

**BLOOD CODE:
THE HISTORY AND FUTURE OF
VIDEO GAME CENSORSHIP**

BY JEFFREY O'HOLLERAN*

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INTRODUCTION

Video games, once an obscure and relatively insignificant form of entertainment, have become a major world industry, with sales totaling \$12.53 billion in 2006 and \$17.9 billion in 2007.¹ There are also over

* J.D. Candidate at the University of Colorado (2010) and Production Editor for Volume 8 of the Journal on Telecommunications and High Technology Law. I would like to thank the editorial board of the JTHTL, Creta O'Holleran, Larry O'Holleran, Taylor O'Holleran, Andrew Rubottom, Tobin Spratte, and Brad Justice for their help and support.

1. Posting of Matt Peckam to PCWorld.com Blog, Game On: 2007 Video Games Sales Soar by Record-Shattering 43%, PCWORLD.COM, <http://blogs.pcworld.com/gameon/>

213,000 employees in the video game industry in the United States alone.² Such figures drive home the point that when we discuss video game censorship, we are dealing with a significant number of people in our country whose freedom of speech, livelihood, and economic contributions are at stake.

Over the past several years, there have been many attempts at the state and national levels to regulate the video game industry, particularly in the form of labeling and limiting availability to minors.³ One of the most recent attempts comes from Representative Joe Baca (D-Cal), whose Video Game Health Labeling Act of 2009 would mandate that “all video games with an Electronics Software Ratings Board (ESRB) rating of Teen (T) or higher be sold with a health warning label.”⁴ The proposed sticker would read: “WARNING: Excessive exposure to violent video games and other violent media has been linked to aggressive behavior.”⁵

Unfortunately, such a regulation is not unique in the intermittent assault on the video game industry, as we have seen over the past two decades.⁶ It is important to distinguish between government-mandated regulation and voluntary self-regulation. Obviously, if an industry wants to self-censor its content,⁷ it is that industry’s unequivocal right to do so and no legal argument should be made to the contrary. In this article, I contend that government-mandated ratings systems or warning labels (such as the one proposed by Representative Baca) are unconstitutional censorship under the First Amendment. The Supreme Court recently agreed to hear a case involving banning violent game sales to minors, but for now the only case law comes to us from the Circuit Courts.⁸ Along with these Circuit opinions, the Supreme Court’s First Amendment jurisprudence regarding other media gives us an idea of how the video

archives/006324.html (Jan. 17, 2008, 16:33 PST).

2. IBIS WORLD, VIDEO GAMES: U.S. INDUSTRY REPORT (2010), <http://www.ibisworld.com/industry/retail.aspx?indid=2003&chid=1>.

3. See, e.g., Press Release, FTC, Undercover Shop Finds Decrease in Sales of M-Rated Video Games to Children, March 30, 2006, available at <http://www.ftc.gov/opa/2006/03/videogameshop.shtm>.

4. News Release, Congressman Joe Baca, Rep. Baca Introduces Legislation to Make Violent Video Games Sold With Health Warning Label, Jan. 7, 2009, available at http://www.house.gov/apps/list/press/ca43_baca/videogame_health_010709.html.

5. Video Game Health Labeling Act of 2009, H.R. 231, 111th Cong. § 1(b) (2009), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.231:/>.

6. See *infra* Section II.

7. For example, the makers of major video game consoles refuse to license games with an ESRB rating of AO (Adults Only) for release on their consoles. See, e.g., Brendan Sinclair, *Manhunt 2 PC Gets AO Rating*, GAMESPOT, Aug. 25, 2009, <http://www.gamespot.com/news/6216220.html?tag=result;title;1>.

8. Posting of Jacob Sullum to Reason.com, <http://reason.com/blog/2010/04/26/supreme-court-to-consider-viol> (April 26, 2010).

game debate should turn out. Films, for example, have long existed with scant more than “regulation by raised eyebrow.”⁹ There is good reason to think that video games should not be subject to any additional regulatory scheme beyond the self-imposed ratings seen in the film industry.

The purpose of this article is to look at the history of video game censorship and analyze the political, legislative, and legal battles surrounding this increasingly important medium of entertainment and to reach a conclusion about how the debate might and should turn out.

Section I provides some background information on First Amendment jurisprudence and accordingly shows how the legal status of obscenity has changed due to society’s desensitization. Section II addresses the analogous histories of films and video games, particularly how their self-censorship regimes developed in similar manners. This includes the particular set of battles the video game industry endured as the nascent technology developed in a way that brought new concerns after the establishment of its self-regulatory scheme. Because the censorship debate continued after the establishment of a ratings system, Section III discusses why video games should not be treated differently than films, including: (a) a discussion of the difference between objectionable video game content and pornography/obscenity; (b) the analogous violence that exists in games and films; (c) the positive aspects of violent gaming; and (d) the legal and political consequences of desensitization. Section IV outlines the current state of video game censorship jurisprudence. Section V addresses why mandatory ratings and warning labels on video games are unconstitutional censorship under the First Amendment.

Finally, I conclude that due to the unconstitutionality of such labels and the sufficiency of self-regulation, legislatures and politicians need to stop bombarding the game industry with the threat of regulation. But even if they do not, I argue we will see legislative complacency and a decrease in regulatory attempts based on social desensitization, similar to the trajectory of the film industry’s decrease in controversy.

I. FIRST AMENDMENT BACKGROUND

“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁰ The Free Speech Clause of the First Amendment has had a long, rocky, and heavily

9. See, e.g., Steven J. Cleveland, *The NYSE as State Actor?: Rational Actors, Behavioral Insights & Joint Investigations*, 55 AM. U.L. REV. 1, 52 (2005) (using the phrase “regulation by raised eyebrow” to describe a situation in which non-state actors are forced to self-regulate) (citation omitted).

10. U.S. CONST. amend. I.

litigated history. The interpretation of the rights granted under the Free Speech Clause have changed significantly over the past two centuries.

As a general matter, First Amendment jurisprudence has developed to give varying levels of protection to different forms of speech. Core political speech is most highly protected, while other forms of speech, such as symbolic speech (acts performed to convey a message) or commercial speech, are afforded less protection.¹¹ Also, the Court has drawn a distinction between time, place, and manner restrictions and content-based restrictions: unlike time, place, and manner restrictions, content-based restrictions are reviewed under strict scrutiny by the Court—even when the free speech of minors is at issue (which is largely the focus of video game censorship).¹² “Content-based regulations are presumptively invalid”¹³ and government action “must be narrowly tailored to promote a compelling [g]overnment interest.”¹⁴

The Court has held that even though the language of the First Amendment is unconditional, it was “not intended to protect every utterance.”¹⁵ Obscenity and libel, for example, are outside the boundaries of First Amendment protection.¹⁶ There are two important factors that determine these boundaries at any given point in history: (1) the language of the case law, and (2) the interpretation of that language. These two factors are particularly disconnected because of the importance of the social context in which the law is applied.

The changes seen in obscenity law and the implementation of those standards shows the effect of this disconnect. In 1957, the Supreme Court decided *Roth v. United States*, upholding convictions under federal and California obscenity statutes,¹⁷ on the basis of the following standard: obscenity laws are constitutional if they regulate content that has no social value, is not an essential part of the exposition of political ideas, and the truth value expressed is outweighed by a social interest in order and normality.¹⁸ The Court said that content is obscene if “the

11. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that “communication of ideas by conduct” is not always constitutionally protected); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (holding that the content of commercial speech can be regulated to a certain extent and to a greater degree than political speech).

12. *Video Software Dealers v. Schwarzenegger*, 556 F.3d 950, 957 (2009) (“Existing case law indicates that minors are entitled to a significant measure of First Amendment protections, that content-based regulations are presumptively invalid and subject to strict scrutiny, and that if less restrictive means for achieving a state's compelling interest are available, they must be used.”).

13. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted).

14. *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (citation omitted).

15. *Roth v. United States*, 354 U.S. 476, 483 (1957).

16. *Id.* at 485 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

17. *Id.* at 494.

18. *Id.* at 485.

average person, applying contemporary community standards, [finds] the dominant theme of the material taken as a whole appeals to prurient interest.”¹⁹

In *Memoirs v. Massachusetts*, decided nine years after *Roth*, “the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity[.]”²⁰ “(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.”²¹

The Court’s test for obscenity was amended again in 1973 when the Court decided *Miller v. California*, in which the Court recognized that “the *Roth* definition [as amended in *Memoirs*] does not reflect the precise meaning of ‘obscene’ as traditionally used in the English language.”²² The test then became: “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”²³

The Court’s semantic evolution tells us little about how the law should be implemented. Depending on the social context, the earlier *Roth* test for obscenity (applying contemporary community standards to determine whether content taken as a whole appeals to a prurient interest in sex)²⁴ could easily result in an identical censorship regime as the later *Miller* test (sexual content that appeals to a prurient interest in sex, portrays sex in a patently offensive manner, and lacks serious literary, artistic, political, or scientific value).²⁵ The result is contingent on the social context in which the test is implemented (by definition).

One particularly noteworthy example of the importance of social context in First Amendment law is the publication of James Joyce’s *Ulysses*. Joyce’s story was published in the 1920s in the United States as a serialized novel in a journal publication called *The Little Review*.²⁶ When the “Nausicaa” episode was published, which contained references to

19. *Id.* at 489 (citations omitted).

20. *Miller v. California*, 413 U.S. 15, 21 (1973) (citing *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)).

21. *Memoirs*, 383 U.S. at 418.

22. *Miller*, 413 U.S. at 20 n.2.

23. *Id.* at 24 (internal citations omitted).

24. *Roth*, 354 U.S. at 478.

25. *Miller*, 413 U.S. at 24.

26. ERIC BULSON, THE CAMBRIDGE INTRODUCTION TO JAMES JOYCE 13 (2006).

onanism and used the word “undies,” the American publishers were fined in court for obscenity and the serialization of the book ceased.²⁷ It wasn’t until 1933 that a Federal District Court judge held the book not to be obscene.²⁸

Today, of course, it is thoroughly impossible to imagine comparable content raising legal concerns. Obscenity standards have changed dramatically over time based on social conditions,²⁹ as have other standards in First Amendment jurisprudence, including: what constitutes speech; what level of protection is a given form of speech worthy of receiving; and whether different media should be treated differently.

Tracing the evolution of a given medium more fully informs these answers. For purposes of analyzing video games, the history of film censorship provides the best framework.

II. THE ANALOGOUS HISTORIES OF FILMS AND VIDEO GAMES

A. *Film Controversy and the Formation of the MPAA*

Because of the contextually sensitive nature of media censorship and because video games are a relatively new, somewhat unlitigated medium, it is best to start the discussion by comparing video games with another, more well-litigated medium in order to have a frame of reference.

In terms of how technology conveys information, the most analogous medium to the video game is the motion picture. They both employ the delivery of visual and auditory information, although the distinguishing characteristic is the interactive quality of video games.³⁰ Because of the shared characteristics of these two media, looking at the history of motion picture censorship gives us the best insight into predicting what will—and should—happen in the video game censorship debate.

The ability to convey information through a newly devised medium, especially vivid multi-sensorial media like films and video games, is a

27. *Id.*

28. *Id.* at 15.

