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Gregory K. Laughlin
The University of Memphis

PLAYING GAMES WITH THE FIRST AMENDMENT: ARE VIDEO GAMES SPEECH AND MAY MINORS' ACCESS TO GRAPHICALLY VIOLENT VIDEO GAMES BE RESTRICTED?

Gregory K. Laughlin *

I. INTRODUCTION

On March 21, 2005, a sixteen-year-old boy in Bemdji, Minnesota shot and killed his grandfather, his grandfather's companion, a school guard, a teacher, and five of his classmates at Red Lake High School.[1] Seven others were wounded before Jeff Weise shot and killed himself, ending yet another of a string of school killings that has horrified our nation over the past decade.[2] The Associated Press listed the Red Lake High School tragedy as the fourteenth fatal school shooting since 1997.[3] News reports de-

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* Associate Dean for Information Resources, Director of the Law Library, and Associate Professor of Law, The University of Memphis. B.A., 1982, Southwest Missouri State University; J.D., 1986, University of Missouri, Columbus; M.S. in L.I.S., 1995, University of Illinois, Urbane-Champagne.

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1. Joshua Freed, *Utter Disbelief*, DESERET MORNING NEWS (Salt Lake City), Mar. 23, 2005, at A1, *available at* 2005 WLNR 4527273.

2. Amy Forliti, *Dark Picture Emerges of School Shooter: Teen Drew Gruesome Pictures, Apparently Wrote on Neo-Nazi Site*, CHARLOTTE OBSERVER, Mar. 23, 2005, at 1A, *available at* 2005 WLNR 4532074.

3. *See Previous Fatal School Shootings*, FOXNEWS.COM, Mar. 22, 2005, http://www.foxnews.com/story/0,2933,151119,00.html (last visited Nov. 13, 2005). The Associated Press listed the following previous shootings since 1997:

— Sept. 24, 2003: Two students—Aaron Rollins, 17, and Seth Bartell, 14—were fatally shot at Rocori High School . . . in Cold Spring, Minn. Fellow student John Jason McLaughlin, who was fifteen at the time of the shooting, awaits trial in the case.

— March 5, 2001: Charles "Andy" Williams, 15, killed two fellow students and wounded 13 others at Santana High School . . . in Santee, Calif., in San Diego County. Williams was sentenced to fifty-years-to-life in prison.

— May 26, 2000: Thirteen-year-old honor student Nathaniel Brazill . . . killed his English teacher, Barry Grunow, on last day of classes in Lake Worth, Fla. after the teacher refused

scribed a young man obsessed with violence. The Associated Press reported: "He created comic books with ghastly drawings of people shooting each other and wrote stories about zombies. He dressed in black, wore eyeliner and apparently admired Hitler and called himself the 'Angel of Death' in German."[4] Once again, as with each previous school shooting, grieving parents and a shocked nation asked why.[5] Many have pointed fingers at violent

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to let him talk with two girls in his classroom. He was convicted of second-degree murder and is serving a twenty-eight-year sentence.

— Feb. 29, 2000: Six-year-old boy shot and killed six-year-old classmate at Buell Elementary School in Mount Morris Township, Mich. Because of his age, the boy was not charged.

— Nov. 19, 1999: Thirteen-year-old girl shot in the head in school at Deming, N.M., and died the next day. A twelve-year-old boy later pleaded guilty and was sentenced to at least two years in juvenile prison.

— Apr. 20, 1999: Students Eric Harris, 18, and Dylan Klebold, 17, killed twelve students and a teacher and wounded twenty-three before killing themselves at Columbine High School . . . in Littleton, Colo.

— May 21, 1998: Two teenagers were killed and more than twenty people hurt when a teenage boy opened fire at a high school in Springfield, Ore., after killing his parents. Kip Kinkel, 17, was sentenced to nearly 112 years in prison.

— May 19, 1998: Three days before his graduation, Jacob Davis, an eighteen-year-old honor student, opened fire at a high school in Fayetteville, Tenn., killing a classmate who was dating his ex-girlfriend. Davis was later sentenced to life in prison.

— April 24, 1998: Andrew Wurst, 15, opened fire at an eighth-grade dance in Edinboro, Pa., killing a science teacher. The boy pleaded guilty to third-degree murder and other charges and is serving thirty to sixty years in prison.

— March 24, 1998: Two boys, 11 and 13, fired on their Jonesboro, Ark., middle school from nearby woods, killing four girls and a teacher and wounding ten others. Both boys were later convicted of murder and can be held until age twenty-one.

— Dec. 1, 1997: Three students were killed and five wounded at Heath High School in West Paducah, Ky. Michael Carneal, fourteen-year-old, later pleaded guilty but mentally ill to murder and is serving life in prison.

— Oct. 1, 1997: Sixteen-year-old Luke Woodham of Pearl, Miss., fatally shot two students to death and wounded seven others after stabbing his mother to death. He was sentenced the following year to three life sentences plus 140 years.

— Feb. 19, 1997: A sixteen-year-old boy took a shotgun and a bag of shells to school in Bethel, Alaska, and killed the principal and a student and injured two others. Evan Ramsey is serving a 210-year sentence. *Id.*

4. Forliti, *supra* note 2.

5. This represents a recurring theme throughout American history. Youth violence is nothing new. While the percentage and number of students was much smaller in the seventeenth century, teachers in that era went to extraordinary means to keep order, including tying children to whipping posts and beating them, branding, and even putting them to death. *See* David Greenberg, *Students Have Always Been Violent*, SLATE, May 7, 1999, http://slate.msn.com/id/27715 (last visited Nov. 13, 2005). Greenberg reported:

> Branding fell from favor in the 18th century, but students were still flogged or tied to chairs. . . . In the early 19th century, school reformer Horace Mann reported that he saw 328 floggings in one school during the course of a week. . . .
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> . . . In 1837, Mann noted that almost 400 schools across Massachusetts had to be shut down because of disciplinary problems. In most institutions,

media, including video games,[6] which they argue are desensitizing those who play them, and perhaps even encouraging acts of violence.[7] In response to these concerns, some states and localities

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> keeping order took precedence over teaching. One observer in 1851 likened the typical American school to "the despotic government of a military camp." In the colleges, where the teen-age students were bigger and less docile, violence was even worse. Princeton University, to take just one example, witnessed six major riots between 1800 and 1830, including the burning of the library in 1802 and a rash of campus explosions in 1823 that caused half of one class to be expelled.
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> School violence persisted into the 20th century, taking different forms according to the climate of the day. In politically charged times, students became violent in the name of political causes. In 1917, for example, when New York City introduced a "platoon" system to deal with an influx of pupils, students rebelled—literally. Between 1,000 and 3,000 schoolchildren picketed and stoned P.S. 171 on Madison Avenue and attacked nonstriking classmates. Similar riots erupted across the city, resulting in furious battles between student mobs and the police. Likewise, the civil rights movement and anti-Vietnam War protests brought different forms of "political" violence to places ranging from Little Rock Central High in Arkansas to Kent State University in Ohio.

Id.

6. At the time of this writing, it is not yet clear whether Jeff Weise played violent video games, though it seems likely. His aunt, Kim Desjarlait, stated that he loved to play video games, but the type of games was not mentioned. David Hanners & Beth Silvers, *Troubling Internet Postings Clash with Family's View of a Happy Weise*, ST. PAUL PIONEER PRESS, Mar. 24, 2005, at 1A, *available at* 2005 WLNR 4598253. School officials also indicated that Weise was "big into video games." Don Erler, *Label These Games 'W' for Wrong*, STAR-TELEGRAM.COM, Mar. 29, 2005, http://www.dfw.com/mld/dfw/news/opinion/11256728.htm (last visited Nov. 13, 2005). Some reports indicate that shortly before the shootings, Weise viewed *Elephant*, a 2003 movie about a fictional school shooting by two boys, one of whom plays violent video games. *See Red Lake Shootings: Deputy Put on Leave; Publication of His E-mail about Shooting Preceded Action*, GRAND FORKS HERALD, Apr. 1, 2005, *available at* 2005 WLNR 5078012.

Violent crimes committed by suspects alleged to have been avid players of violent video games include the school shootings in Paducah, Kentucky in December 1997; Jonesboro, Arkansas in March 1998; Springfield, Oregon in May 1998; Columbine High School in Littleton, Colorado in April 1999; Santee, California in March 2001; Wellsboro, Pennsylvania in June 2003; and Red Lion, Pennsylvania in April 2003. In addition, other violent crimes linked to players of violent video games include a crime spree in Oakland, California in January 2003; five homicides in Long Prairie and Minneapolis, Minnesota in May 2003; beating deaths in Medina, Ohio and Wyoming, Michigan in November 2002; and the "Beltway" sniper shootings in Washington, D.C. in the fall of 2002. Video game related crimes have also been reported in Germany and Japan. *See* Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. OF ADOLESCENCE 113, 113 (2004).

7. Blaming media for the misbehavior of youth also has a secure place in American history. In 1872, Anthony Comstock helped found the Committee for the Suppression of Vice. He lobbied Congress for passage of what has become known as the Comstock Act, arguing that "children could purchase 'vile books' at their schools for a mere ten cents." Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 747 (1992). C.L. Merriam, a member of the House of Representatives from New York, argued that passage of the Comstock Act was necessary because "'our fair Republic will be of but short duration unless the vigor and purity of our youth be preserved.'" *Id.* at

748 (quoting CONG. GLOBE, 42d Cong., 3d Sess. app. 168 (1873)). In addition to targeting material on sexuality, contraception, and abortion, Comstock opposed publication by newspapers of stories about football and boxing (as too violent), "so-called blood and thunder publications that carried vivid stories of crime," and dime novels. *Id.* at 757. He termed the latter "'devil-traps for the young,'" *id.* (citing Mary Noel, *Dime Novels*, AM. HERITAGE, Feb. 1956, at 55), which he argued "were leading youths down the path to destruction, for once a child had read such stories, no one could prevent a career of crime and loss of an immortal soul." *Id.* In 1881, the Boston Public Library was the subject of controversy because it collected "'many directly immoral books,'" which it made available to minors. Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, 51 DRAKE L. REV. 213, 223 (2003) (citing EVELYN GELLER, FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876–1939: A STUDY IN CULTURAL CHANGE 32–34 (1984)). After a heated public debate, the library board, which initially had opposed any restrictions on access, bowed to public pressure and "removed the offending books from its shelves, created separate cards for young users (along with separate fiction and juvenile collections), and provided the librarian and his staff more power to "'suppress[] all works discovered to be vicious.'" *Id.* at 224. With the advent of motion pictures, proponents of the argument that media corrupted youth had a new target. Even before the turn of the twentieth century, in the infancy of motion pictures, the sexual content of movies was the subject of complaints. *See* Blanchard, *supra*, at 761. By 1903, complaints of crime and violence were also being raised with the release of *The Great Train Robbery*. *Id.* By 1907, the first ordinance censoring motion pictures was enacted. *Id.* In 1911, Pennsylvania enacted the first statewide law censoring movies. *Id.* at 762. Congress considered, but failed to pass, legislation which would have created a national board to censor movies. *Id.* at 764. Corruption of youth was, naturally, a ready defense for such regimens. *See id.* at 763. At the same time that motion pictures were being attacked as harmful to minors, ragtime music was under a similar assault. In 1899, the newspaper *Music Courier* declared:

> A wave of vulgar, filthy and suggestive music has inundated the land. Nothing but ragtime prevails, and the cake-walk with its obscene posturing, its lewd gestures. . . [sic] Our children, our young men and women are continually exposed to its contiguity, to the monotonous attrition of this vulgarizing music. It is artistically and morally depressing and should be suppressed by press and pulpit.

Shasta College, Controversies Associated with Music and Its Lyrics, http://www3.shastacollege.edu/music/hrj/apndxe.html (last visited Nov. 13, 2005). The 1920s saw concerns about the impact of jazz on youth. One critic of jazz wrote:

> Welfare workers tell us that never in the history of our land have there been such immoral conditions among our young people, and in the surveys made by many organizations regarding these conditions, the blame is laid on jazz music and its evil influence on the young people of to-day.

Anne Shaw Faulkner, *Does Jazz Put the Sin in Syncopation,* LADIES' HOME J., Aug. 1921, at 16. Also in the 1920s, a new media emerged—broadcast radio. By the 1930s and 1940s, radio was blamed for contributing to juvenile delinquency by inspiring criminal acts and providing instructions on methods. *See* Ellen A. Wartella & Nancy Jennings, *Children and Computers—New Technology—Old Concerns*, THE FUTURE OF CHILDREN, (Fall/Winter 2000), at 31, 33, *available at* http://www.futureofchildren.org/usrdoc/vol10no2Art2.pdf (last visited Nov. 13, 2005). In 1938, swing music was declared to be "'a degenerated musical system . . . turned loose to gnaw away the moral fiber of young people.'" Shasta College, *supra* (quoting Francis J.L. Beckman, Archbishop of Dubuque). In the early and mid 1950s, local governments and states began enacting laws regulating comic books. *See* Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 749 (1999). In 1954, the United States Senate held hearings into the alleged relationship between juvenile delinquency and the reading of comics. *See* Blanchard, *supra*, at 789. Frederick Wertham, a New York psychiatrist, purported to find such a connection. *See id.* at 788–89. At

have enacted restrictions on the sale or access to certain video games.[8] Congress has considered, but has yet to enact, national regulation of violent and sexually explicit video games.[9]

Three cases arising out of such government-imposed restrictions (an ordinance enacted in Indianapolis and Marion County, Indiana,[10] another enacted in St. Louis County, Missouri,[11] and a statute enacted in Washington state[12]) presented the questions which this article seeks to address: (1) are video games speech and, as such, entitled to protection under the First Amendment; and (2) if so, may minors' access to graphically violent games nonetheless be restricted? The Seventh Circuit, in *American Amusement Machine Association v. Kendrick*,[13] determined that at least some such games are speech, and minors' access to graphically violent games may not be restricted, at least where they had not "used actors and simulated real death and mutila-

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the same time, concerns were being raised about the new medium of television, including allegations that it contributed to juvenile delinquency. Congress held hearings on these alleged effects as early as 1955. *See* Wartella & Jennings, *supra*, at 34. In the early 1990s, a public furor erupted over the publication of trading cards featuring criminals, including notorious serial killers and mass murders. Several states and localities considered, and in some cases enacted, restrictions on the distribution of these cards to minors. *See* Gail Johnston, Note, *It's All in the Cards: Serial Killers, Trading Cards, and the First Amendment*, 39 N.Y.L. SCH. L. REV. 549, 549 (1994).

8. Among the jurisdictions which have enacted such regulations are Indianapolis, Indiana, St. Louis County, Missouri, and Washington State. *See infra* notes 10–12 and accompanying text. Other jurisdictions which have considered or are considering such restrictions include California, the District of Columbia, Georgia, Illinois, Maryland, Minnesota, and North Carolina. *See* 3 Int'l Game Developers Ass'n, Anti-Censorship—Lobbying, http://www.igda.org/censorship/lobbying.php (last visited Nov. 13, 2005).

9. *See* Protect Children from Video Game Sex and Violence Act of 2003, H.R. 669, 108th Cong. (2003). The Protect Children from Video Game Sex and Violence Act would have penalized the sale and the attempt to sell at retail and rental outlets to minors "any video game that depicts nudity, sexual conduct, or other content harmful to minors." *Id.* Content harmful to minors was defined as:

> video game content 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 minors, and lacks serious literary, artistic, political, or scientific value for minors, and contains—
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> (A) graphic violence;
> (B) sexual violence; or
> (C) strong sexual content.

Id.

10. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

11. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003).

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

13. 244 F.3d 572.

tion convincingly."[14] On the other hand, in *Interactive Digital Software Association v. St. Louis County*,[15] a federal district court judge in St. Louis found that video games are not speech,[16] and, even if they were, minors' access to graphically violent games may be restricted.[17] The Eighth Circuit reversed both holdings.[18] In *Video Software Dealers Association v. Maleng*,[19] a federal district court in Washington state followed the Seventh and Eighth Circuit precedents.[20]

Professor Kevin W. Saunders has explored and addressed the specific First Amendment issues involved in the regulation of youth access to violent video games.[21] He has specifically explored the issue of whether video games are speech and argues that they are not.[22] His conclusion is based on the argument that video games are non-communicative.[23] As will be more fully developed below, I must disagree with that conclusion.[24] It is not necessary to conclude that all video games are speech in order to conclude that video games are being used as a medium through which expression is communicated. For this reason, any restrictions on minors' access to violent video games will require First Amendment scrutiny.

