

VIRTUAL VIOLENCE OR VIRTUAL APPRENTICESHIP: JUSTIFICATION FOR THE RECOGNITION OF A VIOLENT VIDEO GAME EXCEPTION TO THE SCOPE OF FIRST AMENDMENT RIGHTS OF MINORS

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Despite humble beginnings as a coin-operated, black and white electronic version of ping-pong in a small local bar,¹ the video game has come to offer “some of the most compelling, stimulating, and challenging entertainment available anywhere, in any form.”² Second only to the television, video games are the most popular form of entertainment for Americans of all ages.³ The popularity of video games shows little sign of slowing as evidenced by the fact that in 2000 video games comprised approximately thirty percent of the U.S. toy market, reaping more revenue than Hollywood,⁴ and the long lines at the toy store each time a video game manufacturer introduces a new home console or the sequel to a popular game. However, as video game manufacturers reap increasing revenues, there is a growing concern among some parents, teachers, child advocacy groups, and legislators that because of their interactive nature, violent video games pose an even greater risk to the mental, emotional, and physical well-being of children than the extensively documented negative effects of violent television.⁵ Furthermore, the increasingly violent content and the aggressive marketing tactics of violent video games have subjected video game manufacturers to intense criticism by the U.S. Attorney General, members of Congress, and the media. All point to the rise in fatal school shootings where violent video and computer games have been directly implicated in the deaths of school students, citing evidence that the adolescent killers were avid video game players arguably influenced and subconsciously trained by playing violent shooter video games.⁶

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1. Ben Pappas, *From Pong to Kingpin*, FORBES, May 31, 1999, at 54.

2. Paul Keegan, *Culture Quake: What Happens to a Generation Immersed in the Most Violent, Interactive Entertainment Ever Created?*, MOTHER JONES, Nov. 1999, at 42, 44.

3. Mediascope, *Issue Briefs: Video Game Violence* (1999), at <http://www.mediascope.org/pubs/ibriefs/vgv.html> (citing J. Quittner, *Are Video Games Really So Bad?*, TIME, May 10, 1999, 50).

4. Royal Van Horn, *Technology: Violence and Video Games*, 81 PHI DELTA KAPPAN 173 (Oct. 1999) (noting that in 1999 the video game industry earned 8.8 billion dollars, a share larger than the Hollywood box office gross of 5.2 billion dollars.)

5. Elisa Hae-Jung Song & Jane E. Anderson, *How Violent Video Games May Violate Children's Health*, 18 CONTEMP. PEDIATRICS 102 (May 2001).

6. Thom Gillespie, *Violence, Games & Art (Part I)*, 9 TECHNOS: Q. FOR EDUC. & TECH. 17

Video games do not kill people, but new psychological research suggests that violent video games may indirectly lead to death. Specifically, an increasing number of studies support the existence of a positive correlation between exposure to violence in video games and aggressive behavior in children.⁷ Coupled with the rise in school shootings, the statistics revealing the hidden dangers of violence in the media have forced parents and lawmakers to take notice of the content of popular video games. In fact, there is a growing consensus among lawmakers that restricting a child's ability to play violent video games is the most logical starting point in the war to curb juvenile delinquency and violence.⁸ Specifically, lawmakers argue that violent video games should be subjected to age-related restrictions, similar to those placed on tobacco, alcohol, guns, adult movies, and pornography.⁹ However, a recent Seventh Circuit Court of Appeal opinion, addressing a city's ability to restrict a child's access to violent video games in public arcades, suggests that a local government's ability to attack this issue of profound national importance is sharply limited by the Constitution.¹⁰

This Note addresses whether cities and states have a compelling interest in protecting minors from psychological harms posed by violent video game play and, if so, how an ordinance or statute can be narrowly drawn to restrict a minor's access to violent video games in public places without unconstitutionally burdening the First Amendment rights of adults. Part I discusses *American Amusement Machine Ass'n v. Kendrick*, where the Seventh Circuit struck down a first-of-its-kind ordinance restricting a minor's access to violent video games in public places.¹¹ Part II provides a brief survey of the history of video game technology and provide explanations as to the recent emergence of violence in popular video game titles. Part III addresses the scientific studies and psychological research that supports the existence of a compelling interest in protecting the psychological well-being of minors from the harmful effects of violent video games. Part IV discusses the First Amendment constraints upon

(2000) (Doom, the extremely popular ultra-violent video game, has been implicated in the Bethel Alabama; Jonesboro, Arkansas; Littleton, Colorado; and Paducah, Kentucky school shootings as one of the adolescent shooters' favorite video games.)

7. Lisa Mascaro, *Entertainment's Violence, Children's Aggression Linked, Report Says*, L.A. DAILY NEWS, Nov. 6, 2001, at 3A (referring to a report released by the American Academy of Pediatrics that meta-analyzed more than 3500 research studies examining the association between media violence and violent behavior in children, and determined all but eighteen demonstrated a correlation).

8. Wendy Y. Lawton, *Oregon Doctors Group Unites against Violent Video Games*, KNIGHT-RIDDER TRIB. BUS. NEWS, Nov. 6, 2000, 2000 WL 28949158.

9. ABCNEWS.com, *The Games Kids Play: John Stossel Looks at Debate Over Violent Video Games*, at http://abcnews.go.com/onair/2020/2020_000322_videogames_feature.html (Mar. 22, 2000) (quoting from Army psychologist Lt. Col. David Grossman).

10. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001).

11. *Id.*

creating content-based restrictions in the context of minors and violent video games. Finally, Part V proposes a solution to the narrow tailoring concerns raised by Judge Posner in *American Amusement Machine v. Kendrick*.

I. PLEASE PLAY AGAIN: JUDICIAL REACTION TO THE INDIANAPOLIS ORDINANCE

Indianapolis, Indiana, was the first city in the nation to take legal action to limit a minor's access to violent video games in arcades and other public areas.¹² Adopted on July 10, 2000, Indianapolis City-County General Ordinance, No. 72, section 831-1, placed several restrictions on the accessibility of certain video games to minors. First, the ordinance prohibited arcade operators, regardless of the size of the establishment, from allowing "a minor who is not accompanied by the minor's parent, or guardian, or custodian"¹³ to play any video game that the city considered "harmful to minors."¹⁴ Second, the ordinance required that warning labels, which advised players of the nature of a game's content, be affixed and displayed on every game that included "graphic violence."¹⁵ Finally, arcade owners were required to isolate violent video games from non-violent games by partition, similar to the methods employed by video stores to segregate adult movies from other movies.¹⁶

The ordinance defined the term "harmful to minors" to mean a video arcade game that:

predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years, and: (1) contains either graphic violence, or strong sexual content.¹⁷

The term "graphic violence" was defined to include a video game's "visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration."¹⁸

Litigation prevented actual enforcement, as the ordinance was stayed pending the judicial resolution of challenges launched by members of the video game industry, who argued that the ordinance was an unconstitutional invasion of the

12. INDIANAPOLIS, IND., CITY-COUNTY GENERAL ORDINANCE, No. 72, § 831-1 (2000).

13. *See, e.g., id.* § 831-5(h) (limiting "registrants" or establishments with five or more games); § 831-6(f) (limiting "exhibitors" or establishments with four or fewer games).

14. *Id.*

15. *Id.* § 831-5(j).

16. *Id.*

17. *Id.* § 831-1.

18. *Id.*

First Amendment rights of minors. After extensive discussion regarding the extent to which video games are protected by the First Amendment and the evidence supporting the city's compelling interest in the welfare of minors, the U.S. District Court for the Southern District of Indiana denied the video game manufacturers' motion for preliminary injunction.¹⁹

Specifically, the district court held that only if the city lacked a "reasonable basis for believing the Ordinance would protect children from harm" would the ordinance be unconstitutional.²⁰ Here, the court reasoned that the psychological studies, offered as evidence by the city, sustained the underlying basis for believing that such measures were necessary to protect children from harm. The studies illustrated that violent video game play engenders aggressive feelings in minors while making them more aggressive in their attitudes and behaviors.²¹ Echoing the concern of violent video game critics, the judge reasoned that,

It would be an odd conception of the First Amendment . . . that would allow a state to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses . . . but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission.²²

However, the aggrieved video game manufacturers inserted another quarter to save the game, by appealing the decision. Then in October 2001, the Seventh Circuit Court of Appeals ultimately struck down the ordinance in a unanimous opinion written by Judge Posner, signifying "game over." The Seventh Circuit Court of Appeals rejected the City of Indianapolis's argument that video games are beyond the scope of First Amendment protection and rejected the contention that a city or state actor may constitutionally restrict minor's access to games depicting graphic violence.²³

The court held that video games are a form of entertainment protected by the First Amendment; therefore, in order for restrictions on video games in public arcades to be valid, such restrictions must withstand strict scrutiny.²⁴ Otherwise stated, the ordinance could only be upheld upon a showing by the City of Indianapolis of two things: first, that the city had a compelling interest in protecting minors from the potential psychological and emotional development of children by shielding them from video games depicting violent content and second, that the ordinance was sufficiently narrowly tailored ordinance that it did not unduly restrict the First Amendment rights of adults.