29. Compare, e.g., JAMES JOYCE, *ULYSSES* 299–301 (Hans Walter Gabler ed., Vintage Books 1986) (1922), with the art of Mike Diana, The Official Mike Diana Website, <http://www.mikedianacomix.com/mikediana/mikediana.html> (last visited Mar. 7, 2010). In 1994, Mike Diana was convicted of obscenity for selling a comic book he had drawn. Jason Zinoman, *A Very Naughty Cartoonist as a Paragon of Normalcy*, N.Y. TIMES, July 19, 2005, available at http://theater.nytimes.com/2005/07/19/theater/reviews/19bust.html?_r=1. The change in obscenity standards between the 1920s and 1990s should be apparent from this contrast.

30. It is also arguable that tactile output is a shared characteristic of films and video games: modern video games quite often utilize controller vibration technology, and film subwoofers elicit visceral bodily sensations apart from delivering sound to the human ear. Tactile output, however, is not a definitional requirement of either media.

powerful tool that has the potential to create great anxiety in a society, which in turn leads to political pressures that are catalytic in the formation of laws. This was most readily apparent in Hollywood during the Great Depression. As Brandeis University professor Thomas Doherty said, "After . . . years of gun-toting gangsters and smart-mouthed convicts, adulterous wives and promiscuous chorines, irreverence from the lower orders and incompetence from above, the immoral and insurrectionist impulses on the Hollywood screen were beaten back by forces dedicated to public restraint and social control."³¹ It was also the case that:

Though other media were more sexually explicit and politically incendiary, the domain of American cinema was panoramic and resonant, accessible to all, resisted by few. It was to Hollywood that politicians, clerics, and reformers looked when they detected a shredding of the moral fiber of the nation and a sickness in the body politic.³²

The censorship of films was an outgrowth of the ideology of the Progressives, who worried about the impact modernization and urban living would have on the nation's morality and thus saw government as a tool "to create a more livable environment and reinforce traditional Victorian moral standards through 'protective' legislation."³³ Motion pictures were viewed as a particularly dangerous influence, and the first instance of censorship occurred in 1907, when the city of Chicago enacted an ordinance requiring film exhibitors to acquire a permit from the Superintendent of Police before their film could be shown to the public.³⁴ Over the next two decades, cities and states continued to enact their own censorship regimes, and as the threat of regulation grew, the industry chose the course of self-censorship.³⁵ The major studios formed a trade association in 1922, the Motion Picture Producers and Distributors of America which was later renamed the Motion Picture Association of America (MPAA), and they hired political veteran William Harrison Hays to be their frontman.³⁶

By 1922, film censorship existed in Pennsylvania, Ohio, Florida, New York, Maryland, Kansas, and Virginia, with legislation introduced

31. THOMAS DOHERTY, *PRE-CODE HOLLYWOOD: SEX, IMMORALITY & INSURRECTION IN AMERICAN CINEMA* 319 (John Belton ed., 1999).

32. *Id.*

33. GREGORY D. BLACK, *HOLLYWOOD CENSORED: MORALITY CODES, CATHOLICS, & THE MOVIES* 8 (Cambridge Univ. Press 1996) (1994).

34. *Id.* at 11.

35. *See id.* at 21–33.

36. *Id.* at 31.

in thirty-seven other states.³⁷ The Massachusetts legislature had passed a film censorship bill, but a public referendum needed for it to become law failed.³⁸ While legislation to censor film exhibition was a generally acceptable means of achieving social stability and moral fortitude, others, such as Chicagoan Martin Quigley took a different view. Quigley, a staunch lay Catholic, advocate for theater owners, and publisher of *Exhibitors World Herald*, thought that the solution was to eliminate objectionable content during the production phase.³⁹ Also, he saw self-censorship as a way for the film industry to reduce criticism and ensure continued popularity of films.⁴⁰ Using his connections in the Catholic Church, Quigley collaborated with Father Daniel Lord and Joseph I. Breen, among other Catholics, to create a draft of what would eventually become the production code for the film industry.⁴¹

Quigley took the code to Hays, who later said, "My eyes nearly popped out when I read it. This was the very thing I had been looking for."⁴² Dealing with the plethora of municipal and state censorship boards over the years had been annoying for the film industry, and producers such as Louis B. Mayer conceded that the Catholic lobby may be right that there was too much sex and violence in films, so the code was quickly adopted.⁴³

The Hays Code, as it was widely known, ruled cinema for the next few decades. The MPAA changed significantly in 1966 when Jack Valenti became the association's president. Valenti wrote,

It was plain that the old system of self-regulation, begun with the formation of the MPAA in 1922, had broken down. What few threads there were holding together the structure created by Will Hays, one of my two predecessors, had now snapped. . . . I determined to junk [the Production Code] at the first opportune moment.⁴⁴

Valenti, as he told in his writings, came into the MPAA at a time when control over the content of films was eroding. The film industry's lack of control over its content could mean a renewed interest in legislative intervention.

But by the 1950s, courts were expanding First Amendment

37. *Id.* at 32.

38. *Id.*

39. *Id.* at 35.

40. *Id.* at 36.

41. *Id.* at 37-40.

42. *Id.* at 40.

43. *Id.* at 42-43.

44. Jack Valenti, MPAA, Ratings History: How It All Began, http://www.mpa.org/Ratings_HowItAllBegan.asp (last visited Mar. 7, 2010).

protections for films. In the early 20th Century, films were not viewed as a medium particularly worthy of free speech protections. The Supreme Court decided *Mutual Film Corp. v. Industrial Commission of Ohio* in 1915, holding that “the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion.”⁴⁵ This standard changed radically with the passage of time. In 1950, film distributor Joseph Burstyn received a license from the Motion Picture Division of the New York Department of Education to exhibit the Italian-made short film “The Miracle.”⁴⁶ After receiving hundreds of complaints, the New York Board of Regents held a hearing and rescinded the license on the grounds that “The Miracle” was “sacrilegious” in violation of New York law.⁴⁷ In *Joseph Burstyn, Inc. v. Wilson*, the Supreme Court found the ban on sacrilegious speech unconstitutional, holding, “It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.”⁴⁸

The *Burstyn* Court directly addressed the decision in *Mutual Film Corp.* about the worthiness of films in receiving strict scrutiny protection under the First Amendment, holding,

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.⁴⁹

Today, the First Amendment protection provided by the Court in cases like *Burstyn* in conjunction with the industry's utilization of the MPAA constitute the extent of the film industry's regulation: in essence, it is what some legal scholars have referred to as “regulation by raised eyebrow.”⁵⁰ The history of video game controversy closely parallels this development in the film industry, hence providing a foundation on which

45. *Mutual Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244 (1915).

46. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952).

47. *Id.* at 458–59.

48. *Id.* at 505 (citations omitted).

49. *Id.* at 501–502 (internal citations omitted).

50. See Cleveland, *supra* note 9 (using the term “regulation by raised eyebrow” to describe a situation in which non-state actors are forced to self-regulate).

to base an argument that video games should not be treated differently than films, subject to extra layers of regulation.

B. *Early Video Game Controversy and the Formation of the ESRB*

The development of video game controversy was slower than that of films because its technology was slower to develop. Although motion pictures could produce recognizable (and hence objectionable) content from the beginning, early examples of video game controversy come off as trite and overblown when compared to later controversies, which are rife with very real, socially disruptive violence. From this evolution, it is clear why we did not see more legal action until the mid 1990s and early 2000s.

Two of the first games to create significant national controversy were *Mortal Kombat* and *Night Trap*.⁵¹ This took place after home consoles and arcade machines had advanced significantly⁵² and the industry had expanded to \$5.3 billion a year.⁵³

Released in 1992, *Mortal Kombat* was a fighting game that drew inspiration from martial arts films like *Enter the Dragon* and *Bloodsport*.⁵⁴ The franchise has sold over 26 million units since its inception.⁵⁵ It was originally an arcade game, but was soon released for the home consoles, increasing its availability for consumption—and consequently the worries about the game's impact.

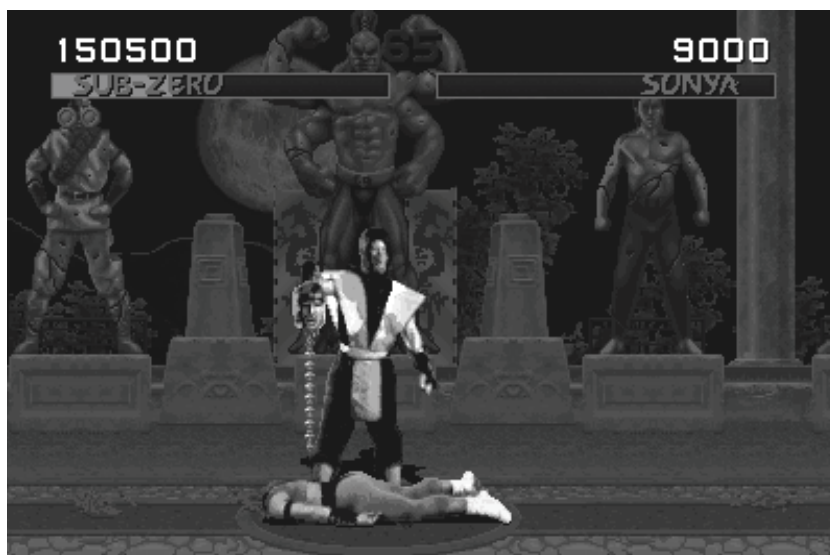
51. David Lightman, *Violent Image of Video Games; Lieberman Joins Critics In Call For Warning Labels; Critics of Video Game Industry Unite in Push for Warning Labels*, HARTFORD COURANT, Dec. 2, 1993, at A1, available at http://articles.courant.com/1993-12-02/news/0000001226_1 (describing a press conference in which Senator Joseph Lieberman and Captain Kangaroo screened portions of *Mortal Kombat* and *Night Trap*).

52. E.g., *Mortal Kombat*, starting in 1993, ran on the Midway T-Unit arcade machine that used the 32-bit TMS34010 processor, see <http://www.arcade-history.com/?n=mortal-kombat&page=detail&id=1674>.

53. Laura Evenson, *Video Game Makers Pledge To Set Up Ratings System*, S.F. CHRON., Dec. 10, 1993, at B1.

54. *Mortal Kombat's* fighter Liu Kang is an obvious Bruce Lee imitation. See ENTER THE DRAGON (Warner Bros. 1973). One of Johnny Kage's fighting moves consists of doing the splits and punching the opponent in the groin, just as Jean-Claude Van Damme's character did in the film *Bloodsport*. See BLOODSPORT (Cannon Group 1988). Van Damme was actually approached by *Mortal Kombat* creators Ed Boon and John Tobias about being in the game, but he turned down the offer because he was already in talks with Sega to star in a game. STEVEN L. KENT, THE ULTIMATE HISTORY OF VIDEO GAMES 462 (Three Rivers Press 2001).

55. *Mortal Kombat: Ed Boon Interview*, NINTENDO: THE OFFICIAL MAG., June 6, 2007, available at http://www.officialnintendomagazine.co.uk/news_060707_mortal.html/.