Professor Saunders further argues that the First Amendment permits restricting minors' access to graphically violent video games even if they are speech.[25] Here, his arguments are on a much sounder footing. While similar arguments were rejected in *Kendrick*, *Interactive Digital Software*, and *Video Software Dealers*, the Supreme Court has yet to consider this issue. When and

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14. *Id.* at 579. The court of appeals did not directly address whether video games are speech, but implicitly accepted the conclusion of the district court that at least some games were speech. This implicit acceptance of the holding of the district court is evidenced by the court of appeals' holding that the restrictions at issue violated the First Amendment. If video games are not speech, then the court would have no basis for such a holding.

15. 200 F. Supp. 2d 1126 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003).

16. *Id.* at 1135.

17. *See id.*

18. *See* 329 F.3d at 956.

19. 325 F. Supp. 2d 1180.

20. *See id.* at 1184–85.

21. *See generally* Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 MICH. ST. L. REV. 51.

22. *See id.* at 93–105.

23. *See id.* at 105.

24. *See infra* text accompanying notes 213–37.

25. *See* Saunders, *supra* note 21, at 106–07, 109.

if it does, the Court should uphold restrictions on minors' access to such games. Such restrictions fall within the reasoning which the Court has already held justifies restricting minors' access to sexually explicit material that is not obscene as to adults.[26] The lower courts that have considered similar restrictions on graphically violent video games have too narrowly applied the reasoning of the Court, restricting its applicability more than the opinions in those cases warrant.

II. A BRIEF HISTORY OF VIDEO GAMES AND THE CONTROVERSY OVER VIDEO GAME VIOLENCE

A. *The Development of Video Games*

Video games[27] were first conceived in 1949 by Ralph Baer, then a young engineer employed by Loral.[28] His assignment was to design a home television set. Baer suggested that the company should "include some novel features, like adding some form of TV game."[29] The idea was rejected.[30] Three years later, in 1952, A.S. Douglas, working on his Ph.D. at the University of Cambridge in the area of Human-Computer interaction, created a tic-tac-toe game, which is considered the first graphical computer game.[31] In 1958, William Higinbotham created *Tennis for Two*, which was played on the oscilloscope at Brookhaven National Laboratory.[32] In 1962, Stephen Russell of MIT created what many acknowledge as the first computer video game, *Spacewar*.[33] The game was essentially a crude (by today's standards) two-player game involv-

26. *See id.* at 87–88.

27. The author uses the term video games to encompass the entire genre of games whether played on a dedicated device, such as an arcade machine or a hand-held gaming computer, or on a computer or video monitor (such as a television) which may be used for purposes other than playing games.

28. *See* Ralph Baer, *How Video Games Invaded the Home TV Set*, R.H. BAER CONSULTANTS, *available at* http://www.ralphbaer.com/how_video_games.htm (last visited Nov. 13, 2005).

29. *Id.*

30. *Id.*

31. Mary Bellis, *Computer and Video Game History*, ABOUT.COM, http://inventors.about.com/library/inventors/blcomputer_videogames.htm (last visited Nov. 13, 2005).

32. *See The First Video Game*, BROOKHAVEN NAT'L LAB., http://www.bnl.gov/bnlweb/history/higinbotham.asp (last visited Nov. 13, 2005).

33. *See Spacewar*, GAMES OF FAME, http://www3.sympatico.ca/maury/games/space/spacewar.html (last visited Nov. 13, 2005).

ing a battle between two spaceships firing photon torpedoes.[34] Within a few years, *Spacewar* had spread to nearly every research computer in America.[35]

Meanwhile, seventeen years after he had first conceived of the video game and while Chief Engineer and Manager of the Equipment Design Division at Sanders Associates, Ralph Baer revisited the idea of using television to play games. On September 1, 1966, he drew up a handwritten outline of his thoughts, including some possible categories of games. These categories included action games, board skill games, artistic games, instructional games, board chance games, card games, game monitoring, and sports games.[36] On October 20, 1966, Baer and a colleague played a "Chase Game."[37] With a team of others, Baer continued to develop the concept, eventually reaching an agreement with Magnavox, who turned his design into the first *Odyssey* (ILT-200) game in 1972. Magnavox demonstrated *Odyssey* to its dealers and the press in March 1972.[38]

Present at one of these demonstrations was Nolan Bushnell. Stephen Russell, the creator of *Spacewar*, had introduced Bushnell to computer games while Bushnell was an engineering student at Stanford University.[39] The *Odyssey* demonstration inspired Bushnell to create *PONG*.[40] *PONG* was the first successful arcade game.[41] The game was essentially a video form of table tennis.[42] That same year, Bushnell and Ted Dabney started Atari

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34. *See id.*; *see also* Mary Bellis, *Spacewar: The First Computer Game*, ABOUT.COM, http://inventors.about.com/library/weekly/aa090198.htm (last visited Nov. 13, 2005).

35. Bellis, *supra* note 34.

36. Ralph Baer, *Notes Page*, R.H. BAER CONSULTANTS, http://www.ralphbaer.com/Notes_page.htm (last visited Nov. 13, 2005).

37. Baer, *supra* note 28.

38. *Id.*

39. Bellis, *supra* note 34.

40. *See id.*

41. *Action*, GAME RESEARCH, http://www.game-research.com/action.asp (last visited Nov. 13, 2005).

42. *Id.* In his book *Zap! The Rise and Fall of Atari*, Scott Cohen describes the introduction of Pong:

> One of the regulars approached the Pong game inquisitively and studied the ball bouncing silently around the screen as if in a vacuum. A friend joined him. The instructions said: "Avoid missing ball for high score." One of [them] inserted a quarter. There was a beep. The game had begun. They watched dumbfoundedly [sic] as the ball appeared alternately on one side of the screen and then disappeared on the other. Each time it did the score changed. The score was tied at 3–3 when one player tried the knob controlling the paddle at

Computers.[43] Three years later, Atari released *PONG* as a home video game.[44] With the commercialization of video games by Atari, the industry was born. Fifty-seven video games were introduced to the market in the years 1974 and 1975.[45] The next year saw that number nearly double.[46] Yet, it was not until 1980 that any video game was registered with the Copyright Office. In that year, Atari registered two of its games, *Asteroids*[47] and *Lunar Lander*.[48] That same year, Midway acquired a license to market *Pacman*. Since *Pacman* and games similar to it are what were considered by courts in early cases holding that video games were not speech,[49] a brief explanation of it may be useful:

> [P]layers find themselves guiding "puckman" around a single maze eating dots, while avoiding the four ghosts "blinky," "pinky," "inky" and "clyde" (each with varying levels of hunting skills), who escape from a cage in the middle of the screen and will end our little yellow friend's life if they touch him. [I]n each corner of the square playfield is a large dot that when eaten will turn the ghosts blue for a brief period, during which time the tables turn and "puck" can eat the ghosts, leaving only the apparently indigestible eyes which make their way back to the cage for reincarnation into another ghost. [D]uring every screen a treat appears for the player under the ghost-cage, in the form of fruit or a bell or some other symbol waiting to be devoured.[50]

> his end of the screen. The score was 5–4, his favor, when his paddle made contact with the ball. There was a beautifully resonant "pong" sound, and the ball bounced back to the other side of the screen. 6–4. At 8–4 the second player figured out how to use his paddle. They had their first brief volley just before the score was 11–5 and the game was over.
>
> Seven quarters later they were having extended volleys, and the constant pong noise was attracting the curiosity of others at the bar. Before closing, everybody in the bar had played the game. The next day people were lined up outside Andy Capp's at 10 a.m. to play Pong. Around ten o'clock that night, the game suddenly died.

SCOTT COHEN, ZAP! THE RISE AND FALL OF ATARI 29 (1984) (quoted in *A Brief History of Home Video Games*, GEEKCOMIX.COM, http://www.geekcomix.com/vgh/first/atpongarc.shtml (last visited Nov. 13, 2005).

43. Bellis, *supra* note 31.

44. *Id.*

45. William Hunter, *The History of Video Games from 'Pong' to 'Pac-man'*, DESIGNBOOM, http://www.designboom.com/eng/education/pong2.html (last visited Nov. 13, 2005).

46. *See id.*

47. ASTEROIDS (Atari, Inc. 1980).

48. Hunter, *supra* note 45; LUNAR LANDER (Atari, Inc. 1980).

49. *See* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 951 (S.D. Ind. 2000).

50. Hunter, *supra* note 45.

B. *A Short History of the Controversy*

While *Pacman* and other games of its generation are the source of most early case law addressing restrictions on video games, *Death Race*[51] was responsible for the first popular protest against violent video games. The game, introduced in 1976, was based on a movie, *Death Race 2000*.[52] The object of the game was to run over pedestrians with a car with points awarded for each pedestrian killed. If the player failed to kill a given pedestrian on the first attempt, he or she could put the car in reverse and try again. Each kill was represented by a cross that appeared where the pedestrian had been killed, and a hit was accompanied by an "ahhhk" sound. The pedestrians were called gremlins, but looked like stick men. The game's violence became a national issue, with newspaper stories and a *60 Minutes* piece on the psychology of video game players. As a result of the controversy, the game's publisher pulled it off the market.[53]

Another early game that generated controversy was *Custer's Revenge*.[54] In *Custer's Revenge*, published in 1983, the player controlled a poorly rendered cartoon version of General George Armstrong Custer, who was obviously sexually aroused. The object of the game was to avoid enemy arrows being shot at Custer while the player attempted to cause the character to reach a Native American woman tied to a pole. If Custer made it past the arrows, he would have sexual intercourse (presumably rape, though the publisher denied this) with the Native American woman tied to the pole. The game generated protest from women's organizations, including the National Organization of Women and Women Against Pornography, and Native American organizations, including American Indian Community House.[55] While the game

51. DEATH RACE (Exidy 1976).

52. DEATH RACE 2000 (Santa Fe Productions 1976).

53. Lauren Gonzalez, *When Two Tribes Go to War: A History of Video Game Controversy*, GAMESPOT, http://www.gamespot.com/features/6090892/p-2.html (last visited Nov. 13, 2005). While no reported cases involving the game *Death Race* were reported, the movie on which it was based, *Death Race 2000*, was implicated in a criminal case in Washington state in which a drunken teenager struck a pedestrian. *See* State v. Nordby, 723 P.2d 1117 (Wash. 1986). Upon seeing two girls pushing their bicycles, a female passenger in the car allegedly said, "There's two points!" *Id.* at 1118. Another passenger then grabbed and jerked the steering wheel, causing the car to hit one of the two girls.

54. CUSTER'S REVENGE (Mystique 1983).

55. Gonzalez, *supra* note 53.

generated considerable protest, it was a commercial failure and its publisher ultimately went out of business.[56]

While controversy regarding violent content has been a part of the video game industry since the mid-1970s, the rash of school shootings beginning in the 1990s, the evolution of more realistic graphics, and the perceptions of ever-increasing depictions of violence led to efforts to restrict minors' access to the most violent of these games.[57] In particular, the 1999 Columbine High School shootings brought renewed and more intense attention to the possible connection between violence in youth and video games.[58] The youths who committed the murders at Columbine, Dylan Klebold and Eric Harris, purportedly played violent video games, including *Doom*.[59] Indeed, it was reported that Harris had modified *Doom* so that the player was invincible and possessed unlimited weaponry and ammunition so that "'[t]he player simply mows down all the other characters.'"[60]

Columbine was not the first school shooting incident with reported ties to video games. In 1997, Evan Ramsey, a high school student in Bethel, Alaska, shot four students, killing two of them.[61] Ramsey reportedly played *Doom*, *Die Hard Trilogy*,[62] and *Resident Evil*,[63] three violent video games, for hours at a time.[64] That same year, Michael Carneal, who played such violent video games as *Doom Quake*[65] and *Redneck Rampage*,[66] shot eight stu-

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56. *See id.*

57. Saunders, *supra* note 21, at 52–61; *see also* Thomas A. Kooijmans, *Effects of Video Games on Aggressive Thoughts and Behaviors During Development*, http://www.personalityresearch.org/papers/kooijmans.html (last visited Nov. 13, 2005) (reporting more than a dozen incidences of violence, most resulting in death, tied to video games between 1997 and 2003).

58. Saunders, *supra* note 21, at 52. Saunders reported that even before the killings at Columbine High School, approximately two hundred children had been killed in "'school associated violence'" between 1992 and 1998. *Id.*

59. *Id.* (citing Burt Hubbard, *Researchers Say Harris Reconfigured Video Game: Boy Turned 'Doom' into School Massacre, Investigators Claim*, DENVER ROCKY MOUNTAIN NEWS, May 3, 1999, at 4A); DOOM (id Software, Inc. 1994).

60. Saunders, *supra* note 21, at 52–53 (citing Hubbard, *supra* note 59, at 4A).

61. *See* Saunders, *supra* note 21, at 53 (citing Tom Bell & Rosemary Shinohara, *Student Kills 2 in Bethel: Frightened Teens Flee High School*, ANCHORAGE DAILY NEWS, Feb. 20, 1997, at A1).

62. DIE HARD TRILOGY (Twentieth Century Fox Film Corp. 1997).

63. RESIDENT EVIL (Capcom 1996).

64. Saunders, *supra* note 21, at 53.

65. QUAKE (id Software, Inc. 1996).

66. REDNECK RAMPAGE (Xatrix Entertainment 1997).

dents in Paducah, Kentucky, killing three.[67] The following spring, Mitchell Johnson and Andrew Golden, shot fourteen of their fellow students and one teacher in Jonesboro, Arkansas, killing four girls and the teacher. Again, the shooters played violent video games.[68] In 2000, Sean Botkin, a fourteen-year-old who played *GoldenEye 007*,[69] another violent video game, took hostages at Glendale Elementary School.[70] Subsequent school shootings linked to minor perpetrators who allegedly played violent video games include the incidents in Santee, California in March 2001,[71] Wellsboro, Pennsylvania in June 2003,[72] and Red Lion, Pennsylvania in April 2003.[73]

Following the Columbine shooting, lawmakers began to act. In July 2000, the City of Indianapolis, Indiana and Marion County, Indiana enacted an ordinance requiring video arcades with five or more games to limit the access of minors to games which were "harmful to minors."[74] In October 2000, St. Louis County, Missouri enacted a similar ordinance.[75] The state of Washington became the first state to enact such restrictions in 2003.[76] As noted above, several other jurisdictions have or are considering such restrictions, and a bill was introduced in Congress which would have imposed similar restrictions.[77]

III. ARE VIDEO GAMES SPEECH?

"Legal rules not only prescribe results, but they also create (or recognize) the categories of conduct to which the rules apply.

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67. *See* Saunders, *supra* note 21, at 53 (citing Ted Bridis, *Praying Students Slain*, LEXINGTON HERALD-LEADER, Dec. 2, 1997, at A1).

68. *See id.* at 54–55.

69. GOLDENEYE 007 (Nintendo of America, Inc. & Rare, Ltd. 1997).

70. The Center for Successful Parenting, *The Facts*, http://www.sosparents.org/the%20facts.htm (last visited Nov. 13, 2005).

71. *See* Anderson, *supra* note 6, at 113.

72. *Id.*

73. *Id.*

74. *See* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 946–47 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001).

75. *See* Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1129 (E.D. Mo. 2002).

76. Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1183 (W.D. Wash. 2004).

77. *See supra* notes 8–9.

Without categories there could be no rules."[78] "[A] necessary part of any rule [] is that part that describes the category of facts to which the rule applies."[79]

A. *What Speech Is Not*

Zechariah Chafee is noted for observing: "Everybody seemed to be for free speech, just as everybody was then for 'freedom of the seas,' but there was the same semantic vagueness."[80] The question of where speech ends and action begins is not susceptible to an easy solution. If one defines speech as any communication of information, then everything is speech or, at least, a medium of speech. This is not a new concept. The psalmist understood this concept some 3000 years ago when he wrote:

> The heavens are telling the glory of God; and the firmament proclaims his handiwork. Day to day pours forth speech, and night to night declares knowledge. There is no speech, nor are there words; their voice is not heard; yet their voice goes out through all the earth, and their words to the end of the world.[81]

Here, the psalmist proclaims that all of creation communicates to the world the "glory" and "handiwork" of God. The universe can be seen, according to the psalmist, as a medium by which God communicates. It is at once, one may say, the message, the medium, and the intended recipient of God's communication. More in keeping with the task of this article, the translators of the Revised Standard Version chose the word "speech" twice to represent the Hebrew word אֹמֶר, which the psalmist used in the quoted passage to describe this communication.[82] The psalmist understood the communicative nature of the universe and, in verse 2, calls this communication "speech" even though, as he wrote in

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78. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 265 (1981).