This decision is significant because it is the first time that a federal court has

19. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000), *rev'd* by 244 F.3d 572 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001).

20. *Id.* at 962.

21. *Id.* at 962-66.

22. *Id.* at 981.

23. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001).

24. *Id.*

affirmatively recognized video games as a form of protected speech. However, it is controversial because of the court's refusal to recognize that a city or state has a compelling interest in protecting the well-being of children. Essentially, by requiring the city to provide definitive scientific proof that violent video games caused psychological harm to children, the Seventh Circuit rejected the longstanding "Ginsberg principle," which supports a finding of a compelling interest where government actors have placed content-based access barriers to material that could be deemed harmful to minors, without conclusive proof of psychological harm, provided the barriers' restrictions do not offend the First Amendment rights of adults.²⁵

Here, the court rejected the city's scientific evidence that violent video games endanger a child's physical and psychological health for several reasons. First, the court held that the studies failed to show that video games had even once caused a person to commit a violent act or increased a person's level of violence due to exposure to violent video games. Second, the court pointed to the lack of indisputable evidence that the interactive character of video games made the depictions of violence more dangerous. Third, the court cited the absence of evidence that violent video games posed a greater risk of harm than other forms of violent entertainment.²⁶ Fourth, the court pointed to the prevalence of violence throughout the history of society, reasoning that limiting a minor's exposure to violent video games would have an effect opposite of that desired by the city, holding that "[t]o shield children right up to the age of eighteen 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."²⁷ Finally, the court analogized the city's efforts to the thought control measures employed by the Nazis under the leadership of Adolph Hitler, reasoning that "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."²⁸ However, it is important to note that the court suggested that an amended ordinance could be brought into conformity with the First Amendment if the amendment was more narrowly tailored than the original or if the city was able to demonstrate that "the games used actors and simulated real death and mutilation convincingly, or . . . the games lacked any storyline and were merely animated shooting galleries."²⁹

In the absence of a Supreme Court decision affirmatively resolving the questions of whether video games are a form of entertainment protected by the First Amendment and whether the Ginsberg principle—i.e., the refusal to require

25. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *New York v. Ferber*, 458 U.S. 747 (1982); *Ginsberg v. New York*, 390 U.S. 629 (1968).

26. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001).

27. *Id.* at 577.

28. *Id.*

29. *Id.* at 579-80.

definitive research results to prove harm by a government actor before imposing content-based restrictions on a minor's access to material that could reasonably be deemed to be harmful to them—is still good law; the Seventh Circuit's opinion serves as the only guide for cities and states attempting to protect children by limiting their access to violent media, particularly violent video games. Although Judge Posner offered some direction as to the nature and quantity of evidence demonstrating a correlation between a child's violent behavior and their exposure to video games, the level of proof necessary to establish compelling interest is uncertain. More specifically, Posner's examples of video game content that may lawfully be restricted fail to provide clear guidance as to how to sufficiently narrowly tailor the content proscription. In effect the "uncertainty surrounding the constitutionality of such measures" is deterring governments from addressing the increasingly important implications of a minor's unrestricted access to harmful media in public places.³⁰

II. VIDEO GAMES 101

As video games enter their third decade as one of the most popular forms of entertainment, it is important to have a cursory knowledge of the history of the video game to understand why the judicial victory by the American Amusement Machine Association has set the stage for a "Battle Royale" pitting the government against the games of the Digital Age.³¹

A. From "Pong" to "Grand Theft III": The Evolution of Violent Video Games

Spinning off of the popularity of pinball machines, the first video game, Pong, was successfully introduced in 1972.³² Available only in arcades, this computerized version of table tennis had only black and white graphics and was very easy to play.³³ The success was immediate as evidenced by equipment failure less than a week after the first coin-operated game appeared in the back room of a bar, because the coin drop was flooded with quarters.³⁴ Computerized versions of board games, and professional sports quickly followed as games like Space Invaders and Asteroids became arcade favorites.³⁵ With more than 115,000 units sold, Ms. Pac-Man became the biggest game in arcade history.³⁶

30. Brief for the Appellant at 3, *Am. Amusement Mach. Ass'n v. Kendrick*, 122 S. Ct. 462 (2001).

31. Lawrence G. Walters, Esq., *Video Game Industry Takes Aim at Censorship*, at <http://www.actiontrip.com/columns/videogameindustry.phtml> (last accessed Nov. 11, 2001).

32. Pappas, *supra* note 1.

33. Mediascope, *supra* note 3.

34. Leonard Herman et al., *History of Video Games: The Games Begin 1971-1977*, at http://gamespot.com/gamespot/features/video/hov/p3_01.html (last visited Dec. 3, 2002).

35. Leonard Herman et al., *History of Video Games: The Golden Age: 1978-1981*, at http://gamespot.com/gamespot/features/video/hov/p4_01.html (last visited Dec. 3, 2002).

36. Leonard Herman et al., *History of Video Games: The Great Crash 1982-1984*, at <http://>

In the late 1970s Americans were spending approximately \$200 million annually on video game hardware and software.³⁷

By the early 1980s, Americans were dropping billions of dollars in quarters into arcade games that could be found in nearly every shopping mall, movie theater, bowling alley, roller-skating rink, pizza parlor, grocery store, and bar.³⁸ The proliferation and popularity of arcades led to widespread criticism of video games because of the “deleterious effect upon the quality of life” video game play was having in neighborhoods and cities across America.³⁹ This criticism served as a catalyst for public officials to pursue measures to restrict minors’ access to arcades and in some cases to ban arcades altogether. In an attempt to combat the perceived side effects of arcades (i.e., truancy,⁴⁰ noise,⁴¹ congestion,⁴² and gambling⁴³), cities started regulating video game play through zoning ordinances and licensing procedures.

Despite First Amendment challenges, courts allowed local governments to place various limits on the public’s access arcades, regardless of the age of the player. Defeated, but not destroyed, the video game industry responded to the court sanctioned restrictions on public playing time developing and marketing at home versions of their most popular arcade games. The reasonably priced consoles featured could be played by anyone at anytime, a feature video game players appreciated. By the end of the decade, thirty million homes in the United States had at least one home game platform; in fact, many had the original Nintendo system.⁴⁴

As gaming technology advanced in the 1990s, video game sales soared. Far from the early days when games were only available in black and white at the local arcade, games could now be played at home, in the car, at work, or even on the school bus with the introduction of handheld systems.⁴⁵ Today, “only two percent of video games are played in coin-operated machines in arcade settings”;⁴⁶ however, their presence cannot be ignored because such coin-operated machines are usually the first to employ new gaming technology.⁴⁷

gamespot.com/gamespot/features/video/hov/p5_01html (last visited Dec. 3, 2002).

37. Pappas, *supra* note 1.

38. William Dobreff, *Video Games Wars: Arcades v. City Licensing Laws*, 1983 DET. C. L. REV. 103, 107-08.

39. *America’s Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

40. *Rothner v. City of Des Plaines*, 554 F. Supp. 465 (N.D. Ill. 1981).

41. *America’s Best Family Showplace Corp.*, 536 F. Supp. at 174.

42. *Id.*

43. *Aladdin’s Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1039 (5th Cir. 1980), *rev’d in part*, 455 U.S. 283 (1982).

44. Pappas, *supra* note 1.

45. Herman et al., *supra* note 34.

46. Fran Spielman, *Proposal Curbs Sale of Explicit Video Games*, CHI. SUN-TIMES, Oct. 31, 2000, at 3.

47. Matthew Hamilton, Comment, *Graphic Violence in Computer and Video Games: Is*

Therefore, as games become increasingly more realistic and violent, such games will be accessible to "all children tall enough to reach the controls" in the local arcade or anywhere stand-alone arcade machines can be found.⁴⁸

"The violence has evolved with the technology from early shooting games blasting mostly spaceships out of the sky to the most gory violence seen today where characters literally tear each other apart with all the realistic details accompanying the act."⁴⁹ Video game content first became an issue in 1993 when the U.S. Senate launched its first "investigation" into video game violence.⁵⁰ The efforts to ban "violent" games ended when the members of the gaming industry agreed to participate in an independent industry-wide rating system.⁵¹ As a result, the Entertainment Software Rating Board (ESRB) was established in 1994 to rate video games and provided information as to the recommended age of players and descriptions of the nature of content.⁵²

Within five years of the creation of ESRB, federal and state lawmakers with the persistent support of child advocacy groups and parents nationwide began to question the increasingly violent content of video games and the effects that playing such games had on children. The concern is justified as evidenced as evidence by the fact that a players' success in forty percent of the top fifty games in 2000 depended upon the player killing someone or ordering the killing of someone.⁵³ Moreover, nine of the fifty most popular games in 2000 fall into the category of first-person shooter games, where the player advances "by killing person after person after person."⁵⁴

In 2001, true to the history of the industry to make games more realistic and lifelike,⁵⁵ Grand Theft Auto III (GA3) was released and quickly became one of the most popular video game titles ever. Referred to by critics as a "virtual apprenticeship in crime," GA3 requires players to "run prostitutes, deliver drugs, make gangland hits and generally flout the law."⁵⁶

GA3's violent story line and immense popularity has led many lawmakers and parents to pay more attention to the psychological effect of violent video games. Similarly, industry advocates have shifted their position from arguing for

Legislation the Answer?, 100 DICK. L. REV. 181, 185 (1995).