Exhibit 1: *Mortal Kombat*⁵⁶

Mortal Kombat, while it maintained the same technical gameplay formula as other contemporary fighting games,⁵⁷ deviated significantly and noticeably in terms of visual and audio presentation. *Mortal Kombat* utilized actual filmed images of actors to provide the basis for the sprites (animated figures) in the game, and the background settings were also more realistic.⁵⁸ The sound effects were also much more gritty and realistic than in previous fighting games, intensifying the sense of brutality as much as technologically possible. In combination with this increase in audiovisual realism, *Mortal Kombat*'s fighting was unprecedentedly violent. Punches and kicks were accompanied by gratuitous blood splatters,⁵⁹ and fights ended with the winner killing his

56. MORTAL KOMBAT (Midway 1992). This screenshot shows one of the more controversial and well-known fatalities: Sub-Zero ripping off his opponent's head along with the spinal column. The name "Sub-Zero" is possibly a reference to the character of the same name in the Arnold Schwarzenegger film *The Running Man*. See THE RUNNING MAN (TriStar Pictures 1987). Another well-known fatality included ripping out an opponent's still-beating heart, which could be seen as a reference to the human sacrifice scene from the film *Indiana Jones and the Temple of Doom*. See INDIANA JONES AND THE TEMPLE OF DOOM (Lucasfilm, Ltd., 1984).

57. The formula for fighting games has not drastically changed over the last two decades. See, e.g., FATAL FURY: KING OF FIGHTERS (SNK 1991); VIRTUA FIGHTER (Sega 1993); SHAO FU (Electronic Arts 1994); SUPER SMASH BROS. MELEE (Nintendo 2001); TEKKEN 6 (Namco Bandai 2007); see also IGN, IGN's Top 100 Games, <http://top100.ign.com/2005/001-010.html>.

58. KENT, *supra* note 54, at 462.

59. Blood was disabled on the SNES and Genesis versions of the games, although the Genesis version contained a prompt screen which allowed players to enter the "Blood Code" that would enable the blood splatter sprites.

helpless, inert opponent. These “finishing moves” depicted acts such as ripping out the opponent’s still-beating heart, burning the opponent down to a charred skeleton, electrocution, and tearing off the opponent’s head in order to yank out the spinal column. Some of the controversial aspects of *Mortal Kombat* could be seen as references to popular films, which had not drawn nearly as much criticism or outrage.⁶⁰

Night Trap, released in 1993 for the Sega CD, was one of the first games to utilize full-motion video (FMV).⁶¹ The game was, as the producing company Digital Pictures, Inc. described it, a “spoof on slasher [] and vampire films,” as is evident from the game’s campy box art.⁶² In the game, players take on the role of a government task force to save a house full of teenage girls from blood-drinking vampires. The perceived gore factor comes in when a player failing to properly trap one of the vampires, thus allowing the vampire to capture one of the girls. The most infamous of these failures includes the “nightgown scene,”⁶³ in which the vampires subdue one of the teenage girls in said attire and put a collar around her neck that supposedly drains her blood (although no dripping blood is actually visible).

Night Trap initially enjoyed moderate success, selling 130,000 copies before Senator Joe Lieberman conducted his hearings and began sending complaint letters to retailers.⁶⁴ In response to receiving letters from Senators Lieberman and Kohl in which they described *Night Trap* as “deeply offensive to women,” Toys-R-Us and Kay-Bee Toys, two of the nation’s then-largest toy chains, pulled the game from their shelves in December of 1993.⁶⁵

60. For discussion about film references, see *supra* note 56. As for my claim that the films referenced by *Mortal Kombat* did not draw as much controversy as the game, this should be clear from the fact that the films in question never sparked congressional hearings, although *Indiana Jones and the Temple of Doom* was catalytic in the MPAA’s creation of its new PG-13 rating as an intermediary rating between PG and R. See Richard Zoglin, *Gremlins in the Ratings System*, TIME, June 25, 1984, at 78.

61. For a discussion of the development of the interactive video technology developed by Tom Zito, founder of Digital Pictures, see KENT, *supra* note 54, at 271–274.

62. Edmund L. Andrews, *Industry Set to Issue Video Game Ratings As Complaints Rise*, N.Y. TIMES, Dec. 9, 1993, at A1.

63. Graeme Browning, *Push-Button Violence*, THE NAT’L J., Feb. 26, 1994, at 458.

64. Daniel Carter, *Battle Against Risky Video Games Wages On After 20 Years*, U. WIRE, Aug. 12, 2005.

65. Browning, *supra* note 63.

Exhibit 2: *Night Trap*⁶⁶



Lieberman's actions marked the point at which a Sword of Damocles appeared over the video game industry. As one article at the time read, "Sen. Joseph I. Lieberman joined Captain Kangaroo, parents and teachers Wednesday to give the video game industry a high-level ultimatum: Put warning labels on sexually explicit or violent video games, or the government will force you to do it."⁶⁷ Just hours prior to the hearings, "representatives of several large game manufacturers sought to partially defuse the bad publicity by announcing that the industry had decided to endorse a ratings system."⁶⁸ Later that day, during the hearings, the industry "pledged to set up a ratings system by Christmas 1994."⁶⁹ This pledge led to the formation of the ESRB,⁷⁰ which virtually

66. NIGHT TRAP (Digital Pictures 1992). Note the "MA-17 Rating" (Mature Audiences—17 and older) placed on the cover as part of Sega's pre-ESRB ratings scheme.

67. Lightman, *supra* note 51.

68. KENT, *supra* note 54, at 469.

69. Evenson, *supra* note 53.

70. See Andy Chalk, *Inappropriate Content: A Brief History of Videogame Ratings and the ESRB*, THE ESCAPIST, July 20, 2007, <http://www.escapistmagazine.com/articles/view/columns/the-needles/1300-Inappropriate-Content-A-Brief-History-of-Videogame-Ratings-and-the-ESRB.2>.

parallels the self-censorship and regulation of raised eyebrows the film industry underwent with the development of the MPAA to avoid more onerous government intrusion. At this point in the history, though, there had not been any litigation of video games that determined the First Amendment boundaries of the medium, and as such, new gaming controversies continued to shape the debate as the 1990s marched on.

C. *Doom and Columbine*

The video game censorship debate reached a blaring crescendo as violent games took a large amount of blame in the wake of youth violence and school shootings that marked the late '90s. Much like the social anxiety in the evolving American culture during the Great Depression that precipitated film industry regulation, a number of high profile games accompanied by equally notorious crimes created a political atmosphere that set the tenor of the debate.

In 1993, id Software (sic) released *Doom* for home computers. *Doom* had a negligible story which put the player in the shoes of a "space marine" on Mars fighting demons and the like.⁷¹ Today, the term "first-person shooter" is used to describe this gameplay setup, but because of the explosive popularity of *Doom*,⁷² the term "Doom clone" was often used in the mid '90s to describe the genre.⁷³ The game was considered a breakthrough in virtual reality technology with its effective rendering of three-dimensional environments on consumer-grade computers.⁷⁴

Relative to other games at the time, *Doom* was very violent. Enemies cried out in agony as they were felled in a spray of pixilated blood. Difficulty settings in *Doom* were given names such as "I'm too young to die" for easy and "Ultra-violence" for very hard (which is a somewhat obtuse film reference).⁷⁵ However, it would be a mistake to think that such film-inspired, alien-killing violence alone drew in the game's fans.⁷⁶ The creators of *Doom* at id Software were aware that with

71. The only plot details for the game were given in the instruction manual. DOOM (id Software 1993).

72. Vanessa Ho, *For Players, Doom's Day is Now*, ORLANDO SENTINEL, Dec. 23, 1994, at E1 ("More than 10 million people worldwide play *Doom* . . .").

73. Wikipedia.org, First Person Shooter, http://en.wikipedia.org/wiki/Doom_clone (last visited Mar. 8, 2010).

74. *Id.*

75. The use of the phrase "ultraviolence" in *Doom* is likely a reference to the use of the word in Stanley Kubrick's film "A Clockwork Orange" based on the novel by Anthony Burgess. See A CLOCKWORK ORANGE (Warner Bros. 1972).

76. A game that exemplifies this is *Fight Club*. Based on the eponymous film, *Fight Club* was generally not well-received by the gaming community. See, e.g., Greg Kasavin, *Fight Club Review*, GAMESPOT, Nov. 11, 2004, <http://www.gamespot.com/xbox/action/fightclub/review.html?tag=tabs;reviews>; Garnett Lee, *Fight Club*, IUP, Nov. 22, 2004,

Exhibit 3: *Doom*⁷⁷

their first foray into shooting games, *Wolfenstein 3D*, there were some players who modified the elements of the game to personalize it.⁷⁸ When id made *Doom*, they took a modular approach to the game's development, allowing players who wanted to customize the game to do so easily.⁷⁹ Whereas *Wolfenstein* was not designed to be expanded, the software architecture of *Doom* encouraged customization and expansion with the use of "Doom WADs."⁸⁰

The use of Doom WADs allowed players' creativity to flow. Players could design their own levels, replace enemy sprites with their own animations, change the appearance of the weapons, and insert their own sound effects and music. Some of the more notable WADs included content from popular culture touchstones as *Ghostbusters*, *Aliens*, *South Park*, and *Pokémon*.⁸¹ In large part, it was the ability to customize *Doom* that led to one of the biggest controversies in video gaming history.

<http://www.1up.com/do/reviewPage?cId=3136793&did=1>; Douglass C. Perry, *Fight Club*, IGN, Dec. 15, 2004, <http://xbox.ign.com/articles/566/566197p1.html>.

77. DOOM (id Software 1993).

78. See, e.g., The Wolf 3D Dome, Editing Introduction, http://www.wolfenstein3d.co.uk/editing_intro.htm (last visited Nov. 23, 2009). For examples of *Wolfenstein 3D* modifications, see ModDB, *Wolfenstein 3D* Mods, <http://www.moddb.com/games/wolfenstein-3d/mods>.

79. Wikipedia: Doom WAD, http://en.wikipedia.org/wiki/Doom_WAD (last visited Mar. 8, 2010).

80. The name for the data package known as a WAD is an acronym for "Where's All the Data?" *Id*.

81. Wikipedia: Doom (video game), [http://en.wikipedia.org/wiki/Doom_\(video_game\)](http://en.wikipedia.org/wiki/Doom_(video_game)) (last visited Mar. 8, 2010).

One such creator of Doom WADs was Eric Harris, who along with Dylan Klebold killed thirteen people in the 1999 Columbine High School massacre. Harris' WAD for *Doom II* is still widely available on the Internet.⁸² Harris modified the animations in his WAD to include more blood and the text file included with it is filled with hyperbole such as "KILL 'EM AAAAALLLLL!!!!!" As was said on one *Doom* website, these things "which would normally be nothing more than adolescent juvenilia, carry a certain premonitory weight."⁸³

In the wake of the Columbine shootings, video games took a more prominent role in the cultural and political debate. In the months that followed, video game censorship became part of the 2000 presidential campaign, with vice-presidential candidate Lieberman proclaiming in his acceptance speech at the Democratic National Convention that "[n]o parent in America should be forced to compete with popular culture to raise their children."⁸⁴ Presidential candidate Ralph Nader also chimed in, saying, "Our children are too precious a resource to be turned over to a bunch of violent, addictive, pornographically oriented corporations whose CEOs get invited to diplomatic dinners at the White House."⁸⁵ Then-Governor George W. Bush took a more laissez-faire approach, stating that there needed to be more self-regulation of the entertainment industry and that responsibility for keeping objectionable material out of the hands of minors lies with parents rather than government.⁸⁶

Anti-violence attorney Jack Thompson also began to gain national prominence at this time, entering the debate and adding to the legal wrangling.⁸⁷

D. *Jack Thompson and Grand Theft Auto*

No discussion of video game censorship would be complete without discussing Florida attorney Jack Thompson. Thompson has been at the forefront of many of the video gaming world's biggest controversies and has been a primary voice of opposition to explicit game content.⁸⁸

82. Harris' file "UAC Labs.wad" is available on sites such as Doomworld.com, 10 Most Infamous WADs, <http://www.doomworld.com/10years/bestwads/infamous.php>.