79. *Id.* at 265 n.2.

80. Zechariah Chafee, Jr., *Thirty-Five Years with Freedom of Speech, reprinted in* FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 325 (Harold L. Nelson ed., 1967).

81. *Psalm* 19:1–4a (Revised Standard Version).

82. Speech was also the word chosen by the translators of the Authorized Version (i.e., King James Version), the New Revised Standard Version, the Douay-Rheims Version (who chose "speeches" for the second use), the New American Standard, and Young's Literal Translation, among other English translations. The translators of the Septuagint chose the word *rhema* to represent the Hebrew word אֹמֶר in Verse 2 of Psalm 19 and *logoi* to represent it in Verse 3.

Verse 3: "There is no speech, nor are there words; their voice is not heard."[83]

Used in this way, speech means anything which conveys information, and, as can be seen by this example from the Psalms, anything can and everything does convey information. Pottery shards and ashes from ancient archeological discoveries convey information to trained archeologists about the people who created the pottery and used the fire. A bridge conveys information about its design and construction to an engineer trained in the construction of bridges. A car's engine conveys information about its design and method of operation to a trained mechanic. DNA conveys information to a geneticist about the organism from which it came and to the cells of the organism itself. One could go on *ad infinitum*. It can be seen that while the conveying of information is a necessary element of "speech," it is too broad a definition to use in deciding how that term as used in the First Amendment should be applied, unless one wants to interpret the term so broadly as to prohibit Congress from enacting any laws at all.[84]

B. *What Speech Is*

Obviously, this was not the intent of the Framers of the First Amendment. Several of the Framers of the First Amendment had just completed crafting the original Constitution, which largely dealt with establishing the procedures for which branches of government would have which powers and responsibilities for creating, executing, and interpreting the laws of the new nation. The application of the term speech must be limited unless it is to become the exception that swallows the law-making provisions of the Constitution. What the Framers of the First Amendment intended to protect is largely, if not entirely, lost in the mist of time.[85] They left few clues, and it is likely that they did not think

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83. *Psalm* 19:3 (Revised Standard Version).

84. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH 105 (1994).

> The distinction [between speech and action] is essential because no one would think to frame a First Amendment that began "Congress shall make no law abridging freedom of action," for that would amount to saying "Congress shall make no law," which would amount to saying "There shall be no law," only actions uninhibited and unregulated.

Id.

85. Leonard Levy observed that "much of history lies in the interstices of the evidence and cannot always be mustered and measured." LEONARD W. LEVY, LEGACY OF

through all the potential implications of what conduct might fall within the definition of the term speech. Indeed, it is likely that individual Framers who drafted and approved the final language of the First Amendment and individual state legislators who voted to ratify it might have had different concepts of exactly what conduct fell within the scope of the Free Speech Clause's protection. While much has been written about what the Framers may have intended, in the end much, if not all, of the conclusions drawn are little more than educated speculation. Unless one is inclined to apply the words in a wooden literal sense and limit the Free Speech Clause's protection to oral and written communication,[86] one is forced to turn elsewhere to determine what conduct falls within the word speech as used in the First Amendment. Whatever the Framers might have intended, it is the precedent established by the Supreme Court to which we must turn for guidance in deciding whether video games are speech.

The Free Speech Clause did not receive a great deal of attention from the courts from the time of the ratification of the First Amendment through the first decade and a half of the twentieth century. Given the importance placed on the adoption of a Bill of Rights by the anti-federalists, this comes as somewhat of a surprise. This lack of case law may reflect several causes. First, the First Amendment limited only the federal government, specifically Congress.[87] It was not until 1925 that the Supreme Court held that the Fourteenth Amendment made the restrictions of the First Amendment applicable to state and local governments.[88] Thus, for more than 100 years after its ratification, only legislation passed by Congress could have raised First Amendment problems. After the Alien and Sedition Act lapsed, Congress passed no restrictions on speech that attracted sufficient opposi-

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SUPPRESSION, at viii (1960). David Anderson, after quoting Levy, added, "[a]scertaining the intent underlying recent legislation is difficult enough, even with the advantages of contemporary perspective and records vastly superior to those kept 200 years ago." David A. Anderson, *The Origins of the Free Press Clause*, 30 UCLA L. REV. 455, 497 (1983).

86. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576–77 (1991) (Scalia, J., concurring) ("The First Amendment explicitly protects 'the freedom of speech [and] of the press' —oral and written speech—not 'expressive conduct.' . . . This is not to say that the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.").

87. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157 (1991).

88. Gitlow v. New York, 268 U.S. 652, 666 (1925).

tion on First Amendment grounds to create any case law.[89] A second possibility is that the agitation for a Bill of Rights was, as some argued at the time, a ruse by the anti-federalists to defeat the Constitution,[90] and, having failed in that effort, those who were the biggest proponents of the First Amendment went on to other issues. Whatever the cause for this lack of significant case law development, World War I represents the end of this era and the opening of intense development of free speech jurisprudence which continues to this day. It is in the twentieth century that courts began to seriously grapple with the issue of what the Free Speech Clause was designed to protect.

The purpose here is not to explore in depth that history, but to summarize the more important developments relative to the question of the boundaries of speech. In 1931, in *Stromberg v. California*,[91] the Supreme Court of the United States for the first time applied the Free Speech Clause to nonverbal conduct. In *Stromberg*, the Court held that a California statute criminalizing the displaying of a red flag "as a sign, symbol or emblem of opposition to organized government"[92] violated the right of free speech.[93] The Court did not specifically address its reasoning for applying free speech protection to the conduct of displaying a red flag. The Court did, however, note that the statutory language at issue "'might . . . be construed to include peaceful and orderly opposition to government by legal means.'"[94] Apparently, without explicitly stating so, the Court found from the language of the statute that it was designed to punish conduct used for expressive purposes and that such non-verbal, expressive conduct was speech.[95] In his dissent, Justice Butler recognized the implicit finding of the majority, that such conduct was speech, by denying

89. Congress passed legislation during this time that certainly would raise First Amendment objections today. For example, the Comstock Act enacted in 1873 restricted dissemination of information about contraceptives and abortion. These restrictions certainly implicated "speech" no matter how narrowly one might seek to define that term. *See supra* note 7.

90. Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING, 82, 84–85 (Eugene W. Hickok, Jr., ed., 1991) (citing Madison to Richard Peters, Aug. 19, 1789) (quoted in LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 261, 266 (1985)).

91. 283 U.S. 359 (1931).

92. *Id.* at 361 (internal quotations omitted).

93. *See id.* at 368–69.

94. *Id.* at 369.

95. *See id.* at 366–67.

that the issue of "whether the mere display of a flag as the emblem of a purpose [should be considered] speech within the meaning of the constitutional protection" was before the Court.[96]

In 1940, in *Thornhill v. Alabama*,[97] the Court held that freedom of speech encompassed "peaceful picketing."[98] *Thornhill* has been recognized as the Court's earliest extension of freedom of speech "beyond expression of ideas, the right to inform and persuade, to disagree, and to protest in political matters."[99] Thus, *Thornhill* is the Court's earliest holding that the First Amendment protects expressions which "inform about less than public matters."[100] Neither *Stromberg* nor *Thornhill*, however, provided generally applicable principles for determining when conduct other than the oral or written use of words related to "public matters" was speech.

It was not until 1974, in *Spence v. Washington*,[101] that the Court articulated a test for when activity is speech: the activity must be undertaken with "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [is] great that the message [will] be understood by those who view[] it."[102] While the test seems straightforward, its application has proven to be anything but straightforward. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[103] the Court addressed one weakness of the *Spence* test, noting that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."[104]

While this holding may have aided the Court in deciding the case before it in *Hurley*, it failed to articulate a test for when an activity not conveying a particularized message would nonetheless constitute speech. Further, many activities which are clearly

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96. *Id.* at 376 (Butler, J., dissenting).
97. 310 U.S. 88 (1940).
98. *See id.* at 105.
99. Louis Henkin, *Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 78 n.48 (1968).
100. *Id.*
101. 418 U.S. 405 (1974).
102. *Id.* at 410–11.
103. 515 U.S. 557 (1995).
104. *Id.* at 569.

not speech as that term is used in the First Amendment can nonetheless satisfy the *Spence* test. No one can doubt that the September 11, 2001, hijackers intended "to convey a particularized message,"[105] and "the surrounding circumstances" made it all too clear what that message was. Yet the Court has held that the First Amendment does not protect violent conduct by which the violent actor intends to convey a threatening message even when there exists a sufficient likelihood that the message will be understood.[106]

What we are left with are very inexact and not universally applicable definitions and descriptions of what conduct the Court will consider speech for purposes of applying First Amendment protections. As one lower court has noted, determining whether given conduct is speech involves a "hodgepodge of categories and tests . . . [,] semantic distinctions and artificial rubrics."[107] As the First Amendment is perhaps our most revered reservation of rights, this has opened the door for anyone wanting to challenge government restrictions on his or her chosen conduct. A wide range of conduct has been the subject of First Amendment analysis. For example, reported cases have addressed whether each of the following are speech: social dancing,[108] nude dancing,[109] flag burning,[110] flag display,[111] mandated flag saluting,[112] solicitation

105. The message is at least as particularized as the message conveyed in *Spence*. *See* 418 U.S. at 410–11.

106. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 360 (2003) (demonstrating that states may ban cross burning with intent to intimidate, and noting the history of the use of cross burning by the Ku Klux Klan as part of its "reign of terror"); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (explaining that states may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

107. Loper v. N.Y. City Police Dep't, 802 F. Supp. 1029, 1041 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

108. City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989) (stating that social dancing "do[es] not involve the sort of expressive association that the First Amendment has been held to protect").

109. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) ("[N]ude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.").

110. United States v. Eichman, 496 U.S. 310, 317–18 (1990) (holding that flag burning is a form of expression protected by the First Amendment).

111. Stromberg v. California, 283 U.S. 359, 369–70 (1931) (holding that displaying a red flag "'as a sign, symbol or emblem of opposition to organized government'" is protected under the First Amendment).

112. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) ("[F]lag salut[ing] is a form of utterance. Symbolism is a primitive but effective way of communicating ideas" which may not be compelled without violating the First Amendment.).

by charities,[113] panhandling,[114] draft card burning,[115] cross burning,[116] mask wearing,[117] computer software source code,[118] and games.[119]

C. *Application to Video Games*

While games like *Death Race* and *Custer's Revenge* created the first protests against video game violence, they were not the subject of the first cases addressing the issue of whether video games are speech. Rather, such litigation developed out of efforts to limit the availability of video games without regard to their content. Nonetheless, parties in these early cases asserted that the regulations in question violated the First Amendment. In rejecting these claims, several courts held that the First Amendment was not implicated because video games were not speech. These cases

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113. Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) (stating that solicitation by charities is entitled to First Amendment protection).

114. Gresham v. Peterson, 225 F.3d 899, 904 (7th Cir. 2000) (stating that the Court "assum[ed] for the purposes of . . . appeal that some panhandl[ing] [is] speech . . . protected by the First Amendment.").

115. United States v. O'Brien, 391 U.S. 367, 376 (1968). The Court rejected the proposition that the First Amendment protected the burning of a draft card, stating that it could not

> accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. . . . [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Id.

116. Virginia v. Black, 538 U.S. 343, 358 (2003) ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.").

117. Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 208 (2d Cir. 2004) ("[W]here, as here, a statute banning conduct imposes a burden on the wearing of an element [a mask] of an expressive uniform [of the Ku Klux Klan], which element has no independent or incremental expressive value, the First Amendment is not implicated. . . .").

118. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001) ("Communication does not lose constitutional protection as 'speech' simply because it is expressed in the language of computer code."). *But see* Junger v. Daley, 8 F. Supp. 2d 708, 717 (N.D. Ohio 1998) ("[E]xporting source code is conduct that can occasionally have communicative elements. Nevertheless, merely because conduct is occasionally expressive, does not necessarily extend First Amendment protection to it."), *rev'd*, 209 F.3d 481, 485 (6th Cir. 2000) ("Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.").

119. There to Care, Inc. v. Comm'r of Ind. Dept. of Revenue, 19 F.3d 1165, 1167 (7th Cir. 1994) (explaining that bingo is not "speech" for purposes of the First Amendment).

form the legal precedents which parties and scholars have cited in recent years for the proposition that video games are not speech and are therefore unprotected by the First Amendment. Indeed, several of these cases were cited by the district court in *Interactive Digital Software* to support its holding that video games were not speech.[120] To understand why these earlier cases do not support the proposition that the games at issue in the recent cases are not speech it is necessary to explore those earlier cases, including the video games then at issue and the reasoning for the holdings.

1. The Early Cases Holding that Video Games Are Not Speech

American Best Family Showplace Corp. v. City of New York[121] was the first reported case to hold that video games are not speech and thus not entitled to protection under the First Amendment.[122] At issue were various city zoning and licensing regulations which "effectively preclude[d]" the plaintiff from operating a restaurant in which it intended to have forty dining tables in which video games were embedded.[123] The regulations in question required a license for operating video games and restricted such licensing to no more than four games except in a zone which permitted arcades.[124] The plaintiff's location was not in such a zone.[125] The plaintiff argued that the zoning and licensing restrictions violated its First Amendment rights, asserting that video games were speech. It argued that the "'visual and aural presentations on a screen involv[e] a fantasy experience in which the player participates.'"[126] The plaintiff compared the games to movies.[127] The court rejected this argument, finding no element of information or idea was being communicated.[128] The court declared: "In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a

120. 200 F. Supp. 2d 1126, 1133 (E.D. Mo. 2002).
121. 536 F. Supp. 170 (E.D.N.Y. 1982).
122. *Id.* at 174.
123. *Id.* at 171.
124. *Id.* at 172.
125. *Id.*
126. *Id.* at 173.
127. *Id.*
128. *See id.*

game of chess, or a game of baseball, is pure entertainment with no informational element."[129]

American Best Family Showplace was soon followed by several other cases reaching the same conclusion. Among these were *Caswell v. Licensing Commission for Brockton,*[130] which cited *American Best Family Showplace* in finding that video games were not speech.[131] The *Caswell* court, however, cited two unpublished opinions which held that video games were speech and, as a consequence, entitled to First Amendment protection.[132] While acknowledging that "video games might involve the element of communication,"[133] the court held that the plaintiff had "failed to demonstrate that video games import sufficient communicative, expressive or informative elements to constitute expression protected under the First Amendment."[134] Similar reasoning led to the same conclusion in *Malden Amusement Co. v. City of Malden,*[135] *Marshfield Family Skateland, Inc. v. Town of Marshfield,*[136] *Kaye v. Planning and Zoning Commission, Westport,*[137] and *People v. Walker.*[138]

Following similar reasoning are cases which denied First Amendment protection to video games in upholding regulations designed to limit their access to minors. In *Tommy and Tina Inc. v. Dep't of Consumer Affairs of New York,*[139] the regulation in

129. *Id.* at 174. It should be noted that the court cited no authority for the proposition that pinball games, chess, or baseball were not speech.

130. 444 N.E.2d 922 (Mass. 1983).

131. *Id.* at 926.

132. *Id.* (citing Oltmann v. Palos Hills, No. 82 CH 3568, slip op. at 13–14 (Ill. Cir. Ct., Aug. 20, 1982) (holding that a "trial judge determined that, since video games are similar to movies, they deserve First Amendment protection"); Gameways, Inc. v. McGuire, N.Y. L.J., May 27, 1982, at 6, col. 2 (N.Y. Sup. Ct. May 3, 1982) ("'Considering the fact that other forms of expression no more 'informative' than video games—viewing nude dancing through a coin operated mechanism—have been recognized as constitutionally protected and the elusive line between informing and entertaining, this court concludes video games are a form of speech protected by the First Amendment.'")). The *Caswell* court also cited *Stern Electronics, Inc. v. Kaufman,* 523 F. Supp. 635, 639 (E.D.N.Y. 1981), in which the court, in a copyright case, compared the game in question to a movie.

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

134. *Id.* at 926–27.

135. 582 F. Supp. 297 (D. Mass. 1983).

136. 450 N.E.2d 605 (Mass. 1983).

137. 472 A.2d 809 (Conn. Super. Ct. 1983).

138. 354 N.W.2d 312 (Mich. Ct. App. 1984).