48. *Id.* at 186.

49. David A. Walsh, *Video Game Violence: What Does the Research Say?*, 1998 VIDEO AND COMPUTER GAME REPORT CARD, at <http://www.mediafamily.org/research/vgrc/1998-2.shtml> (last accessed Jan. 7, 2002).

50. Leonard Herman et al., *History of Video Games: The 32-Bit Era Begins 1993-1997*, at http://gamespot.com/gamespot/features/video/hov/p9_01.html (last visited Dec. 6, 2002).

51. *Id.*

52. *Id.*

53. Gillespie, *supra* note 6.

54. *Id.* at 7.

55. David Clements, *Video Violence Too Close to Real Thing*, STERLING NEWS SERV., July 26, 1995, available at <http://www.media-awareness.ca/eng/med/class/teamedia/vidvionz.htm>.

56. Steven Kent, *Game Glorifies Life of Crime; Hot Release is School for Thugs, Critics Charge*, USA TODAY, Dec. 20, 2001, at D3.

the existence of a right to play video games to the merits of marketing a game where players restore themselves by “jumping into a car with a prostitute . . . [and get] their money back if they run over her afterward or attack her with a baseball bat.”⁵⁷

The popularity of GA3 and its predecessors is troubling when coupled with a recent study that revealed “violence in entertainment and aggressive behavior in children has a closer correlation than secondhand smoke and lung cancer.”⁵⁸ As video games become more integrated into the daily routine of children and the fabric of American entertainment,⁵⁹ critics will increasingly find reasons to challenge the video game industry. In the face of increasing troubling statistics, the controversy surrounding the psychological ramifications of violent video games may very well forever alter the history of the video game.

B. Explanations For the Emergence of Violent Content

Many explanations exist to explain the emergence of lifelike graphic violence content in video games of varying storylines and plots. First, violence is easy. Game designers refer to violence as the “most obvious tool in the game designer’s armamentarium” because a violent games delivers a more “compelling, stimulating, entertaining, intense experience to the player” than a simple puzzle or electronic board game.⁶⁰ Alternatively, critics argue that video game manufactures are more concerned with “competing madly with one another to create the fastest video-game console ever, each boasting more horsepower” allowing for intense sensory experiences as opposed to “spending billions of dollars to create clever story lines.”⁶¹

Second, some game designers admit that it is easier to develop games where violence, as opposed to engaging frameworks of struggle, is the only recourse to overcome obstacles.⁶² Third, game designers suggest that the answer is as simple as basic economics; violent video games “really bring in the quarters for arcades.”⁶³ Fourth, video game designers believe that a video game’s success is dependent upon conflict. Bottom line, without the tension of conflict “games just

57. *Id.*

58. Mascaro, *supra* note 7 (citing a report released by the American Academy of Pediatrics released on Nov. 5, 2001).

59. Ken Lachlan et al., *Popular Video Games: Assessing the Amount and Context of Violence* (paper presented at the annual meeting of the National Communication Association in Seattle, Washington), at <http://web.ics.cc.purdue.edu/~sherryj/videogames/VGCA.pdf> (last visited Dec. 5, 2002) (reporting that adolescents spend an average of forty minutes a day playing video games).

60. Greg Costikyan, *Game’s Don’t Kill People—Do They?*, SALON TECHNOLOGY, June 21, 1999, at http://www.salon.com/tech/feature/1999/06/21/game_violence/index.html.

61. Keegan, *supra* note 2, at 42.

62. Gillespie, *supra* note 6 (quoting Greg Costikyan, a game designer).

63. Jon Konrath, *Video Games and Violence*, at <http://theroc.org/roc-mag/textarch/roc-15/roc15-08.htm> (last visited Nov. 11, 2001).

aren't very fun," and playing video games is supposed to be fun.⁶⁴

Although violence emerged as a prevalent theme in video games very early (in *Space Invaders* and *Asteroids*, for example), it is the recent simultaneous increase in violence, coupled with technology, which allows games to be more realistic, that has caught the attention of parents, psychologists, and legislators. Contemporary video games are accused of conditioning children to do things that are "abhorrent to the human spirit,"⁶⁵ a far different issue than truancy, loitering, or gambling. The interactive nature of video games enables children to direct their realistic on-screen representative to steal automobiles, murder foes, rape women, bomb buildings, and even carry out acts of bio-terrorism.

The concern is not limited to content as two particular technological advances have also come under fire. In 1998, the game developer, Rare, announced that it was adding a "face-mapping" option to one of its top selling games, *Perfect Dark*.⁶⁶ This new technology allows players to "capture anyone's face, and put it into the video game." However, concerns following the Columbine tragedy forced Nintendo to delay installation of the face-mapping feature because students could practice virtually killing their classmates and teachers.⁶⁷

Another advance in gaming technology, Nintendo's Virtual Boy, has generated some concern because of its ability to imitate real-life action and situations. Virtual Boy is "a virtual reality headset which envelopes the player in the video game world."⁶⁸ Currently, Nintendo has only made boxing and other athletic games using this technology available. However, since many video game players think that a sports game is a "waste of time unless it has an extreme aspect to it or a futuristic feel,"⁶⁹ the possibility and popularity of games simulating combat and other first-person perspective shooting has placed the technology under scrutiny.

III. VIOLENT VIDEO GAMES 101: A COURSE IN "KILLOLOGY"

A. *Beginner's Level: Early Research on the Effects of Violent Video Games*

While parents, teachers, physicians, legislators, and video game designers all agree that video games are powerful educational tools, there is little consensus on the effect of violent games.⁷⁰ Moreover, "[t]he empirical literature on the

64. Clements, *supra* note 55.

65. Associated Press, *Ashcroft Urges Parents to Curb Kids' Game Play*, USA TODAY, June 15, 2001, available at <http://www.usatoday.com/life/cyber/tech/review/games/2001-04-04-ashcroft.htm> (last visited Dec. 5, 2002).

66. Jarred, *Censorship of Gaming Violence*, Dec. 16, 2000, at <http://www.nintensity.com/columns/censor.html> (last accessed Feb. 8, 2002).

67. *Id.*

68. Clements, *supra* note 55.

69. Gillespie, *supra* note 6 (quoting an avid teenage video game player).

70. David Moberg, *Policing Virtual Violence in an Anxious New World*, CHI. TRIB., Nov. 15,

effect of exposure to video game violent is sparse.”⁷¹ Due to the relatively recent arrival of ultra-violent video games, there are few studies available on the effects of video game violence.⁷² At a minimum, the research available indicates that regardless of age, players are physically and emotionally affected by playing video games.

Video games have been credited with increasing a child’s hand-eye coordination and sharpening the child’s attention to detail.⁷³ Medical research has linked video game play to noticeable changes in a player’s heart rate and blood pressure.⁷⁴ Further research has linked video game play with a variety of medical concerns. For example, pediatricians in Japan have discovered a correlation between extensive video game play and an increase in persistent “unexplained symptoms.”⁷⁵ Other research has suggested that video game play acts as a catalyst for photosensitive epilepsy by triggering seizures in adolescent players who may have otherwise outgrown their epilepsy.⁷⁶ The aforementioned effects of video games are the results of preliminary research; the long-term effects of video game playing are currently being studied and have yet to be fully uncovered.

Given that early research is only beginning to provide a picture as to what the effects might be on video game players of all ages, the inevitable question becomes whether violent video games have a negative effect on the “most frequent players: children eight to fourteen years and younger.”⁷⁷ It is this absence of extensive research on the effects of video game violence on which video game proponents rely when arguing that the content of video games does not pose a threat of harm to young game players. Critics of violent video games, however, draw attention to the history of television programming research, citing the fact that preliminary evidence in video game research “mirror much of the work done in the area of television violence and its impact on children.”⁷⁸ They reference the more than 1000 studies, where researchers have documented that “children exposed to violent programming are more likely to behave in an aggressive or violent manner and are more likely to become involved with the

2001, 2001 WL 4135897.

71. Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and Life*, 78 J. PERSONALITY & SOC. PSYCH. 772, 772.

72. Walsh, *supra* note 49.

73. Bernard Cesarone, *Video Games and Children*, ERIC DIGEST: ERIC CLEARING HOUSE ON ELEMENTARY AND EARLY CHILDHOOD EDUCATION, Jan. 1994, at http://www.ed.gov/databases/ERIC_Digests/ed365477.html (last accessed Nov. 11, 2001).

74. *Id.*

75. Song & Anderson, *supra* note 5 (referring to the “unexplained symptoms” as headache, abdominal pain, fatigue, nausea, anorexia, weight loss, chest pain, low-grade fever, sweating, exhausted facial appearances, and black rings under the eyes.)

76. *Id.*

77. Walsh, *supra* note 49.

78. *Id.*

justice system than children who have not had such exposure.”⁷⁹ Ironically, “defenders of violent video games use the same argument as defenders of violent television do, claiming that the catharsis these games offer allows players to release aggressive tendencies” discounting the “more than 3500 research studies examining the association between media violence and violent behavior” where “all but eighteen have shown a correlation.”⁸⁰

Despite the similarities between television and video games, there is one striking and significant difference: video games are interactive entertainment. As the following discussion indicates, as results emerge from research on the effect of violent video games, a compelling argument can be made that video games are training their players to kill, like the military trains soldiers for battle.

B. Intermediate Level: Contemporary Research on the Psychological Effect of Violent Video Games on Children

This section provides a cursory survey of two comprehensive studies that examine the psychological effects of violent video games. The first study examined the amount and context of violence in video games popular with children.⁸¹ The second study compiled research on the short-term effects of video game violence.⁸²

In the first study, researchers discovered that “interactive games rated for older children and adults not only feature more violence, but present physical aggression in such a way that increases the risk of learning and emotional desensitization.”⁸³ A review of the sixty most popular games of the year 2000, many of which are rated “T” or “M,” revealed that during a ten-minute period, players were exposed to forty-six violent transactions.⁸⁴ Otherwise stated, while playing the most popular games, individuals witness and virtually commit more than “180 incidents of aggression per day or 5,400 incidents per month.”⁸⁵ Based on general principles of learning, researchers believe that “repeated exposure to acts of aggression in video games may function as a form of cognitive rehearsal that strengthens and reinforces aggressive scripts for social problem solving stored in memory.”⁸⁶ More simply stated, the prevalence of violence in popular video games, especially those rated “T” or “M,” poses a significant risk to younger players because the repeated acts of violence are justified and rewarded. Such games are similar to interactive study guides to violence.

The second study, the General Affective Aggression Model (GAAM), is the most widely cited study of the short-term effects and long-term implications of

79. Song & Anderson, *supra* note 5, at 110.

80. Mascaro, *supra* note 7.

81. Lachlan et al., *supra* note 59.

82. Anderson & Dill, *supra* note 71.

83. Lachlan et al., *supra* note 59.

84. *Id.*

85. *Id.*

86. *Id.*

violent video game play. The GAAM results, published in 2000, were derived from two other studies, one correlational, and the other experimental. The correlational study “measured both the amount of exposure to video game violence and the amount of time participants had played video games in prior time periods regardless of content.”⁸⁷ The subjects were selected from a college student population, “because they are old enough for long-term effects of playing violent video games to have had a measurable impact on real-world aggression.”⁸⁸ Data were collected via self-report questionnaires that focused on exposure to video game violence and the amount of time spent playing video games in general, regardless of content.⁸⁹

The results of the study were two-fold. First, it legitimized the “concern about the deleterious effects of violent video games on delinquent behavior.”⁹⁰ Second, it revealed that time spent playing violent video games was a “superior predictor” of delinquency when compared to time spent playing video games generally.⁹¹

The experimental study “examined the effects of violent video game play on aggressive thought, affect and behavior.”⁹² Each participant attended two laboratory sessions and played the assigned video game a total of three times.⁹³ Researchers found that “inside the laboratory, college students who played a violent video games behaved more aggressively toward an opponent than did students who had played a nonviolent video game.”⁹⁴ Additionally, the research indicated “outside the laboratory, students who reported playing more violent video games over a period of years also engaged in more aggressive behavior in their own lives.”⁹⁵

Together, the two studies add considerable credence to the idea that “exposure to violent video games can increase aggressive behavior.”⁹⁶ The research also indicates that “violent video games provide a forum for learning and practicing aggressive solutions to conflict situations” and that the effect “appears to be cognitive in nature.”⁹⁷ More specifically stated:

In the short term, playing a violent video game appears to affect aggression by priming aggressive thoughts. Longer-term effects are likely to be longer lasting as well, as the player learns and practices new aggression-related scripts that become more and more accessible for use

87. Anderson & Dill, *supra* note 71.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

when real-life conflict situations arise. If repeated exposure to violent video games does indeed lead to the creation and heightened accessibility of a variety of aggressive knowledge structures, thus effectively altering the person's basic personality structure, the consequent changes in everyday social interactions may also lead to consistent increases in aggressive affect.⁹⁸

Together, most importantly, the studies stand for the proposition that, "the active nature of the learning environment of the video game suggests that this medium is potentially more dangerous than the more heavily investigated TV and movie media."⁹⁹

C. Advanced Players Only: Comparative Evidence That Violent Video Games Are Virtual Apprenticeships in Violence

The most compelling source of unsettling evidence that violent video games are conditioning children to commit violent acts can be derived from more than twenty-five years of military research into the psychology of killing conducted by Army Lieutenant Colonel David Grossman, adjunct professor at Arkansas State University and former military psychologist who specialized as a "killologist" for the U.S. military. Grossman offers the "most disconcerting and convincing argument for the hypothesis that violent video games teach violent behavior."¹⁰⁰ His criticism of violent video games stems from his work in the field of killology, "the study of the methods and psychological effects of training army recruits to circumvent their natural inhibitions to killing fellow human beings."¹⁰¹

Developed during World War II, killology was a remedial response to surveys revealing that approximately eighty percent of individual riflemen could not mentally or emotionally bring themselves to fire at an exposed enemy soldier, which from a military perspective is like a "fifteen percent literacy rate among librarians."¹⁰² In the infant stages of killology research, the military learned that "the biggest barrier to killing is the psychological resistance, not the technical skills involved in firing a weapon accurately."¹⁰³ The military employed, and continues to employ, methods of operant and classical conditioning to overcome a human's built-in aversion to killing other humans.¹⁰⁴ The success of killologists, whose missions was to desensitize Marine recruits to increase their effectiveness in combat, was demonstrated during the Vietnam War where the

98. *Id.*

99. *Id.*

100. Song & Anderson, *supra* note 5, at 113.

101. David Grossman & Mary Cagney, *Trained to Kill*, CHRISTIANITY TODAY, Aug. 10, 1998, at 31.

102. *Id.*

103. Walsh, *supra* note 49.

104. Grossman & Cagney, *supra* note 101.

firing rate of individual riflemen averaged better than ninety percent.¹⁰⁵

The military's success at desensitizing soldiers to kill prior to and during the Vietnam War supports the notion that while humans do not naturally kill, they can be trained to kill.¹⁰⁶ Consequently, examining and understanding how the military systematically applied psychological conditioning techniques to eliminate man's inherent resistance to kill in combat is important because the same techniques that are used to train recruits to kill are imitated by game players in popular interactive violent video games.¹⁰⁷ When applied to violent video games, the principles of operant and classical conditioning have a profound impact on impressionable adolescent video game players.

The cornerstone of the military's killer conditioning is operant conditioning, "a very powerful procedure of stimulus-response, stimulus-response," which is employed to teach soldiers to react in a particular way in various situations.¹⁰⁸ One example of how operant conditioning has been used to increase the firing rate on modern battlefields is by the replacement of World War II era bull's-eye targets with realistic, man-shaped silhouettes for target practice that are used by all branches of the armed forces and local law enforcement officers.¹⁰⁹ Research has shown that repeatedly shooting at human silhouettes, as opposed to bull's-eyes, increases the likelihood that "when soldiers are on the battlefield or a police officer is walking a beat and somebody pops up with a gun, they will shoot reflexively and shoot to kill."¹¹⁰ This simple change proves that operant conditioning is effective because statistics show that "seventy-five to eighty percent of shooting on the modern battlefield is the result of this kind of stimulus-response training."¹¹¹

Application of stimulus-response conditioning techniques is not limited to soldiers on the battlefield, but is applied in a multitude of circumstances to persons regardless of age. Generally, research on operant conditioning suggests that when people are frightened or angry, they behave as they have been conditioned to behave.¹¹² Therefore, to increase one's ability to respond to a particular situation, the individual is required to repeat behaviors to learn the desired behavior. Consider school fire drills, an everyday example of the effects of operant conditioning: school fire drills. In fire drills, children learn to file out of the building in an orderly fashion by repeatedly practicing what to do when the fire alarm sounds. Consequently, despite the fact that children are noticeably frightened when there is a real fire, most children do exactly what they have been conditioned to do, escaping the fire and ultimately saving their lives.