83. *Id.*

84. Eric Nagourney, *They Want Your MTV*, N.Y. TIMES UPFRONT, Oct. 16, 2000, at 12.

85. *Id.*

86. *Id.*

87. In the months that followed the Columbine attack, Jack Thompson appeared a guest on television news shows. *E.g.*, The Edge with Paula Zahn, Fox News (Jan. 13, 2000) and Talkback Live, CNN (Sep. 14, 2000).

88. Jack Thompson is an integral figure in the history of the debate on video game censorship, and the facts surrounding his disbarment are directly related to his interactions with the video game industry. Therefore, a discussion of those events is necessary for a complete chronology of the history of video game censorship. Discussion of Jack Thompson's legal troubles are not presented for the purpose of personally attacking him, but to chronicle

Thompson first gained notoriety by getting 2 Live Crew's album "As Nasty As They Wanna Be" banned in Broward County and declared obscene by a federal district court judge.⁸⁹ He became involved with video games in 1997, when fourteen year old Michael Carneal opened fire at his school in Paducah, Kentucky, killing three and wounding five others. Thompson filed suit for the parents of the three slain girls against a number of video game, entertainment, and Internet pornography companies.⁹⁰ They argued that these companies were responsible for Carneal's behavior under theories of negligence, violations of RICO, and strict liability for inherent danger of their products' designs.⁹¹ In the plaintiffs' complaint, they mention specific games that Carneal played, including *Doom*, *Quake*, *Wolfenstein*, *Redneck Rampage*, *Nightmare Creatures*, *Mech Warrior*, *Resident Evil*, and *Final Fantasy*.⁹²

The judge ruled that:

[T]he theories of liability sought to be imposed upon the manufacturer of a role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms. It cannot be justified by the benefit Plaintiff claims would result from the imposition. The libraries of the world are a great reservoir of works of fiction and nonfiction which may stir their readers to commit heinous acts of violence or evil. However, ideas expressed in one work which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness. As was stated by the second Mr. Justice Harlan, 'one man's vulgarity is another man's lyric.' Atrocities have been committed in the name of many of

one of the most important and recognizable figures in the debate on video game censorship and child protection.

89. The judge's decision was later overturned on the grounds that the Broward County Sheriff's Department failed to show that the album lacked artistic value. *Luke Records v. Navarro*, 960 F.2d 134, 139 (11th Cir. 1992). The test from *Miller v. California*, 413 U.S. 15, 24 (1973), applied in *Luke Records* holds that for material to be considered obscene: (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 21.

90. Defendants in the case ranged from Meow Media, Inc., d/b/a www.persiankitty.com, Network Authentication Systems, Inc., d/b/a www.adultkey.com, www.pornotech.com, Midway Home Entertainment, Apogee Software, Ltd., ID Software, Inc., Acclaim Entertainment, Inc., GT Interactive Software Corp., Interplay Productions, Inc., Nintendo of America, Sega of America, Inc., Virgin Interactive Media, Activision, Inc., Capcom Entertainment, Inc., Sony Computer Entertainment d/b/a Sony Interactive Studios America, Lasersoft, Inc., Williams Entertainment, Inc., Time Warner, Inc., Polygram Film Entertainment Distribution, Inc., Island Pictures, Palm Pictures and New Line Cinema, Defendants. *Joe James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000).

91. See generally *id.*

92. *James v. Meow Media*, 300 F.3d 683, 687 (6th Cir. 2002), cert. denied, *James v. Meow Media*, 537 U.S. 1159 (2003).

civilization's great religions, intellectuals, and artists, yet the first amendment does not hold those whose ideas inspired the crimes to answer for such acts. To do so would be to allow the freaks and misfits of society to declare what the rest of the country can and cannot read, watch and hear.⁹³

The District Court's decision was affirmed by the Sixth Circuit.⁹⁴ This suit, while important because of the finding of no legally significant causality between games and violence, was more of a footnote in Jack Thompson's career. He became most famous for his involvement in litigation surrounding the *Grand Theft Auto* series.

The original *Grand Theft Auto* was released in 1997. It chronicled the rise of a criminal underling through the ranks of the mafia. By stealing cars and carrying out mafia hits, the player gains money and status. The visuals were not particularly impressive, giving players a top-down view of the game's fictional setting, Liberty City. The real appeal of *Grand Theft Auto* was not visuals or gameplay, but the possibility of committing random crimes and generally terrorizing the residents of Liberty City.⁹⁵ The game received lukewarm to good reviews.⁹⁶

The *Grand Theft Auto* franchise received two mission expansion packs and an official sequel in the same top-down format before the series was overhauled.⁹⁷ In 2001, *Grand Theft Auto III* was released and hailed as a revolutionary game.⁹⁸

93. *Meow Media*, 90 F. Supp. 2d at 818–19 (quoting *Watters v. TSR, Inc.*, 715 F. Supp. 819, 822 (W.D. Ky. 1989)).

94. *Meow Media*, 300 F.3d at 687.

95. Top-down games have been seen in video gaming for quite some time before *Grand Theft Auto*'s release, with titles such as the arcade classic *Gauntlet*, released by Atari in 1985.

96. See, e.g., GAMESPOT, GRAND THEFT AUTO REVIEW FOR THE PLAYSTATION, <http://www.gamespot.com/ps/adventure/grandtheftauto/review.html>; GAMESPOT, GRAND THEFT AUTO REVIEW FOR THE PC, <http://www.gamespot.com/pc/adventure/grandtheftauto/review.html?mode=web&tag=tabs;reviews>.

97. Mission expansions include *Grand Theft Auto: London '69* and *Grand Theft Auto: London '61*. The sequel was (obviously enough) dubbed *Grand Theft Auto 2*.

98. IGN Rating: 9.6 out of 10. Doug Perry, *Grand Theft Auto III Review*, IGN, <http://ps2.ign.com/articles/165/165548p1.html> ("The game is absolutely, insanely good, and is truly one of the best titles of the year, on PlayStation 2, or on any system.") See, e.g., GAMESPOT, GRAND THEFT AUTO III REVIEW, <http://www.gamespot.com/ps2/action/grandtheftauto3/review.html?mode=web&tag=tabs;reviews>.

Exhibit 4: *Grand Theft Auto*¹⁰⁰



Whereas the previous *Grand Theft Autos* relied on sprite animations hurrying around on a background image of a street, *Grand Theft Auto III* was rendered in full 3D, and replacing the static top-down camera angle was a swooping third-person perspective at eye-level with the player.⁹⁹ This change in the visual structure of the game was ultimately the reason for the increase in controversy between *Grand Theft Auto II* and *III*.¹⁰¹

The more cinematic presentation put the player much closer to the violence. With actors like Frank Vincent, Michael Madsen, Joe Pantoliano and Michael Rapaport providing their voices for the story's profanity-laden cut scenes, the game was highly evocative of films like *The Godfather* and *Goodfellas*.¹⁰² The player in *Grand Theft Auto III*, however, does not find himself bound by the narrative structure of the game. As in earlier games in the series, pedestrians can be killed for cash, weapons can be purchased, prostitutes can be picked up and paid to gain health and subsequently killed for a refund.¹⁰³

The makers of *Grand Theft Auto*, Rockstar Games, a division of

99. In its original release on the PlayStation 2, the camera followed the player from behind while on foot and multiple points of view were able to be selected while driving stolen cars (driver's point of view, behind the car, from a helicopter).

100. GRAND THEFT AUTO (Rockstar Games 1997).

101. Without the increase in visual realism, controversy about the content of the game would be in the same realm as that of in the case of *Custer's Revenge*: anger over what the game is nominally supposed to represent, rather than what the visuals depict in a discernable manner. See Jerry Kirshenbaum, *Fun(?) and Games*, SPORTS ILLUSTRATED, Nov. 1, 1982, at 16.

102. A cut scene in a video game is a non-interactive portion of the game used to advance the story, i.e. a film clip within the presentation of the game.

103. No actual sex was ever shown in *Grand Theft Auto III*.

Exhibit 5: *Grand Theft Auto IV*¹⁰⁵



Take Two Interactive, continued to push the envelope with the next installment of the series in *Grand Theft Auto: Vice City*, released in 2002. Set in a fictionalized 1980s-era Miami, the game drew heavily from sources like *Miami Vice* and the Brian DePalma version of *Scarface*.¹⁰⁴

Vice City was followed up by *Grand Theft Auto: San Andreas* in 2004. *San Andreas*, set in a fictionalized Southern California, was responsible for arguably the biggest controversy of the series: “Hot Coffee.” In June 2005, hackers reverse engineered a PC version of the game and found sexual content within the source code that was not accessible during gameplay but was never taken out during development.¹⁰⁶ After the content was made public, hackers created modification files for the PC version and Action Replay codes for consoles (PlayStation 2 and Xbox) to make the “Hot Coffee” minigame accessible.¹⁰⁷

Grand Theft Auto: San Andreas was originally released with an ESRB rating of M (Mature), but the M rating was replaced with AO (Adults Only) after the discovery of the hidden “Hot Coffee” content. ESRB

104. As a reference to the film *Scarface*, the protagonist of *Grand Theft Auto: Vice City*, Tommy Vercetti can enter an apartment and find a bloody bathroom with a chainsaw.

105. GRAND THEFT AUTO IV (Rockstar Games 2008). As is evident from comparison to the previous screenshot from the original *Grand Theft Auto*, technological advances and an increase in the market size of the video game industry has allowed for exponential changes in the rendering of characters and environments in games.

106. The term “Hot Coffee” refers to the part of the game where the protagonist’s girlfriend invites him into her home for “coffee.” The minigame would have occurred at this point in the game, were it to be accessible. The inaccessible game segment portrays the protagonist CJ engaging in sexual movements with his girlfriend, but the two are fully clothed.