139. 459 N.Y.S.2d 220 (N.Y. Sup. Ct. 1983).

question limited the access of minors to video games.[140] The regulation prohibited the issuance of a common show license to any establishment within 200 feet of a school. Its purpose was to prevent truancy.[141] The regulation, therefore, applied to any video game without regard to content. The court cited and followed *American Best Family Showplace* in finding that the video games in question imparted no information to the user nor communicated any idea.[142]

In 1991, the issue of the First Amendment status of video games was again revisited. In *Rothner v. City of Chicago*,[143] the Seventh Circuit considered whether a city ordinance prohibiting minors from playing video games during school hours was unconstitutional.[144] In reviewing the earlier cases, the court stated: "[T]hese cases do not hold that, under *all* circumstances, *all* video games can be characterized as completely devoid of any [F]irst [A]mendment protection."[145] It then found that the record before it was insufficient for it to determine whether the games at issue were protected by the First Amendment.[146] Instead, the court affirmed the lower court's holding that "even if the ordinance regulates [F]irst [A]mendment expression, the ordinance is a legitimate time, place, and manner restriction on that expression."[147] As noted by Professor Saunders, what makes *Rothner* particularly interesting and worthy of mention is that Judge Posner, the author of the opinion in *American Amusement Machine*, was one of the judges who decided *Rothner*.[148]

2. Recent Case Law Development

In *American Amusement Machine*, the district court rejected the holding in earlier cases that video games are not speech.[149] At issue was an Indianapolis ordinance that restricted access of mi-

140. *See id.* at 226.
141. *See id.*
142. *Id.* at 227.
143. 929 F.2d 297 (7th Cir. 1991).
144. *See id.* at 302–04.
145. *Id.* at 303.
146. *See id.*
147. *Id.*
148. *See* Saunders, *supra* note 21, at 96–97.
149. Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943 (S.D. Ind. 2000).

nors to violent video games as defined in the act, labeling such games as "harmful to minors."[150] The district court did not declare that video games were speech *per se*, but, citing *Rothner* and language in other earlier video game cases,[151] concluded that some video games conveyed speech.[152] The court nonetheless denied a preliminary injunction against enforcement of the ordinance, concluding that the violence targeted by the ordinance gave sufficient justification for the restrictions imposed.[153] While the court acknowledged the earlier cases which held that video games were not speech,[154] it did not expressly reject them. Instead, it accepted the plaintiffs' argument that:

> the once-predicted future of video games has arrived, that the video games of the year 2000 have gone far beyond the simple displays [of the games considered in the 1980s litigation] and that many of today's games are highly interactive versions of movies and story books, replete with digital art, music, complex plots, and character development.[155]

Examining games presented by the parties, the court found "that at least some video games contain protected expression."[156] In doing so, the court stated: "It is difficult for First Amendment purposes to find a meaningful distinction between the Gauntlet game's ability to communicate a story line and that of a movie, television show, book, or—perhaps the best analogy—a comic book."[157] It rejected the argument that the interactive nature of video games rendered them ineligible to be considered speech.[158] It also noted that video games could be subject to "viewpoint discrimination" and that this added further weight to the conclusion that they are speech for First Amendment purposes.[159] Indeed, the ordinance in question could be so viewed.[160] In Judge Posner's

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150. *See id.* at 946. The ordinance was actually passed by the City-County Council of the City of Indianapolis and Marion County. *Id.* For brevity's sake, I will refer to it simply as being the "Indianapolis ordinance." The text of the Indianapolis ordinance is appended to the case as Exhibit A. *Id.* at 981–87.

151. *See id.* at 950–51.

152. *See id.* at 954.

153. *See id.* at 981.

154. *See id.* at 950–51.

155. *Id.* at 951–52.

156. *Id.* at 952.

157. *Id.*

158. *See id.*

159. *See id.* at 953.

160. *See id.* at 954.

opinion, reversing the district court's denial of a preliminary injunction against enforcement of the ordinance, he accepted without analysis its finding that at least some video games are speech.[161]

A more thorough treatment of the issue can be found in the district court and appellate court opinions in *Interactive Digital Software*.[162] The district court began by noting that the First Amendment protections applied only if the party asserting them could show that its conduct is expressive.[163] It then set forth the test for whether conduct qualifies as speech: (1) "an intent to convey a particularized message," and (2) "a great likelihood that this message will be understood."[164] While acknowledging that "the Supreme Court . . . does not approve of the suggestion that the constitutional protection . . . applies only to the exposition of ideas," the court nonetheless held that "there must be some element of information or some idea being communicated in order to receive First Amendment protection."[165] Citing the earlier cases denying that video games were speech[166] and having examined four games,[167] the district court "found no conveyance of ideas, expression, or anything else that could possibly amount to speech."[168] The court explicitly rejected the argument "that some video games do contain expression while others do not."[169] Indeed, it suggested that such an approach was "dangerous."[170] Instead, the district court reasoned that "either a 'medium' provides sufficient elements of communication and expressiveness to fall within the scope of the First Amendment, or it does not."[171] Though unstated, presumably had the district court found that some video games conveyed a particularized message likely to be understood, then it would have extended First Amendment protection to all video games, even to those which did not convey

161. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 574 (7th Cir. 2001).
162. 329 F.3d 954 (8th Cir. 2003); 200 F. Supp. 2d 1126 (E.D. Mo. 2002).
163. 200 F. Supp. 2d 1126, 1132 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984)).
164. *Id.*
165. *Id.*
166. *Id.* at 1133.
167. *Id.* at 1134.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*

such a message. Instead, the court found that video games were closer to board games and sports than to movies.[172] It then cited cases finding that such games were not entitled to First Amendment protection.[173] It specifically rejected the possibility that "ordinary game[s]" are not speech, but the same games become speech when presented in "video form."[174]

Because the Eighth Circuit rejected the lower court's finding on whether video games are speech, it was required to address that issue explicitly. It began by rejecting the two part test used by the district court to determine whether video games are speech.[175] Instead, the appellate court, citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[176] and *Winters v. New York*,[177] found "that a 'particularized message' is not required for speech to be constitutionally protected."[178] Instead, the court noted Supreme Court precedent holding that "the [F]irst [A]mendment protects '[e]ntertainment, as well as political and ideological speech.'"[179] The court then turned to the record before it, which included "scripts and story boards showing the storyline, character development, and dialogue of representative video games."[180] Quoting the Supreme Court's opinion in *Hurley*, the Eighth Circuit found:

> If the first amendment is versatile enough to "shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll," . . . we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to a similar protection."[181]

While the district court found that the fact that the games contained violence did nothing to establish that they conveyed speech, the appellate court found these displays of violence to be

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172. *Id.*

173. *See id.* (citing There to Care, Inc. v. Comm'r of the Indiana Dep't of Revenue, 19 F.3d 1165, 1167 (7th Cir. 1994); Allendale Leasing, Inc. v. Stone, 614 F. Supp. 1440, 1454 (D.R.I. 1985)).

174. *Id.*

175. *See* Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 957 (8th Cir. 2003).

176. 515 U.S. 557 (1995).

177. 333 U.S. 507 (1948).

178. *Interactive Digital Software*, 329 F.3d at 957.

179. *Id.* (quoting Shad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981)).

180. *Id.*

181. *Id.* (quoting *Hurley*, 515 U.S. at 569).

further proof of the games' expressive nature.[182] While one might have wished for a more detailed analysis of the question both by the district court and by the appellate court, the two opinions provide the first example of two courts examining the same evidence and reaching different conclusions as to whether video games are speech.

In *Video Software Dealers Association,*[183] the first state statute restricting minors' access to video games was examined.[184] The court devoted only a single paragraph to the issue of whether video games qualify as speech.[185] As one might expect when an issue is treated in such brevity, little analysis went into the court's finding that video games have sufficient expressive elements to qualify for First Amendment protection. Distinguishing the cases from the 1980s holding that video games are not speech, the court stated:

> The games at issue in this litigation, however, frequently involve intricate, if obnoxious, story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experience. . . . In fact, it is the nature and effect of the message being communicated by these video games which prompted the state to act in this sphere.[186]

In addition to the three cases which have struck down laws restricting minors' access to violent video games, a few courts have denied tort claims brought by victims of youth violence against the publisher of violent video games. In these cases, the victims alleged that the violent video games contributed to the violent acts committed by minors who played those games. Three cases, each decided in 2002, rejected such claims on the basis, among others, that the publishers were protected under the free speech clause of the First Amendment from liability. In *Wilson v. Midway Games, Inc.*,[187] a mother sued the publisher of the video game *Mortal Kombat*,[188] claiming that it caused a friend of her son to stab and kill him.[189] The court considered the claim of Midway Games that it was shielded from liability under the First

182. *See id.* at 957–58.
183. 325 F. Supp. 2d 1180 (W.D. Wash. 2004).
184. *See* WASH. REV. CODE ANN. § 9.91.180 (West 2005).
185. *See* 325 F. Supp. 2d 1180, 1184–85 (W.D. Wash. 2004).
186. *Id.* at 1184.
187. 198 F. Supp. 2d 167 (D. Conn. 2002).
188. MORTAL KOMBAT (Midway Amusement Games, L.L.C. 1999).
189. 198 F. Supp. 2d at 169.

Amendment. Considering the cases from the 1980s and the more recent cases,[190] the court concluded that:

> [T]he cases are reconcilable on this point: While video games that are merely digitized 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 under the First Amendment. . . . [T]he inquiry must be context-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.[191]

Applying this standard to *Mortal Kombat*, the court not only rejected the argument that the game's interactivity was fatal to its being classified as speech, it held that this feature actually served to "*enhance* everything expressive and artistic about Mortal Kombat: the battles become more realistic, the thrill and exhilaration of fighting is more pronounced."[192] Further, the court found that plaintiff's complaint further supported the finding that the *Mortal Kombat* was speech. The court found that the allegation that the game presented and encouraged violence as "a problem solving technique" targeted the expressive elements of the game:

> [I]ts 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 opponent's head leaving his spinal cord still dangling").[193]

The second tort case to address the issue of whether video games were speech was *Sanders v. Acclaim Entertainment, Inc.*[194] *Sanders* arose out of the 1999 killings at Columbine High School and was filed by the widow and children of the teacher killed in that attack.[195] Among the defendants were publishers of violent video games played by the killers, Dylan Klebold and Eric Har-

190. *See id.* at 179–80.
191. *Id.* at 181.
192. *Id.*
193. *Id.*
194. 188 F. Supp. 2d 1264 (D. Colo. 2002).
195. *Id.* at 1268.

ris.[196] Unlike the *Wilson* court, the *Sanders* court did not try to distinguish the earlier cases holding that video games are not speech from the more recent ones.[197] Instead, it held that the earlier cases, specifically *America's Best*, were "directly contrary to the Supreme Court's teaching that the distinction between information and entertainment is so minuscule, that both forms of expression are entitled to First Amendment protection."[198] Again, however, the court engaged in little actual analysis of video games. Indeed, under its holding, one could argue that traditional games and sports (which are both forms of entertainment) are likewise protected expression.

The third case, *James v. Meow Media, Inc.*,[199] arose out of the 1997 Paducah, Kentucky school shooting by Michael Carneal. In finding that the violent video games played by Carneal were speech, the court noted: "Although the defendants' products may be a mixture of expressive and inert content, the plaintiffs' theory of liability isolates the expressive content of the defendants' products."[200] It then continued, "Expression, to be constitutionally protected, need not constitute the reasoned discussion of the public affairs, but may also be for purposes of entertainment."[201] It then declared, "[M]ost federal courts to consider the issue have found video games to be constitutionally protected."[202] In doing so, it entirely ignored the earlier cases holding that video games are not speech. The court then makes a rather remarkable holding:

> Extending First Amendment protection to video games certainly presents some thorny issues. After all, there are features of video games which are not terribly communicative, such as the manner in which the player controls the game. The plaintiffs in this case, however, complain about none of those non-expressive features. Instead, they argue that the video game, somehow, communicated to Carneal a disregard for human life and an endorsement of violence that persuaded him to commit three murders. Because the plaintiffs seek to attach tort liability to the communicative aspect of the video games produced by the defendants, we have little difficulty in holding that the First Amendment protects video games in the sense uniquely

196. *See id.* at 1268–70.

197. *Compare* 198 F. Supp. 2d at 179–82, *with* 188 F. Supp. 2d at 1279–81.

198. *Sanders*, 188 F. Supp. 2d at 1279 (citing Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)).

199. 300 F.3d 683 (6th Cir. 2002).

200. *Id.* at 695.

201. *Id.*

202. *Id.* at 696.

> relevant to this lawsuit. Our decision here today should not be interpreted as a broad holding on the protected status of video games, but as a recognition of the particular manner in which James seeks to regulate them through tort liability.[203]

This statement is remarkable because it appears to indicate that whether video games are speech depends on the regulation being reviewed. This is simply illogical. Either such games are speech or they are not. If they are, then the regulation requires some level of First Amendment scrutiny. If they are not, no regulation can make them speech. It may be true that "there are features of video games which are not terribly communicative," but this observation applies to other media as well. With any medium of speech, whether the First Amendment bars a regulation depends on the degree to which expression is restricted and the significance of the interest which is used to justify the regulation. Nothing about video games makes this any different than with any other medium, other than courts' unfamiliarity with the medium.

While the six most recent cases discussing this issue have reached the correct conclusion, the courts engaged in very little analysis in reaching their conclusions. In essence, the opinions represent very little more than conclusory statements: "video games are speech because they are communicative and communicative conduct is speech," or "video games are speech because they are entertainment and entertainment is speech." As Judge Limbaugh in *Interactive Digital Software* correctly pointed out, not all that is entertaining is speech.[204] He cited examples such as bingo and blackjack which have been specifically held not to be speech.[205] Further, not all conduct that communicates information is speech.[206] None of the six courts analyzed what made video games different from unprotected forms of entertainment nor did they explore what made video games different from other conduct that communicates information that is not protected. The next section will discuss several video games which are used to communicate a variety of messages. It is because of this capacity and

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203. *Id.*

204. *See* Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1133–35 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003).

205. *Id.* at 1134.

206. *See supra* text accompanying notes 80–84.

actual use that video games should be considered a medium of speech and afforded First Amendment protection.

3. Application to More Recent Games

Those who argue that video games are not speech often begin their argument by citing the cases decided in the early 1980s which held that the games in question were not speech. They then apply that reasoning to a subset of currently available video game titles and argue that more realistic and detailed graphics do not fundamentally change this analysis. They ignore other games, however, that have the explicit and primary goal of communicating a particularized message to the gamers who play them. As would be expected, the Interactive Digital Software Association (recently renamed the Entertainment Software Association or "ESA") disagrees.[207] In its "Memorandum in Support of Plaintiff's Motion for Summary Judgment" filed with the district court in the *Interactive Digital Software* case, the ESA asserts that "video games . . . are a modern form of artistic expression. Like movies, today's video games are rich combinations of narrative, storyline, music, and graphic design. The creative process of developing video games resembles that of other forms of protected expression."[208] A video game begins as a creative concept in the minds of game developers and is brought to life by teams of artists. Story lines and themes guide the development of games from concept art to a final product that contains extensive plot and character development. Even games without explicit plots or story lines, such as puzzle games, contain visual art, graphic design and sound elements that constitute a form of aesthetic expression akin to music or abstract art.[209]

Water Cooler Games is a web site dedicated to "videogames [sic] with an agenda."[210] It "explores the emerging field of games [that] want to do more than simply [be] fun: they want to make a

207. *See generally* Memorandum in Support of Plaintiff's Motion for Summary Judgment, Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126 (E.D. Mo. 2002) (Cause No. 4:00CV2030 SNL), *available at* http://culturalpolicy.uchicago.edu/conf2001/papers/markel.html (last visited Nov. 13, 2005).

208. *Id.* (citations omitted).