Similar to the objective of escaping a burning building quickly in a fire drill,

105. *Id.*; ABCNEWS.com, *supra* note 9.

106. *See* Grossman & Cagney, *supra* note 101; Song & Anderson, *supra* note 5, at 113.

107. *See* Grossman & Cagney, *supra* note 101; Song & Anderson, *supra* note 5, at 113.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

the primary objective of many violent video games is to kill opponents as quickly as possible. Each opponent, like each drill, represents a stimulus; the conditioned response is whatever it takes to eliminate the threat to the player's success like escaping the fire. Additionally, many of the new ultra-violent video games "reinforce violent choices with rewards of additional points, longer playing time, or special effects for certain acts of aggression or violence."¹¹³

Grossman's claim that operant conditioning techniques are employed in video games is supported by medical research. A recent study demonstrated that "striatal dopamine release increases during video game playing and that the correlation between dopamine release and performance level was significant."¹¹⁴ Dopaminergic neurotransmission is linked to "learning, reinforcement behavior, attention, and sensorimotor integration."¹¹⁵ In other words, medical science proves that video games are powerful educational tools, which means that violent video games teach their players that "violence is fun, obligatory, easily justified, and essentially without negative consequences."¹¹⁶ Simply stated, like school children practice escaping a fire, every time a child plays a interactive "point-and-shoot video game, he is learning the exact same conditioned reflex and motor skills" as a police officer training at a firing range.¹¹⁷ While "[i]n the military and law-enforcement worlds, the right option is often not to shoot. But you never, never put your quarter in that video machine with the intention of not shooting."¹¹⁸

The implications of operant conditioning in video games are simple, every time a child plays a violent video game he or she practices destroying his or her enemies. Real life provides an example of presence and effect of operant conditioning in violent video games. Take the school shooting in Paducah, Kentucky, for example. The shooter, a fourteen year old student named Michael Carneal, who had never handled or fired a pistol in his life, "clipped off nine shots in about a 20-second period."¹¹⁹ Eight of the nine shots struck their intended victims, resulting in the deaths of three.¹²⁰ Carneal's expert marksmanship has been attributed to his obsession with video games.¹²¹ Witnesses to the shootings explained that, "He had a blank look on his face. He never moved his feet. He never fired too far to the right or the left or up or down. He simply fired one shot at everything that popped upon on his screen."¹²² Taken together, Carneal and the two Littleton, Colorado, school shooters provide credence to the concern that violent video games are subconsciously teaching its

113. Song & Anderson, *supra* note 5, at 113; *see also* Kent, *supra* note 56.

114. Song & Anderson, *supra* note 5, at 113.

115. *Id.*

116. *Id.* (quoting researchers J.B. Funk and D.D. Buchman).

117. Grossman & Cagney, *supra* note 101.

118. *Id.*

119. Song & Anderson, *supra* note 5, at 113-14.

120. *See id.*

121. *See id.*

122. *Id.*

adolescent players that “the best way to solve a problem is to eliminate the source of the problem.”¹²³

Operant conditioning worked for the military, successfully training army recruits to overcome their inhibitions to kill. These same conditioning techniques can have similar positive consequences when used in educational or strategy games. Alternatively, if you consider the events that may serve as stimuli for children, like teasing by a fellow student or disciplinary action enforced by a parent or teacher, for example, violent video game are subconsciously sending the wrong message to children.

Classical conditioning, unlike operant conditioning that teaches kids to kill, is the “subtle but powerful mechanism” that teaches one to like it.¹²⁴ Classical conditioning techniques originated from Pavlov’s famous work with canines, where the dogs learned to associate the ringing of a bell with food, and after time the dogs could not longer hear the bell without salivating. There are very few examples of the use of classical conditioning in modern United States military training. However, the Japanese have very effectively applied “classical conditioning” methods.¹²⁵ For example:

early in World War II, Chinese prisoners were placed in a ditch on their knees with their hands bound behind them. And one by one, a select few Japanese soldiers would go into the ditch and bayonet “their” prisoner to death. . . . Up on the bank, countless other young soldiers would cheer them on in their violence. Immediately afterwards, the soldiers who had been spectators were treated to sake, the best meal they had had in months, and to so-called comfort girls.¹²⁶

These exercises had the effect of teaching the soldiers “to associate committing violent acts with pleasure,” thus having the ultimate effect of “enabling very large numbers of soldiers to commit atrocities.”¹²⁷

Examples of classical conditioning in violent video games are not as atrocious as the training techniques of the Japanese military, but are equally effective. Most video games, non-violent or violent, reinforce game behavior by awarding players with “additional points, longer playing time, or special effects for certain acts.”¹²⁸ Applying his knowledge of killology to violent video games, Grossman has discovered a “phenomenon that functions much like AIDS,” which he labeled “AVIDS—Acquired Violence Immune Deficiency

123. Media Awareness Network, *Violent Video Games and Stimulus Addiction*, available at <http://www.media-awareness.ca/eng/med/class/teamedia/vidintro.htm> (last accessed Nov. 11, 2001) (adapted from Gloria DeGaetano & Kathleen Bander, *SCREEN SMARTS: A FAMILY GUIDE TO MEDIA LITERACY* (1996)).

124. Grossman & Cagney, *supra* note 101.

125. *Id.*

126. *Id.*

127. *Id.*

128. Song & Anderson, *supra* note 5, at 113.

Syndrome.”¹²⁹ Grossman explains that while AIDS has never killed anybody, “[i]t destroys your immune system, and then other diseases that shouldn’t kill you become fatal.”¹³⁰ Similarly, while violent video games do not kill people, “they destroy your violence immune system and conditio[n] you to derive pleasure from violence. And once you are at close range with another human being, and it’s time for you to pull that trigger, Acquired Violence Immune Deficiency Syndrome can destroy your midbrain resistance.”¹³¹

D. Bonus Round: Non-Scientific Reflections on Violent Video Games

Those who are concerned with the possible negative consequences of the interactive nature of video games because they blur the line that separates fantasy from reality are no longer in the minority. Momentum is growing behind the idea that every time a child plays a violent video game they are subconsciously embracing destruction, violence, and death as a way of life.¹³² Professional educators, who recognize that “[v]ideo games are extremely powerful teaching machines,” are concerned that video games have desensitizing effects even though the technology is “still at a primitive level.”¹³³ Educators are voicing their concern that video gaming technology is “on a trajectory toward increasing realism, or hyperreality, that makes people start thinking they can shoot someone and it doesn’t hurt, that they can recover.”¹³⁴

However, some educators praise the interactive technology and analogize video games to extracurricular activities. Video games allow “geeks get out their competitive spirit . . . because they’re not athletic enough to play on the basketball team.”¹³⁵ They act as an escape valve by giving teens a release, “allowing them to let off steam by doing only virtual damage.”¹³⁶ Finally, some parents argue that children today are over-programmed between school, extracurricular activities, and sports and children live such regulated lives that video games foster a sense of control and independence in children.¹³⁷

Notwithstanding the benefits associated with video game play generally, “social-science work over the last 40 years has shown—that exposure to [media] violence changes our values, makes us more likely to act out aggressively. Not by viewing a particular program, but [after consuming] a steady diet of

129. Grossman & Cagney, *supra* note 101.

130. *Id.*

131. *Id.*

132. *See* Keegan, *supra* note 2.

133. *Id.* (citing Eugene Provenzo, Professor of Education at the University of Miami and author of a yet to be released book entitled *Children and Hyperreality: The Loss of the Real in Contemporary Childhood and Adolescence*).

134. *Id.*

135. *Id.*

136. Robyn E. Blumner, *Avoid a Panicked Rush to Blame the Media*, ST. PETERSBURG TIMES, Mar. 11, 2001, at D1.

137. *See id.*

violence.”¹³⁸ Heightened concern about the effects of violent video games is justified because the “player is actively involved in constructing the violence.”¹³⁹ The interactive nature coupled by the increasing realism may, in fact, “encourage greater identification with characters and more imitation of the behaviors video game models”¹⁴⁰ and ultimately “increase the likelihood of learning aggressive behavior.”¹⁴¹

Despite the fact that violent video game research is in its embryonic stages, early studies have found a correlation between video game violence and aggressive behavior in children. If further research continues to mirror the extensive body of research available on the negative effects of television violence on children, then it is plausible that violent video games are virtual schools for thugs, providing children with an apprenticeship in violence and delinquent behavior. Further research and time will confirm the concerns that motivated the City of Indianapolis to attempt to restrict minors’ access to violent video games in movie theaters, hotel game-rooms, bowling alleys, and arcades, which will prove with scientific certainty compelling interest in restricting a minor’s access to violent video games.