107. Seth Schiesel, Video Game Known for Violence Lands in Rating Trouble Over Sex, N.Y. TIMES, July 21, 2005, at A1.

Chairman Patricia Vance said that the “credibility and utility” of the ESRB M Rating had been “seriously undermined.”¹⁰⁸

Major retailers like Wal-Mart and Target immediately pulled *San Andreas*,¹⁰⁹ and eventually the game was re-released with an M rating after the “Hot Coffee” source code had been taken out.¹¹⁰ This was quite significant from an economic standpoint considering that between 2001 and 2005, the *Grand Theft Auto* franchise had sold more than 21 million copies and generated over \$924 million in revenue.¹¹¹ There were also attempts to make political hay out of “Hot Coffee,” with Senator Lieberman demanding that Take Two allow independent analysis of the *Grand Theft Auto: San Andreas* source code and Hillary Clinton promising to introduce new legislation to prevent the sale of violent video games to minors.¹¹² “Thompson claims he prepped Clinton for the press conference that she had on the issue.”¹¹³

Regarding Jack Thompson’s further involvement with *Grand Theft Auto*, in 2002, 17 year-old JoLynn Mishne was bludgeoned with a bedpost and stabbed to death by 16 year-old Dustin Lynch.¹¹⁴ Thompson, acting in his capacity as attorney for Mickey Mishne, the father of the slain girl, asked to submit an amicus brief arguing that Dustin Lynch was obsessed with *Grand Theft Auto III* and that the manufacturers of the game were accomplices in JoLynn’s murder.¹¹⁵ The prosecutor in the case compared the theory to that of the “Twinkie defense” raised by the man who killed Harvey Milk and San Francisco Mayor George Moscone.¹¹⁶

In October of 2003, Thompson filed suit in Tennessee against Sony (in its capacity as the manufacturer of the PlayStation 2) and Take Two for the victims of two teenage brothers who had pled guilty to

108. Brooks Boliek, *On Capitol Hill, It's All About Food, Hot Coffee*, THE HOLLYWOOD REPORTER, July 26, 2005, http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1000991491.

109. Lisa Baertlein, *Parents Group Urges Recall of Video Game 'GTA'*, REDORBIT, July 19, 2005, http://www.redorbit.com/news/scifi-gaming/180210/parents_group_urgues_recall_of_video_game_gta/index.html (“A media watchdog group . . . has demanded . . . Rockstar Games recall “Grand Theft Auto: San Andreas,” the blockbuster title at the center of a swarm over a hack that helps players unlock a sexually explicit mini-game.”).

110. Ben Fritz & Nick Vivarelli, *'Manhunt' on Hold*, DAILY VARIETY, July 16, 2007, at News 4.

111. Schiesel, *supra* note 107, at A1.

112. Baertlien, *supra* note 109.

113. Priya Ganapati, *Take Two Goes After Chief Critic*, THESTREET.COM, Mar. 16, 2007, http://www.thestreet.com/_googlen/newsanalysis/techgames/10345024.html?cm_ven=GOOGLE&cm_cat=FREE&cm_ite=NA.

114. Stephen Hudak, *Should Video Game Share Blame? Father of Slain Medina Girl Says Manufacturer is Accomplice*, CLEVELAND PLAIN DEALER, Feb. 21, 2003, at B1.

115. *Id.*

116. *Id.*

endangerment, assault, and reckless homicide.¹¹⁷ The brothers were said to be compulsive *Grand Theft Auto* players, and Thompson's argument was that the manufacturers either knew or should have known that the game would cause copycat violence.¹¹⁸ Later that month, the case was removed to the U.S. District Court for the Eastern District of Tennessee, and two days after that the plaintiffs filed for voluntary dismissal.¹¹⁹

In 2005, Thompson once again took on Take Two, this time for their game *Bully*. *Bully* can best be described as toned-down version of *Grand Theft Auto* for kids. The game features the same game mechanics as the *Grand Theft Auto* series, except it takes place at a boarding school, and features milder language, no killing, no hiring of prostitutes, and the theft of vehicles was limited to other children's bicycles and skateboards.

Calling the game a "Columbine simulator," Thompson brought suit against Take Two and Rockstar, claiming that *Bully* violated Florida's nuisance laws.¹²⁰ "On October 13, [2005,] Judge Ronald Friedman ruled that the game did not qualify as a 'public nuisance' under the pollution law invoked in Thompson's lawsuit and allowed the game's release. The judge noted in court that 'Bully' did contain some violence but 'less than we see on television every night.'"¹²¹

Not to be deterred, Thompson yet again dragged the makers of *Grand Theft Auto* into court in September of 2006 for another soon-to-be unsuccessful suit. This time, it was on behalf of three members of the Posey family, whose relative Cody Posey was "convicted of killing his three family members with shots to the head on the Hondo Valley ranch of ABC newsman Sam Donaldson where the family worked and lived."¹²²

The \$600 million suit against Cody Posey, Sony, and Take Two alleged that Posey played *Grand Theft Auto: Vice City* "obsessively" for months leading up to the shootings and that the game made Cody an "effective killer."¹²³ Thompson had contacted Cody's attorney, Gary

117. Hamel, et al. v. Sony Computer Ent., et al., No. 28,613-III (Cocke County Cir. Court of Tenn. 2003).

118. Posting of Michael McCann to The Situationist blog, <http://thesituationist.wordpress.com/2007/01/25/> (Jan. 25, 2007); Wikipedia, Jack Thompson (activist), [http://en.wikipedia.org/wiki/Jack_Thompson_\(activist\)](http://en.wikipedia.org/wiki/Jack_Thompson_(activist)).

119. Wikipedia, Jack Thompson (activist), [http://en.wikipedia.org/wiki/Jack_Thompson_\(activist\)](http://en.wikipedia.org/wiki/Jack_Thompson_(activist)).

120. Mike Musgrove, *Florida Judge Wants to See "Bully" in Court*, WASH. POST, Oct. 12, 2006, at D05.

121. Paul K. McMasters, *Violence and Video Games: Censors are Jumping the Gun*, DAILY RECORD (BALTIMORE, MD), Oct. 27, 2006, at Commentary.

122. Rene Romo, *Video Game Maker Sued in Deaths; Relatives of Posey's Victims Say Grand Theft Auto Helped Turn Teenager into a Killer*, ALBUQUERQUE J., Sept. 26, 2006, at D1.

123. *Week in Review*, SANTA FE NEW MEXICAN, Oct. 1, 2006, at C-4.

Mitchell, “numerous times” during the trial, “urging Mitchell to highlight *Grand Theft Auto* in Posey’s defense.”¹²⁴ Mitchell, however, did not acquiesce to these requests, saying, “I just didn’t find it had any merit whatsoever.”¹²⁵

By March of 2007, Take Two was weary of Thompson suits holding up their business. With two new controversial games about to be released, *Grand Theft Auto 4* and *Manhunt 2*, Take Two filed suit against Thompson to prevent him from delaying the release of their upcoming games, claiming that allowing a delay would violate their First Amendment rights.¹²⁶ By April, Take Two and Thompson settled, effectively neutering Thompson.¹²⁷

Ultimately, because of a number of legal complaints regarding Thompson’s tactics in these and other suits, the Florida Supreme Court ordered Thompson disbarred for life,¹²⁸ but Jack Thompson’s quixotic campaign against violent games left its mark on the censorship debate, elevating the dialogue to a sensational level with his bombastic legal tactics and fiery, self-destructive end. Jack Thompson was by no means a small player in this debate: one bill he helped write (an amendment to Utah’s Truth In Advertising Act that would have punished retailers who sold violent games to minors) passed by wide margins in the Utah House and Senate, although it was later vetoed by Utah Governor John Huntsman.¹²⁹

III. WHY VIDEO GAMES SHOULD NOT BE TREATED DIFFERENTLY THAN FILMS

While the interactive aspect of video games distinguishes it from more passive forms of consumptive entertainment, there are a number of reasons why video games should not be treated differently as a medium of expression. Because of the strict scrutiny in judicial review of speech regulation, a government entity seeking regulation must jump a high hurdle of justification—presumptive invalidity—to treat video games differently than other media.

124. Romo, *supra* note 122.

125. *Id.*

126. Priya Ganapati, *Take Two Goes After Chief Critic*, THESTREET.COM, Mar. 16, 2007, http://www.thestreet.com/_googlen/newsanalysis/techgames/10345024.html?cm_ven=GOOGLE&cm_cat=FREE&cm_ite=NA..

127. *Id.*

128. *Jack Thompson: Disbarment Timeline*, GAMEPOLITICS.COM, Sept. 26, 2008, <http://www.gamepolitics.com/2008/09/26/jack-thompson-disbarment-time-line>.

129. Mike Fahey, *Utah Governor Smacks Down Thompson Bill*, KOTAKU, Mar. 26, 2009, <http://kotaku.com/5185169/utah-governor-smacks-down-thompson-bill>.

A. Violent and Sexual Content in Video Games is Distinguishable from Pornography and Obscenity.

The parallels between the development of self-censorship regimes in the film and video game industries should be clear by now, but the question of how to treat specific types of content is not answered by simply comparing the histories. For example, unlike films in general, content that is pornographic has enjoyed less than strict scrutiny protection from the Court. This is important for a discussion of video game censorship both in terms of sexual content in games and how other objectionable content (i.e. violence) might be treated.

Every state has some regulation of pornographic and obscene material as it relates to children.¹³⁰ Aside from the issue of child pornography, much of this body of law involves giving or selling pornography to minors, the prohibition of which is constitutional under *Ginsberg v. New York*.¹³¹ The analysis in *Ginsberg* specifically carved out restrictions on minor's access to content on the basis of whether the material could be obscene for minors but not for adults.¹³²

There are clear limits to the extent to which the government may regulate media content in order to protect children. Overturning a ban on sexually oriented telephone calls, the Supreme Court held in *Sable Communications v. FCC*, "The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."¹³³

This analysis of pornographic and obscene material has limited applicability to video games. Although, as previously mentioned, there is no free speech right to obscenity, the Court "has carefully limited obscenity [restrictions] to sexual content."¹³⁴ In the context of video game censorship, this means that most obscenity restrictions for media are not applicable—the main concern in video game legislation and the corresponding jurisprudence is violent content, as is evident from the Video Game Health Labeling Act and the 1993 Congressional hearings on video games.¹³⁵ Attempts have been made to analogize violence to obscene sexual content, but courts have resisted, holding that "the standards that apply to obscenity are different from those that apply to

130. See, e.g., ALASKA STAT. § 11-61-128 (2009), COLO. REV. STAT. § 18-7-502 (2009), ILL. COMPILED STAT. ANN. § 5-11-21 (2009).

131. *Ginsberg v. New York*, 390 U.S. 629, 641–42 (1968) (holding that it was not irrational for the New York Legislature to find sexually explicit material harmful to minors).

132. See *id.* at 639 (upholding a ban on materials that are obscene as to minors but not obscene as to adults).

133. *Sable Comms. of California v. FCC*, 492 U.S. 115, 126 (1989).

134. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 959 (9th Cir. 2009).

135. See *infra* Section III-B for a discussion of the 1993 Congressional hearings.

violence.”¹³⁶

It is true that some games exist that would fall under this category of regulation. One recent example is the Japanese PC game *Rapelay*, the prime objective of which is to engage in sexual violence. The game was quickly banned on Amazon.com’s Marketplace after the company discovered the game being sold by individuals.¹³⁷ Such a game occupies a position on the far end of the bell curve, both in terms of extremity of content and public availability here in the United States. The regulations in this country, such as the Video Game Health Labeling Act, mean to target much more commonplace games that do not contain graphic sexual content. Rather, the games at issue contain only violence and less extreme sexual content, rendering games like *Rapelay* a non-issue.