209. *Id.*

210. *About*, WATER COOLER GAMES, http://www.watercoolergames.org/about.shtml (last visited Nov. 13, 2005).

point, share knowledge, change opinions. This includes new genres such as advergaming, newsgaming, political games, simulations and edutainment."[211] Among the categories of games listed on that site are activism games, advergames, business games, educational games, health and medicine games, newsgames, political games, public policy games, and social games.[212] This section examines a few of these and other categories of video games in an analysis of the competing claims that video games are or are not speech.

a. Games with Political Messages

A number of games have politics as their theme. Though many of these games may not convey a particularized political message, one game that undeniably does so (or at least has the intent to do so) is *Special Force*, developed by the Lebanese guerilla group Hizbollah.[213] *Special Force* is intended to be "educational for our future generations and for all freedom lovers of this world of ours."[214] In a 2003 article on the game published by Reuters, the writer stated: "Hizbollah's Internet center created the game, Special Force, in commemoration of the battles of the Shi'ite Muslim group whose attacks helped force Israeli troops out of Lebanon."[215] The game's storyline is described as follows:

> First players train at a war college to use guns and grenades by aiming at pictures of Sharon, as well as Israeli Defense Minister Shaul Mofaz and former Defense Minister Benyamin Ben-Eliezer. Players get a medal from Hizbollah leader Sheikh Hassan Nasrallah after completing their cyber training.
>
> At the next stage, they break through an Israeli position in south Lebanon and salute pictures of real-life "martyrs" killed at the same spot. Finally, players fight Israeli troops and blow up helicopters. When Israelis are killed, they yell "you killed me" in Hebrew.[216]

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211. *Id.*

212. *Id.*

213. *See News*, SPECIALFORCE, http://www.specialforce.net/english/indexeng.htm (last visited Nov. 13, 2005).

214. *Important Notice*, SPECIAL FORCE, http://www.specialforce.net/english/important.htm (last visited Nov. 13, 2005).

215. Mariam Karouny, *Hizbollah Computer Game Recalls Israeli Battles*, REUTERS, *available at* http://www.specialforce.net/english/news/reuters.htm (last visited Nov. 13, 2005).

216. *Id.*

Bilal az-Zein, of the Hizbollah Internet center, "said the game showed the 'integrity of the resistance and fighting the occupation.' . . . 'The goal [of Special Force] is to create an alternative to similar Western games where Arabs and Muslims are portrayed as terrorists.'"[217] One young player stated: "'This game reminds us of the fighters and their suffering. It also entertains us and sends the Jews a message of defiance. . . .'"[218]

This apparently was exactly the particularized message that the developers of *Special Force* intended. On the web site where Hizbollah describes the game, its meaning and intent, and where it is available for downloading, the genesis of the game is described as follows:

> In the Name of Allah, Most Gracious, Most Merciful
>
> One time I was walking in Beirut, the capital that "defeated the greatest army of the world". [sic] I stopped by one of the computer game shops dispersed widely in Beirut and most Arab cities. I saw the children playing the game of the invincible American hero, who's never out of ammunition and continually wins. I asked one of the children, did you like the game? He replied yes, but I wish I were playing as an Arab Moslem fighting the Jews as the Islamic Resistance did in Lebanon! After that, he left to the alleys of Beirut roaming with heroes of the Islamic Resistance.
>
> This is where the necessity emerged for a prompt action of designing the basic construction for the world of the games that match with reality and illustrate battles executed by young men who never played an imaginary game; rather they fought real battles that humiliated the Zionist enemy. . . .[219]

Other games that are explicitly designed to communicate a political message include the *Bushgame* game by Starvingeyes, Inc.[220] One of the developers of the game described its intent as follows:

> Bushgame combines humor, opinion, and fact to bring an entertaining and informative video game adventure to people everywhere. The use of this medium will hopefully reach many people who have not had the time or interest to read up on some of the appalling things

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217. *Id.*

218. *Id.*

219. *Design*, SPECIAL FORCE, http://www.specialforce.net/english/design/design.html (last visited Nov. 13, 2005).

220. *Bushgame*, EMOGAME.COM, http://www.emogame.com/bushgame.html (last visited Nov. 13, 2005).

> that have taken place in our government and society over the past four years.[221]

One feature of the game is that it allows players to jump to "educational parts," which include "Surplus/Deficit," "Budget Crisis," "Estate Tax," "Tax Cuts for the Rich," "Bush and Enron," "Halliburton and Tax Shelters," "The Environment," "Jobs and Benefits," "God and Terrorism."[222] While describing the content as often sophomoric may be too kind, the game's author nonetheless clearly used the medium of video games to communicate a particularized message. Part cartoon video, part video game, the political message intended is not merely understandable, it is unmistakable. The *Bushgame* was one of the video games with a partisan political message described by the *New York Times* in an article published during the 2004 election.[223]

b. Games with Social Messages

Molleindustria is an Italian company which produces online video games with political and social themes.[224] On its web site, Molleindustria states:

> We believe that the explosive slogan that spread quickly after the Anti-WTO demostrations [sic] in Seattle, "Don't hate the media, become the media," applies to this medium. We can free videogames [sic] from the "dictatorship of entertainment," [sic] using them instead to describe pressing social needs, and to express our feelings or ideas just as we do in other forms of art. But if we want to express an alternative to dominant forms of gameplay we must rethink game genres, styles and languages. The ideology of a game resides in its rules, in its invisible mechanics, and not only in its narrative parts.[225]

Two of Molleindustria games address labor issues. Molleindustria promotes one of its games, *TuboFlex*, as follows: "Year 2010. The need of mobility has grown to excess since the first years of the millennium. That's why Tuboflex inc., [sic] the world's leading

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221. *About*, BUSHGAME.COM, http://www.bushgame.com/about.html (last visited Nov. 13, 2005).

222. *See supra* note 220.

223. Michael Erard, *In These Games, The Points Are Political*, N.Y. TIMES, July 1, 2004, at G1.

224. MOLLEINDUSTRIA, http://www.molleindustria.it/pivot/entry.php?id=18 (last visited Nov. 13, 2005).

225. *Id.*

Human Resources Services organisation, created a complex tube system that make [sic] it possible to dislocate employees in real time, depending on demand."[226] It promotes another of its games, *Tamatipico*, as follows: "*Tamatipico* Is [sic] Your virtual flexworker: He works, he rests and he has fun when you want him to! Raise his productivity but pay attention to his energy and his happyness [sic] because he could get injured or strike."[227]

c. Games with Religious Messages

A growing area of the video game industry are games specifically designed for and marketed to Christians. While some of these games merely avoid the violent and sexually explicit content of the games that are the targets of criticism and legislation, many of these games are promoted as teaching Christian morals, Bible stories, or church history. For example, Big Idea Productions, the creator of the popular VeggieTales animated cartoon series, also produces video games.[228] Some of these games lack explicit moral lessons. Others, however, are marketed as teaching values. *Josh and the Big Wall!*,[229] is a web-based game based on the Biblical story of Joshua and the Battle of Jericho and on a video Big Idea produced under the same name. On a web page titled "Info for Parents," Big Idea states the following about this game:

> "Josh and the Big Wall!" is our online, playable version of the VeggieTales video! In Josh and the Big Wall!, Bob the Tomato, Larry the Cucumber and Junior Asparagus teach kids that God's way is better than our own way of doing things. We hope your kids will take the game's lesson to heart![230]

On a web page titled "A Note from Phil," Phil Vischer, the founder of Big Idea, states the following about the company's purpose behind its video games:

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226. *Id.*

227. *Id.*

228. *See Company and Mission: Our Story*, BIGIDEA.COM, http://www.bigidea.com/company/ourstory.htm (last visited Nov. 13, 2005); *Games*, BIGIDEA.COM, http://www.bigidea.com/games (last visited Nov. 13, 2005).

229. *Josh and the Big Wall!*, BIGIDEAFUN.COM, http://www.bigideafun.com/veggietales/arcade/josh/info.htm (last visited Nov. 13, 2005).

230. *VeggieTales: Info for Parents, Josh and the Big Wall!*, BIGIDEAFUN.COM, http://www.bigideafun.com/veggietales/arcade/josh/parents_popup.htm (last visited Nov. 13, 2005).

> We've had a ball sharing with you the adventures of Bob the Tomato, Larry the Cucumber and the rest of the gang! Entertaining kids is a big endeavor in itself, and at Big Idea we want our stories to be high-quality entertainment—and to teach timeless values from the Bible. We want to give parents the tools they need to raise their kids in a media-saturated world. Now Big Idea Interactive is telling these kinds of stories in a whole new way! It's one thing for a kid to sit and watch a video or go to the movies; getting them to interact with the story and make decisions on the computer screen helps kids learn these lessons even more.[231]

Nor is Big Idea alone in the effort to teach Christianity through video games. N'Lightning Software Development produces a game called *Catechumen*.[232] The publisher's web site promotes the game's link to church history as follows:

> Rome had long been a land of persecution towards the minorities, particularly that of the Christian minority. Persecution reached its epitome under the rule of Caesar Nero. The Christians had little that they could do against the Roman government, but to have faith in God, and pray. Christian persecution had escalated until Roman spies would infiltrate the Christian churches, bringing the Roman authorities with them. Darkness was settling over Christianity, evil in nature and threatening to destroy the Christian religion only a few centuries after Christ founded it at the cross. To defend themselves, Christians created a recruitment policy that required brothers seeking the Lord to study the Word for a year before undergoing baptism and partaking in communion. During this time, Christians in training were known as "Catechumen".[sic][233]

Not only does the game teach church history, it also teaches gamers about spiritual weapons:

> Catechumen is a first person action/adventure Christian game where your goal is to defeat the forces of evil, descending deeper into the depths of the Earth and rescue your captured brethren.
>
> Choose from eight powerful spiritual weapons. Each weapon has its own unique use. Maximize your firepower by learning each weapon's abilities. Find the lightning sword, the drill sword, the explosive staff and more.
>
> Encounter Satan's minions and banish them back to their evil realm. Evil lurks everywhere you turn. With your Sword of the Spirit in hand, you must confront the demons head on and show them nothing can overcome the power of the Holy Spirit.

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231. Phil Vischer, *A Note From Phil . . .* , BIGIDEA.COM, http://www.bigidea.com/games/phil_note.htm (last visited Nov. 13, 2005).

232. CATECHUMEN (N'Lightning Software Development 2000).

233. *Catechumen*, N'LIGHTNING SOFTWARE DEVELOPMENT, http://www.n-lightning.com/Catechumen.htm (last visited Nov. 13, 2005).

> Restore your spiritual health by finding scrolls containing God's Word. In Catechumen, you survive by faith. When your faith gets too low, pick up the many scrolls scattered across the lands to renew your faith and continue your journey.
>
> Descend deeper and deeper into the depths of the underworld. Your journey will take you into the very heart of evil, through 18 hand-crafted, highly detailed levels. Each level you visit is unique and each has its secrets you must uncover.
>
> Rescue your captured Christian brethren. Your mentor and some of his flock have been taken hostage by the evil Roman Empire, controlled by Satan himself. The forces of evil and darkness will claim a great victory if he does not survive! Take up this quest and fight for the Lord![234]

Big Idea and N'Lightning Software Development are just two of a growing number of companies producing video games with Christian themes. Capitalizing on the best selling *Left Behind*[235] series of books, Left Behind Games plans to release games based on the fictional series,[236] which itself is based on an interpretation of biblical descriptions of end time events (eschatology) known as premillennial dispensationalism.[237] Eschatology is a hotly debated topic among Christians. While the games have not been released at the time of the writing of this article, it may be assumed these games will communicate the eschatological premises on which the book series is based.

D. *Educational Uses of Video Game Technology*

The same technology that powers video games can be used for education and training in ways that communicate particularized messages. One example is AccuTouch Endovascular Simulation System, a product of Immersion Medical, in which one can perform a simulated medical procedure. "Immersion Medical is now working on a program that would map a patient's medical data and download them in a computer, so the physician can practice on the patient before actually working on him."[238] "Immersion is

234. *Id.*

235. *See generally* TIM LAHAYE & JERRY B. JENKINS, LEFT BEHIND: A NOVEL OF EARTH'S LAST DAYS (1995).

236. LEFT BEHIND GAMES, http://www.leftbehindgames.com (last visited Nov. 13, 2005).

237. *See An Overview of End Times Views*, LEFT BEHIND, http://www.leftbehind.com/channelendtimes.asp (last visited Nov. 13, 2005).

238. Hazel Feigenblatt, *Video Games Are Serious Business for Some Maryland Firms*, GAZETTE.NET, May 14, 2004, http://www.gazette.net/gazette_archive/2004/200420/busi

just one of the companies turning video game technology toward serious uses in medicine, defense, education, telecommunications and other fields."[239] GRS Games developed *Space Station: SIM*,[240] "in which players build a space station, maintain it, run experiments and give technical support."[241] NASA, which assisted in the development of *Space Station: SIM*, was interested in the game "because its hyper-realistic nature gives the public[] a better understanding of what NASA does."[242] Another such game is *Restaurant Empire*,[243] a "real-time, three-dimensional game that puts the player in charge of a restaurant, from balancing finances to answering customer complaints."[244] The game "has been used in business schools and some universities, including Stanford and Harvard."[245]

Indeed, video games have become a subject of academic research and scholarship. For example, Kurt Squire, an assistant professor at the University of Wisconsin-Madison (UW-M) and a research scientist at Wisconsin's Academic ADL Co-Lab, and Constance Steinkuehler, a research fellow at the Academic ADL Co-Lab and dissertator at UW-M, examine how video gamers learn through playing their games.[246] One of the games which they have studied is *Lineage*.[247] In an article on their research, Squire and Steinkuehler describe *Lineage* as "a massive, multiplayer online game where thousands of players interact in real time through avatars—such as a female elf—which are online digital characters that represent the individual player."[248] They continue:

> Despite fears of games "replacing" literate activities, *Lineage* play is a thoroughly literate activity involving manipulation of texts, images, and symbols for making meaning and achieving particular ends. If the ends—conducting sieges and defending castles—are not

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ness/news/217160-1.html (last visited Nov. 13, 2005).

239. *Id.*

240. SPACE STATION: SIM, http://www.spacestationsim.com/products/index.html (last visited Nov. 13, 2005).

241. Feigenblatt, *supra* note 238.

242. *Id.*

243. RESTAURANT EMPIRE (Enlight Interactive Inc. 2003).

244. Feigenblatt, *supra* note 238.

245. *Id.*

246. Kurt Squire & Constance Steinkuehler, *Meet the Gamers*, LIBR. J., Apr. 15, 2005, at 38.

247. LINEAGE (NCsoft 1998).

248. Squire & Steinkuehler, *supra* note 246, at 39.

> valued literacy activities, then the *means* surely are: researching equipment, making maps, managing resources, investing currencies, building models, designing strategies, debating facts and theories and writing. Tons of writing.
>
> Simply playing *Lineage* requires facility with text, particularly in negotiating private, public, and other chat channels through which text constantly streams in real time. . . . Outside of the game world, [players] tell stories, post screen shots, write poetry, search databases, post hints and walkthroughs, and generally "cuss and discuss" all aspects of game play.[249]

Squire and Steinkuehler describe the games they study as creating communities where communication of ideas occurs not only outside the game, but as an essential part of the game itself. To even play games such as *Lineage*, gamers must constantly "convey a particularized message" with a great likelihood that this message will be understood.[250]

E. *Conclusion*

Perhaps most, if not all, of today's video games should be found to be speech simply because of the artistry involved in their visual displays and storylines. Perhaps they should be found to be speech because entertainment is speech. Yet, such an approach may lead to defining speech too broadly. In the case of video games, it is unnecessary to take such a broad approach. From the few games described above, it is clear that video games are a medium of speech however one wants to define that term. Authors of games can use them to convey messages about politics, religion, social issues and probably any other subject matter which one can imagine. With online games, the game becomes a medium for communication between players, in which real communities are formed. The educational value of such games is immense. Certainly some of what is being taught is troubling. That may create a compelling state interest in restricting minors' access to such games. It does not, however, create a plausible argument for denying games the status of speech. Indeed, it does the opposite. It is in large measure the unique ability of such games to educate and shape the ways in which gamers think, particularly through the particularized messages they deliver, which creates the con-

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249. *Id.* at 39–40.

250. Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam).

cerns which have motivated efforts to restrict minors' access to them. It is the fact that such messages are capable of and are being understood that provokes the theory that they are somehow responsible for increased violence among some of those who play them. As Judge Limbaugh noted in *Interactive Digital Software*, "either a 'medium' provides sufficient elements of communications and expressiveness to fall within the scope of the First Amendment, or it does not."[251] It is indeed, to quote his findings, "dangerous" for courts to judge on a case-by-case basis whether the expression conveyed by such a medium is worthy of being speech.[252] Whatever one may think about whether video games should be subject to access restrictions, it is hard to deny that they are a powerful medium for expression. As such, they deserve the full protection of the Free Speech Clause of the First Amendment. Restricting minors' access to them based on their contents, therefore, requires strict scrutiny. The next section will examine whether access restrictions can survive such scrutiny.