IV. GAME OVER: RESTRICTING VIDEO GAME PLAY TIME

A. Need More Quarters: The Efforts of Lawmakers to Limit Play Time

Soon after the first coin-operated video game, Pong, was test-marketed in Andy Capps, a local bar in the game designer’s hometown,¹⁴² arguments for limiting or prohibiting access for both adults and children to video games in public places could be heard throughout many communities. Analogizing arcades to bars and brothels, critics argued that video games had the same deleterious effects as alcohol and pornographic magazines, which justified the enactment of ordinances and licensure procedures limiting the time one could spend in a video arcade. Currently, lawmakers are attempting to use similar ordinances to limit a minor’s access to video games in public arcades, not to alleviate perceived social ailments, but to remedy the damaging effect on the minds of children caused by the increasing violent content of many games.

The question of whether government actors may lawfully prohibit or limit minors from engaging in the popular pastime of playing electronic video games has been posed in local and federal courtrooms across the country. Questioning the constitutionality of such restrictions, arcade owners of the video game industry have challenged restrictions limiting and prohibiting playtime on the grounds that video games are speech protected by the First Amendment. However, no clear winner has emerged in three decades of litigation for two

138. Keegan, *supra* note 2.

139. *Id.*

140. Mediascope, *supra* note 3.

141. *Id.*

142. *See* Herman et al. *supra* note 34.

reasons: the different nature of the restrictions and the various levels of constitutional protection extended to video games by state and federal courts.

Despite the inconsistencies, the U.S. Supreme Court has yet to resolve whether video games are a form of speech protected by the First Amendment, as it has with other forms of entertainment.¹⁴³ This question is an important one as lawmakers in at least three states sponsored bills that would ban violent video games from places where minors congregate: Arkansas,¹⁴⁴ Oklahoma,¹⁴⁵ New Jersey.¹⁴⁶ Additionally, in many cities across the nation, lawmakers in Indianapolis,¹⁴⁷ Chicago,¹⁴⁸ St. Louis,¹⁴⁹ and King County, Washington¹⁵⁰ have taken measures to limit minors' access to violent video games in public arcades and at retail and rental establishments.

B. Playing by the Rules: Implications of the First Amendment

In the absence of a definitive decision by the Supreme Court, similar to the Court's treatment of a state's right to restrict a minor's access to pornography and indecent speech,¹⁵¹ an analysis of the First Amendment is the necessary starting point in determining the government's right to limit a child's access to graphic violence at public arcades. This analysis requires answering three questions. First, the validity of any content-motivated restriction of access to

143. See *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that the Internet deserves the highest level of First Amendment protection).

144. S.B. 81, 83rd Gen. Assem. (Ark. 2001) (prohibiting a minor's access to video games within arcades that were classified as containing adult content) (withdrawn by the author, Senator T. Smith, on Apr. 11, 2001).

145. S.B. 757, 48th Leg. (Okla. 2001) (sponsored by Senator Scott Pruitt and Representative Hopper Smith, banning the sale or rental of any video game with high violence content to anyone under age seventeen) (no formal action was taken on the bill as it was deferred back to committee on Mar. 8, 2001).

146. Assembly Bill 2849, 209th Leg. (N.J. 2000) (sponsored by Assemblyman Leroy J. Jones, Jr., required arcade operators to label and partition those video games containing "harmful graphics" and prohibit minors under age seventeen from playing them without parental consent. The bill died in committee on Nov. 9, 2000).

147. INDIANAPOLIS, IND. CITY-COUNTY GENERAL ORDINANCE No. 72, § 831-1 (2000).

148. Spielman, *supra* note 46, at 3.

149. ST. LOUIS, MO. COUNTY COUNCIL ORDINANCE 20,193 (Oct. 26, 2000) (enacted on October 26, 2000 to regulate the accessibility of minors to violent video games in public arcades in the absence of parental permission. The effective date was pushed back to July 1, 2002 following a legal challenge by the Interactive Digital Software Association that led to an amended version of the sections pertaining to the accessibility to children of video games with violent and sexual content).

150. King County Board of Health, Wa., Resolution 00-302 (Mar. 17, 2000) (requesting the removal of violent video games from public arcades and community centers), *available at* <http://www.metrokc.gov/mkcc/News/0003/03-17Nvvg.htm> (last visited Jan. 10, 2002).

151. *Ginsberg v. New York*, 390 U.S. 630 (1968).

video games is dependent upon whether video games are a form of entertainment within the scope of First Amendment protection. If First Amendment protection extends to video games, the next question is whether violent speech is of a constitutionally protected category. Finally, if violent speech is of a protected category, then the validity of the restrictions depends on whether the content-based regulation survives strict scrutiny.

1. *Are Video Games Within the Scope of First Amendment Protection?*—When video games first became a popular pastime in the early 1980s, ordinances and other government regulations restricting or prohibiting access to public arcades to video game players of all ages were upheld in courtrooms across the country. The majority of courts held that video game restrictions did not implicate First Amendment problems, despite constitutional challenges from arcade owners and video game manufacturers.¹⁵² The theory that video games were beyond the scope of the First Amendment¹⁵³ was premised on the idea that while considered entertainment, video games could only gain protected status if they were “designed to communicate or express some idea or some information,”¹⁵⁴ and video game play was perceived as void any communicative element.¹⁵⁵ In fact, courts analogized video games to pinball machines,¹⁵⁶ reasoning that one’s successful play of a video game was limited to “the player’s eye-hand coordination, reflexes, muscular control, concentration, practice, and on the player’s understanding of the rules of play.”¹⁵⁷ Courts ignored the interactive characteristic of video games, discounting their communicative nature, because communication during game play was “totally divorced from a purpose of expressing ideas, impressions, feelings, or information unrelated to the game itself.”¹⁵⁸ In other words, the fact that “a player may strive to shoot down invaders”¹⁵⁹ was insufficient to implicate First Amendment problems.¹⁶⁰

However, not all courts refused to extend First Amendment protection to video games. A minority of courts held that video games were deserving of First Amendment protection by analogizing their content to that of movies¹⁶¹ and nude

152. *America’s Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

153. *Tommy and Tina Inc. v. Dept. of Consumer Affairs of the City of N.Y.*, 459 N.Y.S.2d 220, 226 (N.Y. Sup. Ct. 1983).

154. *People v. Walker*, 354 N.W.2d 312, 316 (Mich. Ct. App. 1984).

155. See *America’s Best Family Showplace Corp.*, 536 F. Supp. at 174.

156. See *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 610 (Mass. 1983).

157. *Caswell v. Licensing Comm’n for Brockton*, 444 N.E.2d 922, 926 (Mass. 1983).

158. *Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1444 (D.R.I. 1985).

159. *Caswell*, 444 N.E.2d at 926.

160. See *American’s Best Family Showplace Inc.*, 536 F. Supp. at 174.

161. See *Stern Electronics, Inc. v. Kaufman*, 523 F. Supp. 635, 639 (E.D.N.Y. 1981) (the trial judge described the video game *Scramble*, as a “movie in which the viewer participates in the action”).

dancing.¹⁶² Furthermore, many of the courts that refused to extend protection to primitive video games did not foreclose the possibility. Several justices acknowledged in dicta that if video games of the future were to incorporate “more sophisticated presentations involving storyline and plot that convey to the user of a significant artistic message” or were of the nature that they could be “considered works of art,” such games would require First Amendment protection.¹⁶³

Despite the substantial advances in video game popularity and technology in the 1990s, courts avoided the issue of whether video games were deserving of Amendment protection.¹⁶⁴ Only recently have courts willingly analyzed free speech in the context of video games. In *American Amusement Machine Ass’n v. Kendrick*,¹⁶⁵ both the district and appellate court justices held that “at least some video games are protected by the First Amendment,”¹⁶⁶ echoing the wisdom of those courts that two decades before hypothesized about the realities of video gaming technology and more sophisticated games.

Although the U.S. Supreme Court has yet to definitively address the First Amendment in the context of video games, the recent lower court decisions categorizing video games as protected speech are cogent with the expansion trend evident in First Amendment jurisprudence. The Supreme Court has extended First Amendment protection to include various forms of entertainment similar to video games, such as movies,¹⁶⁷ radio and television broadcasts,¹⁶⁸ nude dancing,¹⁶⁹ and, more recently, the Internet.¹⁷⁰ As a result, the Supreme Court is likely to include video games within the scope of constitutionally protected speech and question the constitutional validity of government regulations restricting the access to and availability of video games, regardless of the game player’s age.

2. *Is Violent Speech Protected?*—Assuming that video games are within the scope of the First Amendment, the next question becomes whether constitutional protection extends to the graphic content of video games. Otherwise stated, does

162. See *Gameways, Inc. v. McGuire*, NYLJ (N.Y. Sup. Ct. 1982) (reasoning that since viewing nude dancing through a coin operated machine was judicially recognized as constitutionally protected, and nude dancing was no more informative than video games, that video games were a form of speech protected by the First Amendment).