Gaming has seen an increase in sexual content over the last few years. The game studio Bioware, for example, prominently features sex as an integral aspect of the narrative in games like *Mass Effect* and *Dragon Age: Origins*, but the evolution of such content is unlikely to reach a level of explicitness worthy of *Ginsberg* review below strict scrutiny, because all game console manufacturers in America (Sony, Microsoft, and Nintendo) do not allow AO-rated to be licensed for their consoles, which effectively limits the production and distribution of games beyond the M rating.¹³⁸ Consequently, this limits the sexual content to corresponding with that in R-rated films. If a ratings system were devised to deal with content that is actually obscene for minors, it would have virtually no impact on the game makers, sellers, or consumers in this country.

The vast majority of controversial video games, as the examples in this article show, reflect a range of content that is much more analogous to content seen in PG-13 and R-rated films than it is to the content seen in pornography or obscenity—the courts have held this to be the case in reviewing law limiting minors’ access to sexually explicit games.¹³⁹ As the court in *Entertainment Software Association v. Schwarzenegger* held, “The Supreme Court has carefully limited obscenity to sexual content. Although the Court has wrestled with the precise formulation of the legal test by which it classifies obscene material, it has consistently addressed obscenity with reference to sex-based material.”¹⁴⁰ If the games

136. *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (striking down an ordinance that restricted the sale of baseball cards featuring murderers and dictators to minors).

137. Benedict Moore-Bridger, *MP Calls for Rape Game to be Banned*, LONDON EVENING STANDARD, Feb. 25, 2009.

138. Sinclair, *supra* note 7.

139. See *infra* Sections V, VI for a discussion of these cases.

140. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 959 (9th Cir. 2009) (citing *Roth v. United States*, 354 U.S. 476 and *Memoirs v. Massachusetts*, 383 U.S. 413

at issue had sexual content that fit into *Ginsberg's* classification of material inappropriate for minors, there may be validity to mandatory labels or warnings. The definition of "sexually explicit games" in Illinois' Sexually Explicit Video Game Law (SEVGL) included games that:

[T]he average person, applying contemporary community standards would find, with respect to minors, is designed to appeal or pander to the prurient interest and depicts or represents in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act or a lewd exhibition of the genitals or post-pubescent female breast.¹⁴¹

But the examples in the legislative history were the same film-inspired scenes that can be found in any number of R-rated films, and the court found the application of the *Ginsberg* and *Miller* tests were unconstitutionally vague because of the omission of the qualification of "as a whole" from the definition of sexually explicit games.¹⁴²

As such, the video game censorship debate should follow the trajectory of the film industry as a whole insofar as the sexual content of games is not more explicit than films, and violence is the focus of legislation. Otherwise, the industry would be subject to laws analogous to those governing pornographic and obscene material, but no current market paradigms indicate this is even a remote possibility.

B. *Violent Game Content is Similar to Violent Film Content.*

As can be seen from the examples in Section II, video games draw a large amount of inspiration from contemporary and classic cinema. These references span from *Indiana Jones* and *Scarface* to *The Godfather*, *Clockwork Orange*, and the films of Bruce Lee. In fact, a common goal of modern video game development is to make the gaming experience as close to the cinematic experience as possible.¹⁴³ The content in the multibillion-dollar video game industry has more in common with Hollywood than the adult entertainment industry.

Apart from content, there is also the question of the effect of the media. A recent set of studies by Dr. Brad Bushman of Michigan and Dr. Craig Anderson of Iowa State measured the effect of exposure to violent media on helping behavior by exposing participants to said media

(1966)).

141. 720 ILL. COMP. STAT. 5/12B-10.

142. Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1079-80 (N.D. Ill. 2005) (discussing nudity in *God of War* and the application of the *Ginsberg* and *Miller* tests).

143. Two violent games that serve as examples of this point are HEAVENLY SWORD (Ninja Theory 2007) and METAL GEAR SOLID 4 (Konami 2008).

and then staging a fight outside of the testing room.¹⁴⁴ The first study looked at violent video games, and found that while every participant *did* leave the room to help, those who had played twenty minutes of a violent game took statistically significantly longer to respond than those who played non-violent games.¹⁴⁵ The next study involving non-violent PG and violent R films found those who watched the violent films also had statistically significantly delayed reactions in their helping behavior (although no decrease *in* helping behavior).¹⁴⁶

While the Bushman and Anderson studies are certainly problematic in a number of methodological ways (a blogger pointed out the inability to conduct the film test in a blind fashion, for example) and the element of causality is still suspect, the studies go to show that *both* violent films and games have negative consequences.

The legal question, then, that arises from this commonality of content and effect is, What rationale is there for distinguishing films and video games that passes the test of presumptive invalidity under First Amendment strict scrutiny review? If the film industry was allowed to grow and develop under the self-censorship of MPAA ratings, why aren't voluntary ESRB ratings under regulation by raised eyebrows sufficient to avoid government involvement? Showing that video games deserve less than strict scrutiny First Amendment protection is a very high hurdle for advocates of mandatory labeling systems, which they have not been able to overcome so far. For example, the court in *Entertainment Software Association v. Blagojevich* held, "[Illinois has] failed to show that video games are sufficiently similar to broadcast radio and television, to justify applying a lower standard of review [as in *FCC v. Pacifica*.]"¹⁴⁷

The problem for advocates of such a censorship regime gets compounded when violent games' positive aspects are found to be just as statistically significant as the socially deleterious ones.

C. *Positive Social Aspects of Violent Gaming*

A reason to be skeptical of attempts to force labels on games, particularly warning labels, is that a positive aspect of violent gaming exists: social interaction.

Many violent games embroiled in controversy contain what is

144. Posting of Ed Yong to Science Blogs, *Violent Films and Games Delay People From Helping Others*, http://scienceblogs.com/notrocketscience/2009/03/violent_films_and_games_delay_people_from_helping_others.php (Mar 16, 2009, 08:30).

145. *Id.*

146. *Id.*

147. *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1079 (2005) (citing *FCC v. Pacifica*, 438 U.S. 726 (1978)).

known as a “strong multiplayer component.” When a game has a multiplayer component, it means that the player has the option of playing with others on the same game system (on the same screen) or over the Internet. A strong multiplayer component denotes a game in which the multiplayer component of the game (as opposed to the single-player component) is a primary draw for playing.

There are manifestations of these online networks both for PC games, which tend to be run directly by the companies that make the games,¹⁴⁸ and on the consoles, in which the multiplayer component is facilitated by the console manufacturer.¹⁴⁹

One of the first successful online multiplayer games was Valve’s first-person shooter *Counter-Strike*, released in 2000 as a spin-off of the popular *Half-Life* series.¹⁵⁰ In *Counter-Strike*, a team of terrorists is pitted against a team of counter-terrorist agents in an urban arena. The game allowed for interaction through the use of an in-game text chat system, which could be used to strategize with others on the team or to jibe opponents. This feature enhanced the combat aspect of the game, as was said in a review of *Counter-Strike*, “Games are played in short rounds, and when you’re killed, you sit out the round as an invisible observer . . . This creates a strong social aspect, because with ‘dead’ players chatting, there can be an enormous sense of tension for the remaining players stalking each other.”¹⁵¹

In the wake of Valve’s success came another game franchise that would redefine online gaming: *Halo*.¹⁵²

Developed by Bungie, *Halo* was released in November 2001 as a launch title for Microsoft’s first console, the Xbox. *Halo* was one of the driving forces behind the success of the system, selling upwards of 5 million copies.¹⁵³

The story was standard sci-fi fare, placing the player in the role of Master Chief, an armor-clad cyborg Space Marine, fighting the alien

148. E.g. Valve’s “Steam” content delivery system is an example of a PC network for games such as *Half-Life*, *Team Fortress*, and *Left 4 Dead*.

149. On the current generation of systems, Microsoft’s multiplayer network is called “XBOX Live,” Sony’s is called “PlayStation Network,” and on the Wii, games use what is titled “Nintendo Wi-Fi Connection.”

150. While *Counter-Strike* was one of the first successful *online* competitive multiplayer games, *GoldenEye 007* and *Perfect Dark*, released by Rareware for the Nintendo 64 in 1997 and 2000 respectively, were early examples of successful competitive multiplayer components in violent first-person shooters that did not involve online play.

151. Scott Osborne, *Half-Life: Counter-Strike Review*, GAMESPOT, http://www.gamespot.com/pc/action/halflifecounterstrike/review.html?om_act=convert&om_clk=gssummary&tag=summary;read-review (Nov. 27, 2000).

152. It is arguable that *Half-Life*’s dark, story-driven first-person gameplay directly influenced *Halo*.

153. Bungie.com, *Halo 2: One Year Later*, <http://www.bungie.net/News/content.aspx?type=topnews&cid=7139> (Nov. 9, 2005).

Exhibit 6: *Halo 3*¹⁵⁴

Covenant forces on the artificially created world of Halo (*a la Rendezvous with Rama*).

The story-driven single-player mode was the main draw of the game. There was also the option of playing through the story of *Halo* with two people in a split-screen mode, but the competitive multiplayer portion of the game was fairly weak. Because *Halo* was released before the Xbox Live network launched, players could have multiplayer matches supporting 16 people only by linking systems together with a local Ethernet connection. Because this meant having to have multiple televisions and Xbox consoles in one house, setting up a local Ethernet game of *Halo* was a relatively cumbersome process.

In *Halo 2*, the multiplayer component was drastically stronger, incorporating support for online matches through Xbox Live. Chris Butcher, the Technical Lead for *Halo 2*'s development said,

For *Halo 2* we had our sights set very high on networking . . . We thought about the great LAN parties you can have with Halo 1 and decided to try and recreate that awesome experience of having all your buddies over to play, but using Xbox Live instead of having to lug consoles and televisions around.¹⁵⁵

Halo 2 also added to the interactivity of the multiplayer component by supporting in-game voice chat through the use of a headset attachment to the Xbox controller. This allowed for much more

154. All players in multiplayer games of *Halo* are either in armored suits, as is Master Chief in this picture, or are aliens with no human expressions. HALO 3 (Bungie 2007).

155. Luke Smith, *Does Bungie Hate Halo 2?*, 1UP NEWS, Jan. 26, 2007, <http://www.1up.com/do/newsStory?cId=3156739>.

Exhibit 7: *Gears of War*¹⁵⁸



spontaneous communication in the game compared to the text chat feature of *Counter-Strike* and other online games.

Halo 3, released for Microsoft's second game console, the Xbox 360, improved on the multiplayer component in *Halo 2*, including additional modes of online play and more customizable matches. As of February, 2008, "*Halo 3* has tripled *Halo 2*'s number of concurrent multiplayer participants. 5.9 million people have played the game on Xbox Live; 88 percent attempted matchmaking.¹⁵⁶ Currently, there are 1.2 million people playing *Halo 3* each week."¹⁵⁷

Another game that took advantage of Xbox Live to create a strong multiplayer component was *Gears of War*. Created by Epic Games, the makers of the successful *Unreal* series of first-person shooters, *Gears of War* was an action shooter game that eschewed the first-person perspective in favor of a third-person over-the-shoulder camera.