IV. MAY MINORS' ACCESS TO GRAPHICALLY VIOLENT VIDEO GAMES BE RESTRICTED?

> Despite what they say, courts are never in the business of protecting speech per se, "mere" speech (a nonexistent animal); rather they are in the business of classifying speech (as protected or regulatable) in relation to a value—the health of the republic, the vigor of the economy, the maintenance of the status quo, the undoing of the status quo—that is the true, if unacknowledged, object of their protection.[253]

A. *Introduction*

Having shown that at least some video games are a medium of speech and that any restrictions placed upon their access raises the need for First Amendment scrutiny, the second question to be addressed by this article remains: may minors' access to graphically violent games be restricted? Answering this question involves examination of two issues: (1) are the First Amendment

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251. Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).

252. *See id.*

253. FISH, *supra* note 84, at 106.

rights of minors different from the First Amendment rights of adults and, if they are different, under what circumstances may governments limit minors' access to speech that is protected as to adults?; and (2) do those circumstances apply to graphically violent video games? The remainder of this article will address those issues.

As Professor Fish's quote at the beginning of this section indicates, the First Amendment, despite the declarations of many of its defenders, is not some ultimate good before which all other competing values must fall in the event of a conflict. It is, rather, good because it advances other values which the Framers saw as good. The same is still the case. When conflicts arise between competing values, both identified as good, a careful weighing of the competing interests is essential. Courts recognize this by permitting content-based restrictions in the event of a compelling interest, when the restrictions are narrowly tailored and use the least restrictive means necessary to protect that interest.

In addressing the second question, this article analyzes the competing interests at stake in the regulation of violent video games to determine what limits, if any, should be placed on the First Amendment's protection of any expressions which may be conveyed by such games.

B. *What Are the First Amendment Rights of Minors?*

Minors clearly have some rights which are protected under the Free Speech Clause of the First Amendment. On the other hand, those rights are not coextensive with the First Amendment rights of adults. The seminal case for establishing that minors have less extensive First Amendment rights than adults is *Ginsberg v. New York*.[254] In *Ginsberg*, the Court had before it a New York statute which prohibited the sale to minors of sexually explicit material which was not obscene as to adults.[255] The statute was attacked on the grounds that states may not restrict minors' access to sexually related material which is protected as to adults.[256] The

254. 390 U.S. 629 (1968).
255. *See id.* at 631.
256. *See id.* at 636.

Court rejected this contention.[257] It explicitly recognized that "'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'"[258] The Court found two interests which justified restricting minors' access to sexually related material where "it was rational for the legislature to find that the minors' exposure to such material might be harmful."[259] First, a parent's right of authority in his or her household "to direct the rearing of [his or her] children"[260] entitles him or her to support from the state in the form of "laws designed to aid discharge of that responsibility."[261] Second, the Court found that the state had its own interest in "'safeguard[ing] [children] from abuses' which might prevent their 'growth into free and independent well-developed'" adults.[262]

The Court then explored whether the New York legislature might rationally conclude that exposure to the material restricted under the statute constituted an "abuse."[263] The statute in question included a legislative finding that such material was "'a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.'"[264] The Court acknowledged that it was "doubtful that this finding expresses an accepted scientific fact,"[265] but nonetheless held that "it was not irrational for the legislature to find that exposure to" the sexually explicit material covered by the statute "is harmful to minors."[266] It went on to note that while the scientific evidence as to harm to "'the ethical and moral development of . . . youth,'"[267] if any, resulting from minors' exposure to such material was uncertain, "'a causal link has not been disproved.'"[268] The Court then held that it did "not demand of legislatures 'scientifically certain criteria of legislation.'"[269] Thus, the Court's decision

257. *See id.* at 637.
258. *Id.* at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).
259. *Id.* at 639.
260. *Id.*
261. *Id.*
262. *Id.* at 640 (quoting *Prince*, 321 U.S. at 165).
263. *Id.* at 641.
264. *Id.* (quoting N.Y. PENAL LAW app. 484-e (McKinney 1909)).
265. *Id.*
266. *Id.*
267. *Id.* (quoting N.Y. PENAL LAW app. 484-e (McKinney 1909)).
268. *Id.* at 642 (quoting C. Peter Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 S. CT. REV. 7, 52).
269. *Id.* at 642–43 (quoting Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911)).

in *Ginsberg* can be accurately stated as permitting restrictions on minors' access to expression which a legislature rationally finds to be harmful to the ethical and moral development of youth without the necessity of a high degree of scientific certainty supporting that finding.

This does not, of course, mean that government may restrict minors' access to any material which any member of the community or even a majority might object to a minor having. The case which best demonstrates the limits of such restrictions is *Erznoznik v. City of Jacksonville*.[270] In *Erznoznik*, a manager of a drive-in movie theater was prosecuted for violation of a city ordinance that prohibited the exhibition of films displaying nudity on a screen visible from a public street and place.[271] The ordinance was justified, in part, as necessary to protect children from seeing such displays.[272] The Court acknowledged Jacksonville's "undoubted police power to protect children."[273] It also acknowledged that government may more stringently control the access of minors to certain material than it may adults.[274] Nonetheless, it found that the city was not justified in imposing the restrictions found in the ordinance in question.[275] It began by noting that the First Amendment provides "significant" protections to minors and that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."[276] Because the ordinance in question applied to any film which displayed "*any* uncovered buttocks or breasts, irrespective of context or pervasiveness," the Court found that its prohibition exceeded those which were permissible.[277] The Court then declared: "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[278] In a footnote, the Court elaborated on the First Amendment rights of minors, stating:

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270. 422 U.S. 205 (1975).
271. *Id.* at 206–07.
272. *Id.* at 212.
273. *Id.*
274. *Id.*
275. *See id.* at 214.
276. *Id.* at 212–13.
277. *Id.* at 213.
278. *Id.* at 213–14.

> The First Amendment rights of minors are not "co-extensive with those of adults." . . . "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." . . . In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor.[279]

The issue, then, is whether graphically violent video games are "obscene as to youths [or] subject to some other legitimate proscription."[280] Unless such games also contain sexually explicit material which would without more fall within the existing definition of material harmful to minors, the issue becomes whether the definition of "obscene as to youth" might be expanded to include such graphic displays of violence or whether such displays constitute another legitimate basis for proscription.

The Court has not limited governments to restrictions on what minors may access solely to sexually explicit material that is harmful to minors. In *FCC v. Pacifica Foundation*,[281] the Court approved a declaratory order granted by the Federal Communications Commission which held that a radio station "'could have been the subject of administrative sanctions'"[282] for broadcasting George Carlin's "Filthy Words" monologue.[283] The complaint had been filed by a man who averred that he had heard the broadcast while in his car with his young son.[284] The FCC found that the language used in the monologue was "indecent" pursuant to a federal statute.[285] Addressing Pacifica's First Amendment claim that government may not "restrict the public broadcast of indecent language [under] any circumstances,"[286] the Court rejected the claim that speech must be obscene in order to be subject to re-

279. *Id.* at 214 n.11 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring); Ginsberg v. New York, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring)).

280. *Id.* at 213.

281. 438 U.S. 726 (1978).

282. *Id.* at 730.

283. *See id.* at 750–51. The monologue was based on seven words, "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Id.* at 751. I list these words in the article not for shock value but for later comparison between the harmfulness actually found by the Court from the use of these words in the context of Carlin's monologue and the content in question in the video games which are the target of the statutes and ordinances at issue in this article.

284. *Id.* at 726.

285. *Id.* at 732.

286. *Id.* at 744.

strictions on its broadcast.[287] Acknowledging that Carlin's monologue was indeed speech[288] and that speech may not be suppressed merely because it is offensive,[289] the Court nevertheless held that the words used by Carlin were offensive "for the same reasons that obscenity offends,"[290] and that their restriction was constitutional.[291] In a footnote, the Court quoted, with apparent approval, the FCC's finding that "'[o]bnoxious, gutter language describing [sexual and excretory bodily functions] has the effect of debasing and brutalizing human beings.'"[292] As one basis for its holding, the Court, citing *Ginsberg*, raised the welfare of children and the government's interests in the "'well-being of its youth' and in supporting 'parents' claim to authority in their own household.'"[293] These interests, the Court declared, "amply justify special treatment of indecent broadcasting."[294] The Court emphasized that its holding extended to speech which was not obscene by concluding: "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[295] In his concurrence, Justice Powell noted the Court's past recognition of "society's right to 'adopt more stringent controls on communicative materials available to youths than on those available to adults.'"[296] In part, he argued that "such speech may have a deeper and more lasting negative effect on a child than on an adult. For these reasons, society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear."[297]

In *Bering v. Share*,[298] the Supreme Court of Washington provided further support for the proposition that restrictions on speech which might be received by minors are not limited to ob-

287. *See id.* at 750–51.
288. *Id.* at 744.
289. *Id.* at 745.
290. *Id.* at 746.
291. *See id.* at 750–51.
292. *Id.* at 746 n.23.
293. *Id.* at 749 (quoting Ginsberg v. New York, 390 U.S. 629, 639, 640 (1968)).
294. *Id.* at 750.
295. *Id.* at 750–51.
296. *Id.* at 757 (Powell, J., concurring) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975)).
297. *Id.* at 758.
298. 721 P.2d 918 (Wash. 1986) (en banc).

scenity. In *Bering*, physicians had successfully sought an injunction against abortion protesters which prohibited their oral use of words "'murder,' 'kill,' and their derivatives."[299] The Washington Supreme Court found that this injunction was constitutional insofar as the prohibition applied when minors were present, but unconstitutional when they were not.[300] In remanding the case, the court suggested that the trial court consider evidence as to an appropriate age limit of potential hearers for application of this condition.[301] The basis for affirming the injunction when children were present was the finding that the prohibited words "had 'inflicted trauma upon the children overhearing such references.'"[302] Citing *Ginsberg*, the court relied in part on the "'primary responsibility'" of parents and teachers "'to direct the rearing of their children.'"[303] It also relied on the state's interest in protecting minors "from the potentially harmful effects caused by the proscribed speech."[304] It characterized these harmful effects as "physical and psychological abuse."[305] In addition to *Ginsberg*, the *Bering* court relied heavily on *Pacifica*, especially Justice Powell's concurrence in that case, to support its holding.[306]

From these cases, it is clear that while minors have First Amendment rights upon which government may not infringe, those rights are not coextensive with the First Amendment rights of adults and the limitations upon those rights are not limited to sexually explicit material harmful to minors. The test for whether a given category of expression is subject to restrictions as to nonadult recipients is whether that speech "'impair[s] the ethical and moral development of . . . youth.'"[307] Such an impairment may be found where the speech in question "'has the effect of debasing and brutalizing human beings.'"[308] The state is not required to prove this impairment with a high degree of scientific certainty to justify the restriction.[309] To hold that sexually explicit material is

299. *See id.* at 921.
300. *See id.* at 936.
301. *Id.*
302. *Id.* at 933.
303. *Id.* at 934 (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)).
304. *Id.*
305. *Id.* at 935.
306. *See id.* at 934–35.
307. *Ginsberg*, 390 U.S. at 641 (quoting N.Y. PENAL LAW app. 484-e (McKinney 1909)).
308. FCC v. Pacifica Found., 438 U.S. 723, 746 n.23 (1978).
309. *Ginsberg*, 390 U.S. at 642–43.

the only category of speech which may be limited as to minors is simply to misread or to ignore the body of cases which address the issue of the state's ability to restrict expression received by minors. To require a high degree of scientific certainty of harm is likewise to misread or to ignore the body of cases which address the issue of the states' ability to restrict expression received by minors.

In *Reno v. ACLU*,[310] the Court stuck down the Communications Decency Act ("the CDA"), which was aimed at restricting the access of minors to "patently offensive" and "indecent" speech available via the Internet.[311] In doing so, the Court distinguished the facts and restrictions at issue in *Ginsberg* and *Pacifica* from those related to the CDA. One distinction which the Court noted was the lack of a parental consent provision whereby parents could permit their minor children to have access to the regulated content.[312] Certainly, any restrictions on minors' access to graphically violent video games will need to have such a parental consent provision. Another problem was the lack of a definition for the term "indecency."[313] Again, restrictions on access of minors to graphically violent video games will need to define what depictions and displays are subject to the restrictions. These definitions, however, need not be so precise that much of what is intended to be regulated can escape the restrictions simply by a few minor changes which leave images and interaction which create the same concerns. There is no reason why a modified *Miller* definition, such as that used in *American Amusement Machine*,[314] should not provide sufficient notice to publishers of what content is covered.

The *Reno* decision further noted that the indecency standards apply to broadcast media, which historically has not been afforded full First Amendment protection because of the scarcity of available frequencies and its invasiveness, while the Internet has no such history, scarcity or, according to the Court, invasiveness.[315] Here, the Court's statement needs to be placed in context.

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310. 521 U.S. 844 (1997).

311. *See id.* at 849.

312. *See id.* at 865.

313. *Id.*

314. *See* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 966–67 (S.D. Ind. 2000).

315. *See Reno*, 521 U.S. at 867.

The CDA restricted adult access to speech protected as to them in order to restrict minors' access to such speech.[316] The FCC's indecency standards at issue in *Pacifica* did the same thing.[317] Both *Reno* and *Pacifica* also recognized that the government has a compelling state interest in restricting minors' access to some speech which is protected as to adults.[318] Unlike the regulations at issue in *Reno* and *Pacifica*, the proposed restrictions on minors' access to graphically violent video games do not impose such restrictions on adult access. In this regard, the restrictions are no more burdensome to adults than the restrictions approved in *Ginsberg*. Indeed, the only difference between these proposed regulations and those upheld in *Ginsberg* is the nature of the content. The Court's holding in *Pacifica* establishes that the First Amendment permits restrictions of minors' access to content other than that which is sexually explicit, but not obscene to adults.[319] Thus, these distinctions in *Reno* in no way limit the application of *Ginsberg* and *Pacifica* to restrictions on minors' access to graphically violent video games. If speech which has the "effect of debasing and brutalizing human beings" is harmful to minors when conveyed by broadcast media, it does not become nonharmful merely because it is conveyed by another medium. Indeed, one of the central premises of this article is that the interactive nature of video games magnifies the potential "effect of debasing and brutalizing human beings."

There is one area in which *Reno* may impose a limitation on such enactments. The Court distinguished the restrictions upheld in *Ginsberg* from those struck down in *Reno* by noting that the former's restrictions applied to persons under the age of seventeen, while the CDA's restrictions applied to persons under the age of eighteen.[320] Any restrictions on minors' access to graphically violent video games should end no later than a person's seventeenth birthday.

Scholars have debated the extent to which minors possess First Amendment rights and the age at which full First Amendment rights should vest. In 2004, the *Chicago-Kent Law Review* held a

316. *See id.* at 874.
317. *See id.* at 875.
318. *See id.*; *Pacifica*, 438 U.S. at 749.
319. *See Pacifica*, 438 U.S. at 749.
320. *Reno*, 521 U.S. at 865–66.

symposium on this issue. My exploration here is limited to the question posed by Professor Amitai Etzioni in an essay published in their *Law Review*'s symposium edition: "When freedom of speech comes into conflict with the protection of children, how should this conflict be resolved?"[321] Professor Etzioni's conclusion is that minors' free speech rights may be limited beyond those of adults when a compelling interest exists for doing so.[322] Indeed, he declares that "[t]he position that children have full speech rights is untenable in the face of" case law precedent to the contrary.[323] He cites Professor Michael Wald's examination of social science research that "'younger children, generally those under 10-12 years old, do lack the cognitive abilities and judgmental skills necessary to make decisions about major events which could severely affect their lives.'"[324] Professor Etzioni then quotes Colin Macleod and David Archard for the conclusion that "children 'are seen as "becoming" rather than "being" . . . whose moral status gradually changes.'"[325] Professor Etzioni concludes that "whatever one considers the purpose and merit of the First Amendment—whether to ensure a free exchange of ideas, to maintain liberty, to enrich one's life, and so on—none of this applies to toddlers."[326] One would hope that courts would recognize this principle and, if faced with such a law, uphold restrictions on access to graphically violent video games which apply to children under the age of ten to twelve.

But this conclusion begs the question of what rights older, more mature minors have or should have to access speech. It is older minors who are likely to have sufficient autonomy from parents to purchase or otherwise access graphically violent video games. None of the courts that have decided the restrictions on minors' access to such games have had before them restrictions targeted only at younger minors, and there is no evidence from the case reports that they were asked to consider such restrictions or that the laws in question permitted any such narrower

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321. Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 3 (2004).

