pornographic materials Where gambling is legal, adolescents under 18 are generally not permitted to participate in it, in some or all of its forms *In these and a host of other ways, minors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.*

Id. (emphasis added).

it is time to concede that *Ginsberg* was wrongly decided.¹⁵⁰ If that is the case, in what type of society does the Constitution intend for us to live? Scientific study is confirming what common sense dictated for centuries—the ability of minors to make “mature decisions” should be limited. Thus, the ability to choose to engage in an offensive form of entertainment should be characterized as a “mature decision,” and should be limited accordingly.

¹⁵⁰ Posner explains, “*Ginsberg* did not insist on social scientific evidence that quasi-obscene images are harmful to children. The court, as we have noted, thought this a matter of common sense. It was 1968; it may not be today; but that is not our case.” *Am. Amusement Machine Ass’n*, 244 F.3d 572, 579 (7th Cir. 2001).