What separated *Gears of War* from other sci-fi shooting games was the severity of the game's violence. The intense combat was accompanied by gallons of blood, much of which splattered on the camera and dripped down the screen.¹⁵⁹ *Gears of War* was a major success for Microsoft and Epic, selling over 5.88 million copies,¹⁶⁰ and on the day of its release, it

156. Matchmaking involves the creation of custom game rules for a multiplayer match.

157. Edge Staff, *GDC: Halo 3 and the Importance of Matchmaking*, EDGE, Feb. 20, 2008, <http://www.edge-online.com/news/gdc-halo-3-and-importance-matchmaking>.

158. In *Gears of War*, menacing chainsaw bayonets are visible on the players' guns. Faces are also visible and show some emotion when death occurs. GEARS OF WAR (Epic Games 2006).

159. Much to the amusement of tillated players and the chagrin of concerned parents.

160. Video: The Fidelity Investments "Leadership in Technology" Executive Speakers Series Proudly Presents Michael Capps (Sept. 18, 2008) available at <http://www.csc.ncsu.edu/>

overtook *Halo 2* as the most popular online game on Xbox Live.¹⁶¹

So where does the multiplayer component of these violent games fit into the censorship debate? It's actually very important from a legal standpoint. Legislation that aims to censor violent games is always based on findings by a legislature that violent games are in fact bad for children. For such a law to hold up in court, it must meet the strict scrutiny threshold of presumptive invalidity applied to content-based restrictions, showing itself to be addressing a compelling governmental interest by the least restrictive means.

Like other video game regulations, the Michigan law that led to a court challenge in *Entertainment Software Association v. Granholm* was based on the state legislature's findings that "ultra-violent explicit video games are harmful to minors because minors who play them are more likely to exhibit violent, asocial, or aggressive behavior and have feelings of aggression" and that "there is a causal connection between media violence and aggressive behavior in some children, and that the effects of media violence are 'measurable and long-lasting.'"¹⁶²

The *Granholm* Court correctly granted summary judgment to the plaintiff video game manufacturers, holding that the state of Michigan did not meet its burden to provide "substantial proof," echoing the *Blagojevich* Court's holding that the

defendants have failed to present substantial evidence showing that playing violent video games causes minors to have aggressive feelings or engage in aggressive behavior. At most, researchers have been able to show a correlation between playing violent video games and a slightly increased level of aggressive thoughts and behavior. With these limited findings, it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games.¹⁶³

The court went on to say that the tests created by the state's expert failed to prove that "video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere."¹⁶⁴

Recently, video game violence was comprehensively studied by Dr.

corporate_relations/fi_lit/248.

161. Ellie Gibson, *Gears of War Takes Top Spot in Xbox Live Chart*, GAMEINDUSTRY.BIZ, Nov. 20, 2006, <http://www.gamesindustry.biz/articles/gears-of-war-takes-top-spot-in-xbox-live-chart>.

162. *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 649 (E.D. Mich. 2006).

163. *Id.* at 653 (citing *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (2005)).

164. *Id.* (quoting language used in *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001)).

Lawrence Kutner and Dr. Cheryl K. Olson, both of the Department of Psychiatry at Massachusetts General Hospital. They published their findings in the book *Grand Theft Childhood: The Surprising Truth About Violent Video Games*. In their study, the pair found that children who play M-rated games are significantly more likely to play games in a social setting than children who don't play M-rated games.¹⁶⁵ Of those boys who reported playing at least one M-rated game "a lot," 32% often or always play with multiple friends in the same room, 22% often or always play with an older sibling, 14% often or always play with friends over the Internet (e.g. PlayStation Network or Xbox Live), and 11% often or always play games with strangers over the Internet.¹⁶⁶

The authors also found confusing links with bullying and M-rated games: while boys who play M-rated games are more likely to exhibit bullying behavior in school, boys and girls who play M-rated games were also significantly less likely to be the victims of bullying.¹⁶⁷ The authors theorize that this may be connected with the fact that those who play M-rated games tend to do so in groups, which may mean they have better social skills with which to deal with bullies or the fact that they have friends means they are less likely to be singled out for being picked on.¹⁶⁸

The authors said of their findings that "[w]e can make logical guesses [about the link between problem behavior and M-rated games], but we can't be sure from our research whether violent game play led to these behaviors or vice versa."¹⁶⁹

One of the most common responses from the children in their study as to why the children play games (although the answer for boys was statistically significantly higher than for girls) is that they enjoy competing and winning.¹⁷⁰ As of January, 2009, 17 of 28 million Xbox owners were active Xbox Live members.¹⁷¹ Considering the numbers of people (including children) who play games like *Halo*, *Counter-Strike*, and *Gears of War*, online networks such as Xbox Live facilitate the competition discussed in *Grand Theft Childhood*, which is arguably a very positive thing for society.

As was also found in the *Grand Theft Childhood* study, almost 90% of boys and a little over 70% of girls said that they played video games because they enjoyed the challenge of figuring things out (especially

165. LAWRENCE KUTNER & CHERYL K. OLSON, *GRAND THEFT CHILDHOOD* 130 (2008).

166. *Id.* at 94.

167. *Id.* at 101.

168. *Id.*

169. *Id.* at 100.

170. *Id.* at 113.

171. Tor Thorsen, *28 Million Xbox 360s Sold, 17 Million on Xbox Live*, GAMESPOT, Jan. 6, 2009, <http://www.gamespot.com/news/6202733.html>.

before other players do).¹⁷² As one researcher said in a study that reached the same conclusions about children enjoying competition, “The kids focused on pride and competition in terms of psychological gain. They said they had more confidence: ‘I feel like I did something right.’”¹⁷³ This finding is a far cry from the world of games seen by those who want to restrict sales, such as Senator Lieberman or Jack Thompson who see violent gaming as a bleak, nihilistic hobby without socially redeeming qualities.

Repeated studies have shown that there is a feeling of accomplishment associated with playing competitive games.¹⁷⁴ The reality is that most popular competitive games are violent in nature, and if we want the benefits of a society in which children are raised to value competition and individual accomplishment, it is incumbent on politicians not to harass the industry that facilitates this social good.

Even if we were to devalue competition and accept “cooperation” as the higher social value, the preceding argument would still hold true. Online gaming networks like Xbox Live and PlayStation Network are rife with cooperative “clans,” teams of players who self-organize into intricate hierarchies within a given game or set of games. If the video game industry has to continue to endure legal fights, then those who extol the virtues of cooperation will have to accept the cost that will be imposed on the industry that facilitates *this* social good. As the judge in one of Jack Thompson’s suits said, “[I]deas expressed in one work which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness.”¹⁷⁵

This section is not presented necessarily to argue *in favor* of children playing violent games; rather it speaks to the issue in a First Amendment analysis of whether legislatures imposing such regulations can overcome a strict scrutiny examination of their laws. To be sure, there are a number of studies linking games to problematic behavior in clinical settings, including the aforementioned Bushman and Anderson studies.¹⁷⁶ Accepting, *arguendo*, the validity of conclusions about the negative consequences of violent games, the courts are presented with a commensurability problem in weighing the costs and benefits of violent games, which heavily influences a strict scrutiny analysis. Do the negative consequences outweigh the positive to the point of justifying extra regulation? Are the benefits of violent gaming even *able* to be weighed against the negative consequences?

172. KUTNER & OLSON, *supra* note 165, at 113.

173. *Id.* at 125.

174. *See id.* at 113 (discussing other studies that have come to similar conclusions about the feelings of accomplishment associated with video game playing).

175. *Joe James v. Meow Media, Inc.* 90 F. Supp. 2d 798, 818–19 (W.D. Ky. 2000).

176. Craig A. Anderson, *Violent Video Games: Myths, Facts, and Unanswered Questions*, AM. PSYCHOL. ASS'N, <http://www.apa.org/science/about/psa/2003/10/anderson.aspx>.

Because laws reviewed by the Court under strict scrutiny are “presumptively invalid” and a “compelling governmental interest” must be shown to be at stake in which the government “narrowly tailors” the law to meet that interest,¹⁷⁷ the fact that there is no absolute agreement about whether violent games are more bad than they are good compared to other violent forms of media and the potentially incommensurate nature of the costs and benefits being weighed means that proponents of a censorship regime cannot overcome the Court’s threshold.

D. Desensitization Will Lead to a Decrease in Political Outrage.

We have seen as a matter of psychological principle that repeated exposure to a stimuli tends to decrease the intensity of the response.¹⁷⁸ Thinking of society as a one big Skinner Box, we can look at the history of other media to discern how operant conditioning (punishment/reward reactions to stimuli) will affect the political atmosphere as video game technology progresses.

There is no question, looking at the history of films, that although there have been periods of social anxiety that led to backlash, the general movement of society has been one of increasing tolerance for objectionable speech. The same can be said of other visual media and literature.¹⁷⁹ Considering the facts surrounding the history of video games, there is no reason to believe that video games will turn out differently in terms of increased tolerance.

In the case of graphics, as can be seen from the development of *Grand Theft Auto*, old games that once caused a stir are soon rendered pixilated, blasé relics by their descendants.¹⁸⁰ With rapidly advancing technology in the game industry, we are increasingly likely to look back and ask, “What was all the fuss about?” when we examine the games that were catalytic in prompting political and legal action. *Night Trap*, for example, is laughably amateurish (technically and cinematically) and non-explicit by today’s standards. The idea of this game being released in 2010 and causing a full-scale Congressional inquiry is unfathomable in the same way we would imagine the publishers of *Ulysses* being persecuted for obscenity today.

With this inevitable obsolescence every controversial piece of media is imbued with, it’s not unreasonable to think that courts should discount the present social climate in its analysis of video game laws passed by

177. See *Citizens United v. FEC*, 2010 U.S. LEXIS 766, 51–52 (discussing the strict scrutiny standard of review).

178. See JOSEPH WOLPE, *THE PRACTICE OF BEHAVIORAL THERAPY* 100–122, 138–149 (1969) for a discussion of systematic desensitization.

179. See *supra* Sections I, II.

180. See *supra* notes 100, 105 and corresponding pictures.

legislatures in the heat of their populist passion.

As it is with any form of conditioning, associations matter: the social anxiety associated with a medium leads to fear of the medium. As with films during the Great Depression that were feared because of their association with immoral behavior, there is genuine fear of explicit video games because of their association with youth violence. However, because video games are such an integral part of modern entertainment, there really is no comparison between the ratio of Columbine-like video game players and the normal children that play the same games and never once take up arms against their classmates. This lack of violent consequences cannot help but increase the desensitization to violent game content, and in turn will lead to decreased political desire for regulation and labeling.

IV. EXISTING VIDEO GAME JURISPRUDENCE

Much video game legislation has been introduced in state legislatures and in Congress since Senator Lieberman's hearings, largely as a result of the aforementioned controversies. Some of this legislation was written directly by Jack Thompson.¹⁸¹ The judicial trend in this area of law is clearly toward non-regulation, resembling the jurisprudence of films—although we shall see in the months to come how the Supreme Court comes down on the issue.¹⁸²

The Sixth Circuit held that video games were protected free speech under the First Amendment for the purposes of regulating tort liability and stated that “our decision here today should not be interpreted as a broad holding on the protected status of video games.” However, the Court did recognize that “most federal courts to consider the issue have found video games to be constitutionally protected [free speech].”¹⁸³

The court recognized that video games are “creative, expressive free speech, inseparable from their interactive functional elements” and as such, they are justified in receiving First Amendment protections.¹⁸⁴

An example of a major win for the video game industry involved the Sexually Explicit Video Game Law (SEVGL), passed into law in Illinois

181. Posting of GamePolitics to Live Journal, <http://gamepolitics.livejournal.com/307891.html?thread=23673523> (June 16, 2006, 08:05); Fahey, *supra* note 129.