322. *See id.* at 52–53.

323. *Id.* at 52.

324. *Id.* at 46 (quoting Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 274 (1979)).

325. *Id.* (quoting David Archard & Colin M. Macleod, *Introduction*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 1, 2, 4 (David Archard & Colin M. Macleod eds., 2002)).

326. *Id.* at 47.

application. If such restrictions are enacted, Professor Etzioni's argument and the findings he cites should certainly be given serious consideration. The question for now is whether older minors' access to graphically violent video games may be restricted. If it can, then there would certainly be no problem restricting younger minors' access.

Professor Catherine J. Ross would extend First Amendment protection to mature minors "in order to enhance the meaningful exercise of another right, such as the right to abortion, contraception or free exercise of religion" even in the face of parental opposition.[327] Assuming her views were adopted, the issue would be whether access to graphically violent video games, as a genre, is necessary to exercise any other fundamental constitutional right. It is hard to see how that is the case. Few, if any, of the games which are likely to be covered by such restrictions appear to have messages related to any fundamental rights which minors possess. If a specific game has such value, it should pass a modified *Miller* test. An as-applied challenge would suffice to protect minors' access to such games. That some graphically violent games might conceivably have such a value is no basis for finding bans on minors' access to such games as a class facially unconstitutional. In an as-applied challenge, a trier of fact or court could look at a given game as a whole to determine whether such alleged valuable content was sufficient to overcome a finding that the game was harmful to minors because of its violence or whether it was the equivalent of "[a] quotation from Voltaire in the flyleaf of a book."[328] Only if "'the dominant theme of the material taken as a whole appeals to [a morbid] interest' in"[329] violence could a court hold that the restrictions imposed applied to any given game. Likewise, Judge Posner's arguments about minors' access to violence in literature can be addressed by this limitation on any restriction on minors' access to graphically violent video games. If a violent game has literary value as to minors, the general restriction against minors having access to graphically violent video games would not apply to that specific game. Courts should have no more of a problem making such a determination

327. *See* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 274 (1999).

328. Kois v. Wisconsin, 408 U.S. 229, 231 (1972).

329. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 418 (1965) (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

than they have had in applying this exception to prohibitions on sexually explicit material that is allegedly harmful to minors.

Marjorie Heins wrote a "Reply to Amitai Etzioni," in which she argues for full First Amendment protection for minors.[330] Ms. Heins doubts the "assumption that minors are harmed by sexual or violent content in art and entertainment."[331] She calls Professor Etzioni's essay "thoughtful, well-intentioned, but ultimately superficial."[332] Ms. Heins limited her objections to government-imposed restrictions on minors' access to speech, expressing approval of parental and teacher-imposed restrictions.[333] She argues that "words like *protection* and *harm* mask moral or normative judgments about what is appropriate for youth,"[334] and asserts that "education, not censorship" is the solution to "inculcation of good sexual values and socialization into acceptable behavior (including alternatives to violence)."[335] Here, one notices a weakness in Ms. Heins' argument. She approves and even finds proper parental and teacher-imposed restrictions, presumably because of their roles in "inculcation . . . and socialization" of "values" and "acceptable behavior," but then asserts that restrictions when imposed by government are not a "remedy for what's troublesome in mass media entertainment."[336] If restrictions are not a "remedy" and only education will suffice to counter "troublesome" messages in mass media, then why does she approve of parents and teachers using restrictions? If the argument is that the First Amendment does not restrict parents and teachers in the same way it does legislators, then she should state that as her objection. If she is not merely conceding that the First Amendment does not apply to parental and teacher-imposed restrictions, but finds such restrictions proper, then why, absent First Amendment constraints, would not government-imposed restrictions that aid parents and teachers in their proper roles be beneficial? In short, either restrictions are beneficial in "inculcation . . . and socialization" of minors in acceptable values and behavior, or they

330. *See generally* Marjorie Heins, *On Protecting Children—From Censorship: A Reply to Amitai Etzioni*, 79 CHI.-KENT L. REV. 229 (2004).

331. *Id.* at 229.

332. *Id.*

333. *See id.* at 230.

334. *Id.* at 231.

335. *Id.* at 231–32.

336. *Id.*

are not. Past Supreme Court precedent in the areas of sexually explicit material harmful to minors and indecency would indicate that access restrictions are constitutional where legislative bodies act rationally in finding that the restrictions are beneficial in forming the values of minors, at least where the content being restricted debases or brutalizes humans. Governments may assist parents in limiting minors' access to such content without parental consent.

Ms. Heins spends a substantial portion of her article attacking the use of Internet filters in general and the Children's Internet Protection Act ("CIPA") in particular.[337] The Supreme Court, however, has now held that libraries may use filters to restrict the access of minors and adults to certain content and, as to minors, those restrictions extend to sexually explicit material which is harmful to minors, but not obscene as to adults.[338] Again, the Court has rejected the proposition that minors have First Amendment rights coextensive with adults. The question is why graphic displays of violence should be protected as to minors when "girlie magazines" and "seven filthy words" should not. Here, Ms. Heins attacks the validity of the social science research showing harm to minors from their exposure to violent media.[339] Like Judge Posner, she notes that "violence is an eternal theme in art, literature, and entertainment."[340] Also like Judge Posner, she fails to make the common sense distinction between Brutus slaying Julius Caesar in Shakespeare's play, whether read or viewed

337. *See id.* at 235–39.

338. United States v. Am. Libr. Ass'n, 539 U.S. 194 (2003). Ms. Heins acknowledges the Supreme Court's upholding of CIPA, but criticizes that decision. *See* Heins, *supra* note 330, at 237–39. In fairness to Ms. Heins, this author must disclose that I too objected to the constitutionality of the Children's Internet Protection Act. *See* Laughlin, *supra* note 7, at 257–58. Unlike Ms. Heins, however, I did not object in general to public libraries using filters, but to a Congressional mandate which I believed did not permit adults to "readily and anonymously bypass[] the filters," *id.* at 266, to Congress usurping, through its spending power, the right of local library boards to determine if filters were needed in their libraries and, if so, how they should be implemented, *see id.* at 279, and to its denying parents the option of requesting that their minor children be permitted unfiltered access to the internet in public libraries. *Id.* at 277. The Court read CIPA as requiring libraries to disable filters upon the request of an adult without his or her being required "'to explain . . . why he was asking a site to be unblocked or the filtering to be disabled.'" *Am. Libr. Ass'n*, 539 U.S. at 209. This removed one of my three objections to CIPA, though I found this reading of the statute unwarranted. Unlike Ms. Heins, I did not object to and, in fact, argued for government having a compelling interest in restricting the access of minors to the speech targeted by CIPA. *See* Laughlin, *supra* note 7, at 253–58.

339. *See* Heins, *supra* note 330, at 239–49.

340. *Id.* at 239.

as acted on stage or in a movie, and being a virtual assassin in an interactive video game. To compare the two is a category mistake. Making such a distinction should be no more difficult than the distinction the Court was able to make between the content unprotected as to minors in *Ginsberg* and the content protected as to minors in *Erznoznik*.

Ms. Heins' main point, however, is that media violence research, none of which was specifically targeted to the effects of playing graphically violent video games, was flawed and that competing studies and reviews of the literature as a whole do not support the conclusion that violent media contributes to actual increases in aggressive behavior.[341] She further notes the decline in violent crime among youths during the past decade "even while violence in entertainment has increased" to refute the "assumption" that viewing violent media increases aggression. In any field of scientific inquiry, disputes as to the conclusions to be drawn from research studies will arise. This is an inherent and healthy aspect of scientific research. Science is not static and occasionally later research draws conclusions which entirely overturn "laws of nature" which were long held to be certain. That Ms. Heins can find experts to refute the body of literature that finds a correlation between viewing violent media and aggressive behavior is not, therefore, surprising. Nonetheless, I am inclined to agree with Ms. Heins to the following extent: the social science data does not conclusively and with a high degree of certainty demonstrate that minors who view violent media will, as a direct result, commit violent acts. If a high degree of scientific certainty were required to justify restrictions on minors' access to speech, I would have to agree with Ms. Heins and Judge Posner that the proposed restrictions are not constitutional. Of course, such a level of certainty seldom exists and for that reason the Court does not require it to find a compelling state interest in restricting minors' access to sexually explicit material which is not obscene as to adults and to indecency.[342] The issue, then, is not whether there is a high degree of certainty that playing graphically violent video games is the cause of incidents like the school shootings that have motivated the restrictions at issue in this article. The issue is whether it is rational for legislators to conclude that ex-

341. *See id.* at 239–49.

342. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 641–43 (1968).

posure to the graphically violent video games covered by the statute "is harmful to minors." I have yet to read a single article or court opinion that adequately explains why such a finding is irrational or why a greater degree of certainty of harm is required to restrict access to graphically violent video games than is required to restrict access to "girlie magazines" or "filthy words." Indeed, few articles or court opinions even address that issue, but rather offer conclusory statements to the effect that non-obscene, sexually explicit material is unprotected as to minors because the Court has said so, and it has not said the same as to graphically violent video games. When reading the court opinions striking down restrictions on violent video games, one is left with the inescapable conclusion that the authors of those opinions would reject restrictions on minors' access to non-obscene, sexually explicit material as well were they not bound by prior Supreme Court precedents. As it is, they will refuse to extend that precedent beyond the narrow category of speech at issue in those cases even if the logic behind the precedent would lead to such an extension.

Case law clearly shows that minors' First Amendment rights are not coextensive with those of adults. The Supreme Court has found that society has a compelling interest in protecting minors from some speech which is protected as to adults. It has not required a showing of a high degree of scientific certainty of psychological or other measurable harm to justify such restrictions. It has, instead, recognized that "the ethical and moral development of . . . youth" provide sufficient justification for such restrictions. So long as parents have the right and ability to introduce their minor children to such expressive content when they deem appropriate, such restrictions are permissible. Restrictions may apply to speech other than sexually explicit material, including verbal indecency, at least where it "has the effect of debasing and brutalizing human beings." The next question to consider, then, is whether the compelling interests which the Court found permitted restricting minors' access to "girlie magazines" in *Ginsberg* and "filthy words" in *Pacifica* exist as to graphically violent video games.

V. DO THE FACTORS WHICH COURTS HAVE FOUND JUSTIFY RESTRICTING MINORS' ACCESS TO SEXUALLY EXPLICIT MATERIAL AND INDECENCY APPLY TO GRAPHICALLY VIOLENT VIDEO GAMES?

A strategic mistake made to date by many proponents of restrictions on minors' access to violent video games has been their efforts to justify such restrictions based on studies that show actual psychological harm from their play. There are two problems with this approach. First, while there is a significant amount of evidence to support such a finding, it is by no means undisputed. One can find studies that conclude otherwise. Thus, triers of fact in these cases are faced with competing expert testimony from which they might reasonably conclude that the evidence is inconclusive. While this author believes the weight of such evidence favors a finding of harm, a finding to the contrary probably is not clearly erroneous. Second, and more importantly, such a strategy is unnecessary as the Court has stated that a high degree of scientific certainty of harm is not necessary to justify restrictions on minors' access to expression which may impair their ethical or moral development. Indeed, psychological harm is not the same as impairment to ethical or moral development. One may have fine psychological health and nonetheless be unethical or immoral. Society establishes its own ethical and moral standards without reference to scientific studies. Societal ethical and moral standards will vary over time and are not subject to objective determination.[343]

For example, most Americans may not consider a teenage boy's interest in "girlie magazines" as reflective of, or contributing to, a psychological pathology, but his development of attitudes toward women as mere objects for his pleasure does reflect, in the minds of many, an ethical or moral failing. It would appear that this was the basis for finding a compelling state interest in upholding the statute at issue in *Ginsberg*. Similarly, even though playing vio-

343. For example, at one time, the use of contraceptives even by married couples was considered immoral and was illegal in many states and under the federal Comstock Act. Today, many American couples of childbearing years use contraceptives and find no moral fault in doing so. The Supreme Court, following the shift in public opinion, struck down the laws prohibiting the availability and use of contraceptives by married couples in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and subsequently extended that holding to unmarried adults in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and to minors in *Carey v. Population Services International*, 431 U.S. 678 (1977).

lent video games may not create a pathology resulting in future psychological problems and possibly even violent acts toward others, it may nonetheless cause one to develop an insensitivity toward one's fellow human beings and their suffering. If "the effect of debasing and brutalizing human beings" flowing from Carlin's Filthy Words monologue was sufficient to justify the restrictions upheld in *Pacifica*, such effects flowing from graphically violent video games must certainly justify restrictions on minors' access to those games. Nothing in Carlin's monologue was designed to entertain the recipient through graphic depictions of brutal acts of violence in which the recipient himself or herself takes part. If a high degree of scientific certainty of actual harm was not needed to justify the restrictions in *Ginsberg* and *Pacifica*, it certainly is not needed to justify the restrictions enacted in Indianapolis, St. Louis County, and Washington state. Attempts to justify the restrictions on using the scientific studies have permitted courts to evade the reasoning in *Ginsberg* and *Pacifica*. Posner's well-written opinion hides his lack of consideration of the statement in *Ginsberg* that a high degree of scientific certainty is not a requirement and the clear implication from *Pacifica* that the ethical and moral well-being of children may be impaired by expression other than that which is sexually explicit. His opinion does not adequately address why interactive video games involving the player in simulated acts of extreme violence create less of a compelling interest than the displays in "girlie magazines" or the use of George Carlin's seven filthy words.

With that said, there is considerable research finding that significant exposure to violent media contributes to greater aggressiveness and even violence in boys.[344] These studies and their findings are not without critics.[345] Nonetheless, a report released by the Senate Committee on Commerce, Science and Transportation concluded that significant exposure to violence on television has a number of negative effects on viewers, including the promo-

344. *See, e.g.*, Etzioni, *supra* note 321, at 35–36 (citing SISSELA BOK, MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT 57 (1998); MONROE M. LEFTOWITZ ET AL., GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION 115 (1977); L. Rowell Huesmann et al., *Stability of Aggression Over Time and Generations*, 20 DEV. PSYCHOL. 1120 (1984)).

345. *See, e.g., id.* at 36 n.167 (citing MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 248–50 (2001); Jonathan L. Freedman, *Effect of Television Violence on Aggressiveness*, 96 PSYCHOL. BULL. 227, 241–43 (1984)).

tion of violent behavior.[346] After discussing these and other studies, Professor Amitai Etzioni concluded that the data on the harmful effects of media violence "*strongly support[s] the need to protect children from harmful material.*"[347] While studies of violent video games have a more recent history, a number of these studies have found a correlation between playing violent video games and heightened aggressive thoughts and behavior.[348] These studies add further weight to Professor Saunders' argument that such games cause real, measurable harm to minors.[349]

Indeed, playing violent video games has been identified as one of several characteristics of minors who have become school shooters. The National Center for the Analysis of Violent Crime studied eighteen incidents of school shootings.[350] The study's conclusions are instructive and warn against drawing too tight a connection between playing such games or any other single factor and school shootings. First, the report warned: "The origins of human violence are complex. Thinkers, historians, and scientists have explored the issue for centuries, but answers remain elusive. The roots of a violent act are multiple, intricate, and inter-

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346. *See* Edith Fairman Cooper, *Television Violence: A Survey of Selected Social Science Research Linking Violent Program Viewing with Aggression in Children and Society*, CONG. RES. REP. 95–593, at 2 (Sept. 1, 1995).

347. Etzioni, *supra* note 321, at 39.

348. *See, e.g.*, Anderson, *supra* note 6, at 113–22; Craig A. Anderson et al., *Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior, in* ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 199, 199–249 (2004); Douglas A. Gentile et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 27 J. ADOLESCENCE 5, 5–22 (2004); Eric Uhlmann & Jane Swanson, *Exposure to Violent Video Games Increases Automatic Aggressiveness*, 27 J. ADOLESCENCE 41, 41–52 (2004).

349. Saunders, *supra* note 21, at 62–78. On March 9, 2005, Senator Joseph Lieberman introduced the Children and Media Research Advancement Act ("the CAMRA Act") "to authorize funding for the establishment of a program on children and the media within the National Institute of Child Health and Human Development to study the role and impact of electronic media in the development of children." 151 CONG. REC. S2394 (daily ed. Mar. 9, 2005). One of the findings proposed in the legislation is as follows:

> There are important gaps in our knowledge about the role of electronic media and in particular, the newer interactive digital media, in children's and adolescents' [sic] healthy development. The consequences of very early screen usage by babies and toddlers on children's [sic] cognitive growth are not yet understood, nor has a research base been established on the psychological consequences of high definition interactive media and other format differences for child and adolescent viewers.