163. *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991).

164. See *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991); *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990).

165. 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev’d*, 244 F.3d 572 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001) (the lower court’s extension of constitutional protection to video games was not challenged on appeal).

166. *Id.* at 954.

167. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

168. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

169. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (acknowledging that nude dancing is expressive conduct within the outer perimeters of the First Amendment).

170. *Reno v. ACLU*, 521 U.S. 844 (1997).

the First Amendment protect violent speech? Generally, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."¹⁷¹ However, the Supreme Court has never interpreted the First Amendment as providing full and absolute protection to all forms of speech and expression.¹⁷² Historically, the Supreme Court has confined the categories of unprotected speech to defamation,¹⁷³ fighting words,¹⁷⁴ direct incitement of lawless action,¹⁷⁵ and obscenity.¹⁷⁶ The Supreme Court has expanded these narrow categories of speech only recently to include child pornography.¹⁷⁷

Currently, depictions of violence and violent speech are not included among the narrow categories of unprotected speech carved out of the First Amendment protection. Furthermore, courts have expressly declined to expand the definition of obscenity to include graphic depictions of violence¹⁷⁸ because "[v]iolence and obscenity are distinct categories of objectionable depiction."¹⁷⁹ The distinction between obscenity and violent speech has been articulated in reference to video games. In *American Amusement Machine Ass'n v. Kendrick*, Judge Posner refused to create an exception to the narrow categories of unprotected speech that would include graphic violence on the opinion that "the fact that obscenity is excluded from the protection of the principle that government may not regulate the content of expressive activity . . . neither compels nor forecloses a like exclusion of violent imagery."¹⁸⁰ Consequently, the First Amendment protects graphic depictions of violence, violent images, and violent speech; therefore, any attempts to regulate such speech are subject to strict scrutiny.

3. *Constitutional Standard of Review.*—Generally, regulation of speech is either content-neutral or content-based in nature. A restriction is content-neutral if it serves to "restrict the flow of ideas and information consequent to the pursuit

171. U.S. CONST. amend. I.

172. David C. Kiernan, Note, *Shall the Sins of the Son Be Visited Upon the Father? Video Game Manufacturer Liability For Violent Video Games*, 52 HASTINGS L.J. 207, 210 (2000).

173. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

174. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

175. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

176. *Miller v. California*, 413 U.S. 15, 37 (1973) (reaffirming that obscene material is not protected by the First Amendment); *Chaplinsky*, 315 U.S. at 572.

177. *New York v. Ferber*, 458 U.S. 747 (1982).

178. See *Winters v. New York*, 333 U.S. 507, 518-20 (1948); *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev'd by*, 244 F.3d 572, 574 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66-67 (2d Cir. 1997); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992).

179. *Am. Amusement Mach. Ass'n*, 244 F.3d at 574 (citing *Winters*, 333 U.S. at 518-20; *United States v. Thoma*, 726 F.2d 1191, 2000 (7th Cir. 1984) (stating that "depictions of torture and deformation are not inherently sexual and, absent some expert guidance as to how such violence appeals to the prurient interest of a deviant group, there is no basis on which a trier of fact could deem such material obscene"); *State v. Johnson*, 343 So. 2d 705, 709-10 (La. 1977).

180. *Am. Amusement Mach. Ass'n*, 244 F.3d at 574.

of a distinct governmental goal.”¹⁸¹ Content-neutral restrictions, often referred to as time, place, and manner restrictions, are “motivated by state interests unrelated to speech and expression, but ha[ve] the effect of infringing on the free exercise of First Amendment rights.”¹⁸² For example, noise ordinances designed to control noise on public streets or in residential neighborhoods are content-neutral regulations.¹⁸³ Alternatively, a restriction is content-based if it focuses directly on the ideas, subject matter, or content of the speech.¹⁸⁴ Video game ordinances that restrict or prohibit a minor’s access to particular arcade games because of their violent content are a contemporary example of content-based restrictions.

As a general rule, content-based restrictions on speech are presumptively invalid and subjected to the highest level of judicial review, strict scrutiny.¹⁸⁵ Applying strict scrutiny, under the First Amendment Speech Clause, the government may only “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”¹⁸⁶ However, in upholding broad restrictions on a child’s access to pornography¹⁸⁷ and indecent speech,¹⁸⁸ the Supreme Court has demonstrated that while minors have constitutional rights in common with adults, those “rights are not coextensive with the rights of adults.”¹⁸⁹ Consequently, in many situations where the legislative efforts are aimed at safeguarding children, the Supreme Court has imposed a more relaxed standard of scrutiny when evaluating the compelling government interest promoted by the challenged age-related speech proscription.

The underlying rationale for the double standard present in First Amendment juvenile jurisprudence is sometimes referred to as the “harm-to-minors” censorship principle,¹⁹⁰ where subjecting the rights of minors to greater circumscription than the rights of adults is justified because the “unique developmental and emotional characteristics of childhood give rise to special state interests.”¹⁹¹ The ‘harm-to-minors’ principle originates from two landmark

181. *Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1453 (1985).

182. *Id.*

183. *See Kovacs v. Cooper*, 336 U.S. 77 (1949).

184. *Allendale Leasing, Inc.*, 614 F. Supp. 1440, 1453 (1985).

185. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

186. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

187. *Ginsberg v. New York*, 390 U.S. 629, 642 (1968).

188. *Sable Communications*, 492 U.S. at 131 (recognizing a compelling state interest in preventing minors from being exposed to indecent telephone messages, but concluding that the statute was not a narrowly tailored effort to serve that compelling interest).

189. Note, *Assessing the Scope of Minors’ Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1167-1168 (1984) [hereinafter Note, *Assessing the Scope*].

190. Marjorie Heins, *Not in Front of the Children: “Indecency,” Censorship, and the Innocence of Youth*, 10 B.U. PUB. INT. L.J. 360 (2001) (book review).

191. Note, *Assessing the Scope*, *supra* note 189, at 1163.

Supreme Court decisions, *Prince v. Commonwealth of Massachusetts*¹⁹² and *Ginsberg v. New York*.¹⁹³ In *Prince*, the Court upheld the conviction of the aunt/custodian of a nine-year-old girl for violating the Massachusetts Child Labor Law by permitting the child to sell religious literature on the streets of Boston.¹⁹⁴ *Prince* represents the first case where the Court expressly recognized that “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults” even where fundamental rights are invaded.¹⁹⁵

A quarter of a century later in *Ginsberg*, the Supreme Court again recognized the importance of protecting the welfare of children and seeing “that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men and citizens.’”¹⁹⁶ In *Ginsberg*, the Court upheld a criminal obscenity statute that prohibited the sale to minors of material defined to be obscene on the basis of its appeal to them regardless whether or not it would be obscene to adults. The *Ginsberg* decision recognized that a state’s constitutional power to regulate the well-being of its children in order to aid those with the primary responsibility for children is in addition to a state’s independent interest in the well-being of its youth.¹⁹⁷

Despite criticism, the Supreme Court has continued to recognize the harm-to-minors principle articulated in *Ginsberg*. Advocates of a First Amendment that is applied without regard to age agree that free speech protection is necessary to prepare “youth to become active participants in a democratic society” and foster critical analytical skills.¹⁹⁸ Other critics of the harm-to-minors principle argue that the restrictions are the equivalent of “intellectual protectionism” serving only to inhibit children’s ability to “cope with their environments and the stimuli that surrounds them,” ultimately causing greater harm than that posed by the speech from which minors are being shielded.¹⁹⁹ Nevertheless, the Court has demonstrated that it is committed to the idea that a state has a “compelling interest in protecting the physical and psychological well-being of minors.”²⁰⁰

For more than a century, the Supreme Court has recognized that “the unique developmental and emotional characteristics of childhood give rise to special state interests that in some cases may justify restricting children’s rights more severely than the rights of adults.”²⁰¹ The tension between a state’s interest in the well-being of its children and the rights of children “reflects conflicting and unclear visions of the role that the government should play in the lives of its

192. 321 U.S. 158 (1944).

193. 390 U.S. at 642.

194. *Prince*, 321 U.S. at 170.

195. *Id.*

196. 390 U.S. at 640, 641 (quoting *Prince*, 321 U.S. at 165).

197. *Id.* at 639-40.

198. Heins, *supra* note 190.

199. *Id.*

200. *Id.*

201. Note, *Assessing the Scope*, *supra* note 189, at 1163.

minor citizens.”²⁰² Absent a bright-line rule, it is impossible to predict with certainty how the Supreme Court will decide any case involving the rights of minors, but, at a minimum, *Ginsberg* is still good law today, and in the face of mounting evidence of the negative effects of violent video games, the Supreme Court is likely to find that a city or state has a compelling interest in protecting its minors from the psychological harms posed by violent video games.