Id. at S2396. Video games are specifically mentioned as one of the media to be studied under this legislation.

350. *See* MARY ELLEN O'TOOLE, FBI ACAD., THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 1–2 (2002).

twined."[351] The study found that a school shooter's "behavior at school is affected by the entire range of experiences and influences. No one factor is decisive. By the same token, however, no one factor is completely without effect."[352]

Many of its findings go against conventional wisdom. For example, despite public perception to the contrary, "[a]dolescent violence in general, and homicides in particular" have not increased dramatically over the past decade.[353] In fact, as Marjorie Heins observed,[354] youth violence has declined.[355] Further, the study found that media coverage has painted an inaccurate portrait of school shooters.[356] These findings caution against the tendency to isolate any single factor as the cause or even as the most significant cause of school shootings.[357] Nonetheless, the study found that one common characteristic of school shooters was "an unusual fascination with movies, TV shows, computer games, music videos or printed material that focus intensively on themes of violence, hatred, control, power, death, and destruction," and that they spent "inordinate amounts of time playing video games with violent themes, and seem[ed] more interested in the violent images than in the game itself."[358]

Having explored the scientific evidence of harm and the FBI's study of school shooters, it must be admitted that if one's motivation for limiting minors' access to violent video games is to reduce the risk of school shootings, courts are likely to find that the incidents, however tragic, are too rare and the overall significance of violent video games as a contributing factor is too small to justify, by itself, restrictions on such access. While the weight of the evidence seems to favor fascination with violent video games as a factor in school shootings, it is likely that this fascination is as

351. *Id.* at 1.

352. *Id.* at 4.

353. *Id.* at 2.

354. *See* Heins, *supra* note 330, at 248.

355. O'TOOLE, *supra* note 350, at 2; *see also 2005 Index of Child Well-Being*, FOUNDATION FOR CHILD DEVELOPMENT, http://www.ffcd.org/PDFs/CWIFastFacts_ViolentCrime.pdf (last visited Nov. 13, 2005) (showing a "dramatic reduction" in violent youth crime and victimization since it peaked in the mid-1990s to rates well below even those of 1975, and listing as factors which might have contributed to this trend "the substitution of indoor video games and computer entertainment for outdoor activities").

356. *See* O'TOOLE, *supra* note 350, at 2.

357. *See id.* at 15.

358. *Id.* at 20.

much a symptom of the underlying complexity of problems which lead to the shootings as it is a contributing factor itself. It is probably fair to say that the fascination is both a symptom and a further contributing factor. Removing violent video games, however, will not remove the other contributing factors and will not, by itself, solve the problem. Studies on the effects of violent video games are ongoing and may add further weight to such a justification, but such a justification is not needed and should not be demanded by courts considering the constitutionality of restrictions on minors' access to these games. As has already been noted, a showing of strong scientific evidence of measurable harm or incontrovertible causation between exposure to particular classes of content and actual harmful or even illegal acts is not required. Parental and societal interest in rearing minors to value and respect their fellow humans, rather than to debase the value of others by participating in games in which they commit brutal acts of violence against very human-looking characters as a form of entertainment, is sufficient to support restrictions.

Some may argue that even if developing such values in minors formed a sufficient basis to support restrictions on access to certain expression in the past, such a basis may no longer be sufficient. Citing *Lawrence v. Texas*,[359] a federal district court judge in *United States v. Extreme Associates, Inc.*[360] held that the application of the federal obscenity statutes to a distributor of obscene material through the mails and on the Internet was unconstitutional.[361] In *Lawrence*, the Supreme Court struck down a state law which criminalized homosexual sodomy.[362] The court in *Extreme Associates* read *Lawrence* as prohibiting the application of a "moral code" as a sufficient state interest to justify a law's intrusion into an individual's personal and private life.[363] In so doing,

359. 539 U.S. 558 (2003).

360. 352 F. Supp. 2d 578 (W.D. Pa. 2005).

361. *See id.* at 579–80, 591–92.

362. *See* 539 U.S. at 578–79.

363. 352 F. Supp. 2d at 591. The court notes: "It cannot be seriously disputed that, historically, the government's purpose in completely banning the distribution of sexually explicit obscene material . . . was to uphold the community sense of morality." *Id.* at 592. It went on to declare:

> After *Lawrence*, however, upholding the public sense of morality is not even a legitimate state interest that can justify infringing one's liberty interest to engage in consensual sexual conduct in private. . . . Therefore, this historically asserted state interest certainly cannot rise to the level of a compelling interest, as is required under the strict scrutiny test.

the court cited Justice Scalia's dissent in *Lawrence*, in which he asserted that the majority opinion in that case called into question the constitutionality of laws, including obscenity laws, which were based on a state's desire to maintain a "moral code" of conduct.[364] The court went on to cite several scholars who shared similar views.[365]

The *Extreme Associates* court then, however, went on to explore two justifications which the government advanced as sufficient state interests to justify the application of the obscenity laws to the facts at issue: protecting children from viewing obscene materials, and protecting unwitting adults from inadvertent exposure to obscene material.[366] In doing so, the court explicitly refused to declare the obscenity statutes facially unconstitutional, but rather relied on an "as applied" analysis.[367] Given the court's insistence that a "moral code" is, after *Lawrence*, an unconstitutional justification for a law, this seems strange. Particularly notable was the court's lack of discussion of the impermissibility of the use of a "moral code" justification when analyzing the first of the government's justifications, protecting children from viewing obscene materials.[368] Instead, the court focused its attention on the use of less restrictive means as a means to serve that interest.[369] Yet it failed to explain why the government could legitimately have an interest to serve in protecting children from viewing obscene materials if advancing a "moral code" is unconstitutional. One could speculate as to why the court refused to take this obvious approach in light of its view that "moral codes" are unconstitutional after *Lawrence*, but such speculation would lack any support from the court's opinion. In any event, it is far from

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Id. at 593 (internal citations omitted). The Court even appears to doubt that "the asserted interest of protecting unwitting adults from inadvertent exposure to the offensive material were found to be a compelling one." *Id.*

364. *Id.* at 590 (citing *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting)).

365. *Id.* at 590–91 (citing Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 145–48 (2003); Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 25 (2004); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 964–65 (2004); James W. Paulsen, *The Significance of* Lawrence, 41 HOUS. LAW. 32, 37 (2004); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1945 (2004)).

366. *Id.* at 592–95.

367. *See id.* at 591.

368. *See id.* at 594–95.

369. *Id.*

certain that higher courts will agree with the *Extreme Associates*' court's novel application of the *Lawrence* opinion. Given the Supreme Court's repeated reliance on the societal and parental interests in rearing ethical and moral citizens, it would take an extreme abandonment of the principles of *stare decisis* to read the *Lawrence* case so expansively. Until the Court holds otherwise, lower courts should find that rearing ethical and moral citizens remains a constitutionally permissible state interest justifying laws which restrict as to minors what would be constitutionally protected rights as to adults.

The Court recognizes that minors are more susceptible to outside influences and less able to understand the full implications of their behavior. This was most recently demonstrated in *Roper v. Simmons*.[370] In *Roper*, the Court found that executing felons who had been convicted of capital offenses committed while they were sixteen or seventeen was cruel and unusual.[371] In reaching that holding the Court found:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. . . ." It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." . . . In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. . . .
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. . . .
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.[372]

Because of these facts, the Court concluded: "Their own vulnerability and comparative lack of control over their immediate sur-

370. *See* 125 S. Ct. 1183 (2005).

371. *See id.* at 1200.

372. *Id.* at 1195 (internal citations omitted).

roundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[373]

If these findings justify restraint in imposing the ultimate punishment upon juvenile offenders, it certainly justifies protecting minors from "negative influences and outside pressures" which might motivate "reckless [and even criminal] behavior." If the Constitution prohibits holding minors fully accountable for acts that may have been motivated by such "negative influences," it certainly must permit government to aid parents in preventing them from ever being exposed to such influences in the first instance, rather than facing the still dire consequences, for themselves and for their victims, of "failing to escape" them. The Court cannot ignore its findings in *Roper* and pretend that graphically violent video games are not a "negative influence." Indeed, its findings in *Roper* compel the Court to take seriously the state's compelling interest to protect minors from the various influences which may motivate the very type of offenses which were the basis for the conviction of and death sentence given to the defendant in *Roper*, the same type of offenses committed by the school shooter at places like Bemdji, Minnesota, Columbine High School, Bethel, Alaska, Paducah, Kentucky, and Jonesboro, Arkansas. To argue otherwise is to compartmentalize scientific findings and their legal import. Indeed, the public at large and parents in particular have the right to expect that the same Court which showed mercy toward juvenile offenders in *Roper* will permit the state to aid their efforts to rear children whose moral values dictate against acts of violence in the first place.

Another finding in the *Roper* decision has relevance to the issue of this article. The Court rejected the argument that jurors could decide based on the specific juvenile involved whether he or she had the maturity to resist "negative influences" and fully understand the implications of his or her violent criminal behavior.[374] In doing so, the Court noted the uncertainties of psychological diagnosis.[375] The Court concluded that such uncertainties should weigh in favor of protecting all minors from the death penalty rather than allowing for individual application of that

373. *Id.* at 1186.
374. *Id.* at 1197.
375. *Id.*

penalty based on jurors' findings of maturity based on the evidence presented to them.[376] Any uncertainties which the Court might have regarding the studies showing that minors are motivated to violence by playing graphically violent video games should, likewise, be resolved in favor of protecting minors from such influences.

Applying the case law, scholarly comments, and the findings of studies on the effect of graphically violent video games on minors, the decisions in *American Amusement Machine*, *Interactive Digital Software Association* and *Maleng* that restrictions on minors' access to such games violate the First Amendment must be called into question. To the extent that those courts required a high degree of scientifical certainty of harm, they simply misapplied the Supreme Court's holdings in *Ginsberg*. To the extent those courts held that government may only restrict minors' access to speech that is obscene, they misapplied the Supreme Court's holding in *Pacifica*. If Judge Posner was correct in holding that the basis for restricting minors' access to non-obscene sexually explicit material was offensiveness, then the Seventh Circuit's reasoning in denying to extend that justification to graphically violent video games is hard to understand. It is likely that if one were to take a survey, more people would find the content of many graphically violent video games more offensive than either the "girlie magazines" which were the subject of *Ginsberg* or the seven filthy words uttered by George Carlin in *Pacifica*. If the holdings in those two cases are still good law, it is hard to imagine how any court could find a compelling interest to restrict minors' access to hearing any seven words, no matter how indecent, but not find such an interest in restricting their access to media in which they, as a player, brutally kick women in the groin until blood begins to spurt out (*Grand Theft Auto: Vice City*),[377] drive a crowbar into the top of a man's head, resulting in a spray of gray matter and blood (*Manhunt*),[378] or decapitate a man by hitting the character's head with a baseball bat, resulting in a gush of blood from the severed neck (*Manhunt*). If Carlin's seven filthy words "debase and brutalize humans," certainly games like *Grand Theft Auto: Vice City* and *Manhunt* do. Indeed, the district court in

376. *Id.*
377. Take Two Interactive Software, Inc. 2002.
378. Take Two Interactive Software, Inc. 2003.

American Amusement Machine reached the same conclusion, stating:

> It would be an odd conception of the First Amendment and "variable obscenity" that would allow a state to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses, as in *Ginsberg*, but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission.[379]

The courts which have struck down restrictions on minors' access to graphically violent video games have clearly required more rigorous proof of actual harm and applied a higher standard than that employed by the Supreme Court in *Ginsberg* and *Pacifica*.

When next given the opportunity, intellectual honesty requires the Court to either extend its reasoning in *Ginsberg* and *Pacifica* to graphically violent video games or to overrule those two cases. Judge Posner appears to question if *Ginsberg* would be decided the same way if it were before the Supreme Court today.[380] If that is the case, one must question why the Court has continued to assert that protecting minors from non-obscene sexually explicit material is a compelling state interest, as it did in *Reno v. ACLU*[381] and *United States v. American Library Association, Inc.*[382] If a majority of the Court rejects that proposition, those justices should say so. The Court has an obligation to Congress and to state and local decision makers not to lead them to believe that it still finds such an interest compelling if in fact that is not the case. The only conclusion one can draw is that the Court continues to find a compelling state interest in protecting minors from such material. Not even one justice has stated otherwise despite having had ample opportunity to do so over the past decade. At the next opportunity, the Court should grant *certiorari* to consider and extend its holdings in *Ginsberg* and *Pacifica* to content more offensive, debasing and brutalizing than that which was the subject of restrictions in those cases. It should reject any requirement of greater evidence of scientific harm resulting from

379. Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000).

380. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 579 (7th Cir. 2001).

381. 521 U.S. 844, 849 (1997) (acknowledging the "legitimacy and importance of the congressional goal of protecting children from harmful materials").

382. 539 U.S. 194, 215 (2003) (Kennedy, J., concurring) ("The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree.").

interacting with such games than it required in *Ginsberg*. Alternatively, it should find that what scientific evidence does exist is more compelling and certain than that which was available, but not required, in *Ginsberg*.

VI. CONCLUSION

The issues addressed in this article are difficult. Our society greatly values freedom of expression. We rightly understand that freedom of expression is not merely a means to an end, but an end in itself. Freedom of expression is an essential component of freedom of thought and, as such, goes to the very heart of what it means to be free. Thus, courts have been very reluctant to sanction any restriction on freedom of expression unless some actual, concrete harm can be shown and then seldom permit prior restraint, but leave those who can prove actual harm to damages resulting from the injurious expression. With the introduction of many new media of expression, we have seen a history of efforts to deny such expression First Amendment protection by denying that the new media or the expression thereby conveyed are speech. In each case, these efforts have ultimately proved unsuccessful.[383] As demonstrated in this article, the genre of video games which have been the subject of such efforts during the past several years can be and have been very expressive and are as worthy of protection as similar expressions in any other media. Courts should reject all arguments which seek to deny video games, as a class, the status of speech.

Yet our nation also has a long history of restricting minors access to speech which is or may be harmful to them. This is particularly true of expression which contains sexually explicit messages: obscenity, child pornography and material harmful to minors. The Court has also upheld restrictions aimed at indecency. It has never required scientifically certain and measurable harm, but has understood and affirmed that states have a compelling interest in aiding parents in rearing their children to value and respect the dignity of their fellow human beings. The Court has wisely left it to parents to decide when their minor children have reached the level of maturity necessary to receive

383. *See supra* note 7 (discussing the concerns raised with the introduction of a variety of media or avenues of expression, including efforts to restrict access to some such media).

access to certain sexually explicit material which is not obscene as to adults and to indecency which debases and brutalizes the dignity of others. By permitting restrictions on access, parents can determine when and if their minor children will have access to such material rather than leaving it to vendors who have no legal responsibility to care for the ethical development of those minors. Further, while recognizing that more mature minors may have a greater ability to properly process the meaning of such expression and not be negatively influenced by it, parents, not vendors, with a profit motive, nor courts, which can only apply a broad and arbitrary standard of maturity, should decide when their individual minor children have reached that stage.

The reasons which have led courts to find a compelling state interest in restricting minors' access to non-obscene sexually explicit material and indecency apply at least as much, if not more, to graphically violent video games. Courts should not require a higher standard of certainty of harm from exposing minors to such speech to justify restricting access than it has for sexually explicit or indecent material. As with such material, if a graphically violent video game can be shown to have literary, scientific, artistic or educational value as to minors then such restrictions should not apply. Absent such a showing, however, parents, not courts or commercial enterprises, should decide when an individual child is ready to interact with such material.

Parents, on the other hand, must recognize that any aid they receive from the government to restrict their children's access to such games is of limited value, if any, value unless they have a comprehensive strategy for rearing children who, whether their parents like it or not, will come of age in a world saturated with information, much of which may make many parents uncomfortable. Attempts to completely prevent minor children from accessing graphically violent video games from birth to the age of majority are hopelessly naive, doomed to fail, and likely to be counterproductive. Such games are here to stay. The primary method of addressing this issue is for parents to rear their children to find such displays of violence as offensive as they do and to have a sophisticated understanding of the motives and messages intended by those who supply them with such content. All government can do is provide some aid in giving parents more control over when, not whether, their children will be exposed to such material. Government can, consistent with the First Amendment, and should provide that assistance.

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