V. VIRTUAL APPRENTICES NEED PUBLIC AND PRIVATE GUIDANCE COUNSELORS

In *American Amusement Machine Ass'n*, Judge Posner struck down the Indianapolis Ordinance restricting a minor's access to video games that the city characterized by the city as having content “harmful to minors.” At the conclusion of the decision, Judge Posner provided advice to future lawmakers. He instructed that if and when the research studies prove with reasonable certainty that video games with mature or adult content pose risks to the psychological well-being of minors, ordinances restricting a minor's access to violent video games in public arcades must be narrowly tailored so as to leave adult access and playtime unobstructed. In light of the nature and quantity of evidence linking children's violent behavior and their exposure to video games now available, restrictions can and should be placed on a minor's ability to play violent video games in public places, provided that the statute is narrowly drafted. The current self-imposed rating system, implemented to warn parents as to the content of video games, can be used by city and state lawmakers to determine which games should not be accessible for play by minors under the age of seventeen in public places.

A. *Separating the Good from the Bad*

Since its establishment in 1994, the Entertainment Software Rating Board (ESRB) has become the nation's leading non-profit entertainment software rating body.²⁰³ ESRB is responsible for maintaining an unbiased, standardized rating system. The success of this voluntary rating system is attributable to the unprecedented support of the video game industry, child advocacy groups, national retailers, and federal lawmakers.²⁰⁴ From 1994 to 2001, more than 352 video game publishers voluntarily submitted titles to the ESRB for rating, resulting in content ratings for at least 9011 video games.²⁰⁵

The rating process is simple. Three raters review the content of each game frame by frame, independently submitting recommendations as to the appropriate

202. *Id.*

203. ESRB, *About ESRB: Frequently Asked Questions*, at <http://www.esrb.com/faq.asp> (last visited Feb. 8, 2002) [hereinafter ESRB, *FAQ*].

204. *Id.*

205. ESRB, *About ESRB: Announcements*, at <http://www.esrb.com/> (last visited Feb. 8, 2002).

category and content descriptors.²⁰⁶ The ESRB staff makes the final determination as to the rating and content descriptions that are placed on the games packaging.²⁰⁷

Each game is categorized into one of five symbolic ratings, either: EC, E, T, M, or A. "EC" stands for "Early Childhood," meaning that its content is suitable for persons aged three and older and absent any material that parents would find inappropriate. "E" stands for "Everyone," meaning that its content is suitable for persons aged six and older; however, it may contain minimal violence, some comic relief, and some crude language. "T" stands for "Teen," meaning that its content is suitable for persons ages thirteen and older but may contain violence, mild or strong language, or suggestive themes. "M" stands for "Mature" meaning that its content is suitable for persons ages seventeen and older because it may contain more intense violence or language and include depictions of mature sexual themes. "A" stands for "Adults Only" meaning that its content is suitable for adults only because it may include graphic depictions of sex and/or violence.²⁰⁸

The ESRB rating system was designed to inform parents "what age group the game is appropriate for."²⁰⁹ However, it can serve a similar function for lawmakers, providing a guide as to what video games are most likely to threaten the psychological well-being of adolescent players. By only restricting access to those games determined by the ESRB as having "mature" or "adult only" contents, the discretion of lawmakers is severely limited. By leaving the responsibility of categorizing a video game's content to a well-respected, independent rating board, lawmakers are merely serving the same role a parent plays when purchasing or renting video games from a store. A city ordinance or state law that prohibits minors under the age of seventeen from playing video games containing violent and sexual themes is analogous to a parent refusing to buy similar games for their children. Currently, a parent's prohibition on violent game play is only effective in the home, because children can play games (that they are not allowed to buy from a store unless accompanied by a parent) at the local arcade, movie-theater, hotel game room, or roller skating rink without parental permission or adult supervision.

B. Evidence That a Minor's Access Can Be Restricted Without Unduly Interfering with Adult Game Time

Evidence that such a minor's access to video games can be restricted without impending adult access to violent games can be found in any one of the twenty arcades owned and operated by GameWorks, a joint venture of Universal

206. ESRB, *FAQ*, *supra* note 203.

207. *Id.*

208. ESRB, *ESRB Video & Computer Game Ratings: About Ratings & Descriptors*, at http://www.esrb.com/esrb_about.asp (last visited Feb. 8, 2002).

209. ESRB, *FAQ*, *supra* note 203.

Studios, Sega Enterprises, and DreamWorks SKG.²¹⁰ Following recommendations made in the Federal Trade Commission's report on the effects of mature video games on children, GameWorks voluntarily adopted a policy that restricts the access of children under the age of sixteen to video games designated to have particularly violent content unless a special pass is purchased by a parent or guardian.²¹¹ "Instead of using the traditional coins or tokens, [guests] buy debit-type cards that can be used at any of the 200 games or attractions."²¹² GameWorks offers two types of cards: one for unlimited access and another, the "V-Card," that allows only limited access. "If under the age of 16 and unaccompanied by a parent or adult guardian, only the limited access 'V-Card' is sold to the guest. By employing the use of a special card-scanning device, or "V-Card," minors are denied access to games identified as containing mature content."²¹³

Pursuant to ratings recommendations developed by the ESRB, GameWorks has designated certain games as having mature content.²¹⁴ Those games that are considered as having a mature content are "flagged with a large red sticker."²¹⁵ Consequently, "when a limited access 'V-Card' is swiped on a restricted game, the display will read 'NO PLAY' and the game will not activate."²¹⁶ Moreover, adult access to the fifteen percent²¹⁷ of games deemed to have mature content is unimpeded and the First Amendment right to free speech is protected.

Advocates of restricting a minor's access to violent video games point to the ease and success of the self-imposed child-friendly Gameworks approach. Although movie theaters, roller skating rinks, hotel game rooms, and arcades may experience a decline in the revenue associated with popular violent video games, they could implement a policy similar to that of Gameworks, albeit less elaborate, without serious financial loss or interfering with the constitutional rights of their adult patrons. Together, the ESRB rating board and the policy implemented by Gameworks illustrate two important points. First, despite the fact that most children play video games, not all video games were intended for children. Second, with little difficulty, operators of arcades could limit a child's access to those video games that are not meant for child's play. In light of the fierce defense launched by the American Amusement Machine Association attacking the Indianapolis Ordinance in federal court, video game manufacturers and arcade owners are unwilling to prohibit their adolescent patrons from plugging millions of dollars of quarters into their most popular video games,

210. *LA Arcade Restricts Violent Games*, USA TODAY, Oct. 6, 2000, available at <http://www.usatoday.com/life/cyber/tech/review/games/cgg240.htm>.

211. *Id.*

212. *Id.*

213. GameWorks, *About Gameworks* at http://www.gameworks.com/scoop/pr_gameplay_policy.html (last visited Nov. 11, 2001).

214. *Id.*

215. *LA Arcade Restricts Violent Games*, *supra* note 210.

216. GameWorks, *supra* note 213.

217. *Id.*

regardless of the short and long-term implications on their psychological well-being. Therefore, city and state lawmakers have a responsibility to heed the ESRB warnings that accompany violent video games and prohibit their play by children in public places.

CONCLUSION

While it is true that most children who play violent video games do not turn into school shooters or commit murders, the studies show a correlation suggesting that “every one of those millions possibly has, sleeping inside them, an expert assassin.”²¹⁸ This Note discusses an issue that is quickly becoming a controversial topic as “young people gain greater access to weapons and show less reluctance about using them”²¹⁹ and the influence of violent video games is increasingly coming under scrutiny. While the responsibility of children falls primarily on the parent, cities and states have a duty to support the role of a parent, rather than act as the grandparent who spoils the child. In the context of video games found in arcades, hotel game rooms, movie theaters, and roller skating rinks, cities have a responsibility to ensure that minors are denied access to those games that the video game industry has independently deemed as having mature content. Denying a city the ability to limit a child’s access to adult video games is equivalent to allowing a child to purchase cigarettes and adult magazines from vending machines or allowing underage drinkers to consume alcohol in public places irrespective of their parent’s wishes. As school shootings and the incidents of violent juvenile delinquency increase, the debate over the effects of violent video games and other violent entertainment will encourage more city and state lawmakers to pursue courses of action that will take violent video games out of the hands of minors. This Note attempts to provide a constitutional solution to this problem that is easily applied and provides a logical starting point for remedying the effects of violent video games.

218. Vote.com, *Video Games Teach Kids That Life Is Cheap*, at <http://www.vote.com/vote/1733953/argument1735434.phtml?cat=6834323> (last visited Feb. 8, 2002).

219. Joan Vennoch, *When Teenagers Turn Violent*, BOSTON GLOBE, Mar. 27, 2001, at A13.