182. *See supra* note 8.

183. *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mi. 2006) (citing *James v. Meow Media Inc.*, 300 F.3d 683, 696 (6th Cir. 2002)) (internal citations omitted).

184. *Id.*

by then-Governor Rod Blagojevich in July of 2005.¹⁸⁵ The law required video game retailers to label all sexually explicit video games with a 2x2 inch black and white sign reading "18," with non-compliance resulting in a \$500 or \$1000 fine, depending on how many violations the retailer has accrued.¹⁸⁶ There was also a corresponding Violent Video Game Law (VVGL) passed.¹⁸⁷ The industry brought suit, and in *Entertainment Software Association v. Blagojevich*, the 7th Circuit upheld a District Court decision to permanently enjoin the enforcement of the laws.¹⁸⁸ As the District Court said, "the legislature has a compelling interest in preventing violent behavior by children, protecting children from violence, and assisting parents in achieving the same goals."¹⁸⁹ But

[w]hen the state defends a regulation of speech as a means to "prevent anticipated harms," however, "it must do more than simply posit the existence of the disease sought to be cured." Rather, "it must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."¹⁹⁰

As an example of the problem with the SEVGL, the District Court cited the game *God of War*:

During the game, there are several scenes depicting women whose breasts are visible. In one scene, the main character is shown near a bed where two bare-chested women are lying. It appears that the main character may have had sexual relations with the women. Because of this one scene, a game such as *God of War*, which essentially parallels a classic book like *The Odyssey*, likely would be prohibited for minors under the SEVGL, because the statute allows a game to be regulated based on one scene without regard to the value of the game as a whole. Such a sweeping regulation on speech—even sexually explicit speech—is unconstitutional even if aimed at protecting minors.¹⁹¹

In *Schwarzenegger*, which will be discussed in more detail in the next section, the Ninth Circuit was not amenable to California's fact-finding, holding the state's video game labeling law was unconstitutional and not subject to *Ginsberg* review.¹⁹² The court was highly skeptical of

185. 720 ILL. COMP. STAT. 5/12B-25 (2009).

186. *Id.*

187. *Id.*

188. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 643 (7th Cir. 2006).

189. *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1072 (N.D. Ill. 2005).

190. *Id.*

191. *Id.* at 1080.

192. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009).

the studies used to justify the law, holding:

[T]he evidence presented by the State does not support the Legislature's purported interest in preventing psychological or neurological harm. Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology as they relate to the State's claimed interest. None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable.¹⁹³

These decisions point to a clear judicial preference for non-regulation and skepticism toward the legislative fact-finding used to justify such ratings laws. The 7th Circuit called the District Court's example of *God of War* illustrative of the problem and said of the SEVGL, "These deficiencies are sufficient for this court to conclude that the statute is not narrowly tailored and is overbroad. It is unnecessary for the State to ban access to material that has serious social value for minors to achieve its stated purpose."¹⁹⁴

What is an example, then, of the "serious social value" contained within the discs of today's video games? Apart from serving as modern learning tools, referencing classical mythology in games such as *God of War* and *Too Human*, modern video gaming is a nexus for large social networks that facilitates interpersonal relations, the development of which is described above. This positive aspect of violent gaming exists in the context of a larger debate about whether it is appropriate to treat game content differently than similar content that appears in films (which doesn't experience similar regulatory threats).

V. RATINGS AND LABELS AS UNCONSTITUTIONAL CENSORSHIP

A game and its packaging convey information. As per the holding in *Burstyn*, it can hardly be argued that games and the information contained therein do not constitute speech under the First Amendment—Circuit Courts have repeatedly addressed this issue and affirmed that games and their packages are protectable speech.¹⁹⁵ The addition of a warning, rating, or additional description is new information added to the matrix of information being conveyed by the game.

193. *Id.* at 964.

194. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006).

195. *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 650–651 (E.D. Mich. 2006) (citing *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) and *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003)).

Censorship of this speech exists when labels are mandated because the addition of new information means the original content is not able to be released as-is (i.e. the original message has fundamentally changed). If a rating or warning label is mandatory, it would constitute a content-based restriction on the release of unlabeled games. It might be argued that such an addition is minor and affects the speech very little, but in absolute terms, the mandatory addition of information constitutes a ban on unqualified speech—video game manufacturers are unable to speak without adding additional information to their message.

In *Schwarzenegger*, the 9th Circuit addressed the issue of state-mandated labels (separate from whatever ESRB rating may appear on the games). The state of California argued that the labeling aspect of their law designed to criminalize selling violent games to minors was merely a commercial aspect of retail sales, but the 9th Circuit disagreed.¹⁹⁶ Although labeling and rating games on the exterior of the packaging ostensibly falls under the commercial aspect of the video games at issue, regulation of commercial speech has been upheld by the Court when the state-required inclusions are “purely factual and uncontroversial information.”¹⁹⁷ In *Schwarzenegger*, the 9th Circuit’s holding that the sale and rental provisions were unconstitutional “negate[d] the State’s argument that the labeling provision . . . [was] ‘purely factual and uncontroversial . . .’”¹⁹⁸

Essentially, it was the subjective nature of content warnings that rendered the California law unconstitutional in *Schwarzenegger*. Such a holding will surely have an effect on Rep. Baca’s proposed bill, especially in light of the spurious fact-finding that invariably accompanies video game regulations. Because such labels that describe content as constituting “violence,” “gore,” or “comic mischief” (as many ESRB descriptions read) are inherently subjective, they do not fall under the Court’s category of accepted regulations of commercial speech on a “purely factual and uncontroversial” basis. Nor would such mandatory ratings be purely commercial in the sense of only appearing on the box—many games integrate the ESRB rating into an opening screen when the game is played. Having a mandatory rating would in fact likely end up being integrated into the computer code and audiovisual presentation of the game itself, further blurring the commercial/content distinction. But even if the government-mandated stickers remained solely on the outside of the packaging, they would be unconstitutional insofar as they

196. *Schwarzenegger*, 556 F.3d at 966–67.

197. *Id.* at 966 (citing *Zaunders v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (upholding a state’s requirement that an attorney include in his advertisements a disclosure that clients may be responsible for litigation costs)).

198. *Id.*

contained messages other than purely factual and uncontroversial information.

Such mandatory ratings on violent games are squarely within the realm of strict scrutiny review, since the Court has refused to extend the obscenity exception to violence.¹⁹⁹ Also because the *Blagojevich* Court's held that the state of Illinois misapplied the *Ginsberg* and *Miller* tests,²⁰⁰ there is no content that is sexually explicit for minors so to speak of in the video game censorship debate. If the focus was on regulating games like *Rapelay*, such a narrowly tailored law might conceivably be constitutional. But given what content is out there—particularly the games available in this country at the retail level—the only real issue is the constitutionality of regulating and labeling violent games. The holdings of *Miller*, *Schwarzenegger*, and *Blagojevich* are controlling, and they point to the conclusion that violent content is not tantamount to sexual content, and labels that contain subjective messages, such as the label proposed in the Video Game Health Labeling Act, are impermissible content regulations under the First Amendment.

CONCLUSION

With speech in various media being so thoroughly litigated (films, radio, television, telephone, and print media) and with the relatively small amount of video game litigation that favors non-regulation, it is important to ask why there is still so much video game legislation still on the table. As of the writing of this article, there were still eleven laws at the state and federal level that either had passed and have not yet been challenged or are still alive in the legislative process.²⁰¹

To reiterate, the Video Game Health Labeling Act introduced in the House would require video games rated Teen or higher by the ESRB to sport stickers reading, “WARNING: Excessive exposure to violent video games and other violent media has been linked to aggressive behavior.”²⁰² Such a requirement isn't rational in light of studies like that in *Grand Theft Childhood* and the film and game studies by Bushman and Anderson. It would be far more accurate to make the assertion “Exposure to violent video games has been linked to increased social skills and less bullying” or that “Playing violent games has shown no decrease in the

199. *See id.* at 959 (citing *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)).

200. *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1079–80 (discussing nudity in *God of War* and the application of the *Ginsberg* and *Miller* tests).

201. GamePolitics.com, Legislation Tracker, <http://www.gamepolitics.com/legislation.htm> (last visited Nov. 28, 2009).

202. Video Game Health Labeling Act of 2009, H.R. 231, 111th Cong. § 1(b) (2009), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h231ih.txt.pdf.

occurrence of helping behavior.” The warning label suggested by Representative Baca is not any *more* accurate—and may in fact be *much less* accurate in terms of the statistics it presents—than any number of positive or neutral factors that may be shown about violent games. Under the holdings in *Schwarzenegger* and *Blagojevich*, the bill’s subjective descriptions are impermissible content regulations and ultimately could not pass the Supreme Court’s strict scrutiny review.

In the state of Washington, two bills have recently addressed the issue of controversial video game content. House Bill 2178, introduced in 2005, would allow a person to “maintain an action for personal injury or wrongful death against a manufacturer or retailer of violent video or computer games” if the game was sold to someone under the age of seventeen.²⁰³ Under the case law that appeared in the wake of Jack Thompson’s suits, such a law would have great trouble establishing causality.

Also introduced in 2005, House Bill 1366 was signed into law by Governor Christine Gregoire.²⁰⁴ The law requires retailers to post information about “the existence of a nationally recognized video game rating system” (i.e. the ESRB).²⁰⁵ The law also states that “a video game retailer shall make available to consumers, upon request, information that explains the video game rating system.”²⁰⁶ Although this law could pass constitutional muster in terms of being a “purely factual and uncontroversial information” requirement, it seems highly superfluous. In an age of unprecedented access to information, why is the state of Washington willing to place the burden on retailers to invest in printed literature on video game ratings that can—and *most definitely should*—be looked up by parents when considering purchasing video games for their children?²⁰⁷ Even if retailers and parents did see the need for such a service, that is something that would easily distinguish one retailer from another in the marketplace of video game purchases, which is one more example of what makes the process of legislating the issue highly unnecessary.²⁰⁸

203. H.B. 2178, 2005 Leg., Reg. Sess. (Wa. 2005), *available at* <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bills/House%20Bills/2178.pdf>.

204. Substitute H.B. 1366, 2005 Leg., Reg. Sess. (Wa. 2005), *available at* <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/Session%20Law%202005/1366-S.SL.pdf>.

205. WASH. REV. CODE § 19.188.040(2) (2008).

206. WASH. REV. CODE § 19.188.040(4) (2008).

207. The ESRB’s homepage contains a search engine that allows users to search for game ratings by game title, keyword, or publisher. Entertainment Software Ratings Board, Index, <http://www.esrb.org/index-js.jsp> (last visited Nov. 28, 2009).

208. As a relevant anecdote, I am acquainted with an owner of a video game store in Boulder, Colorado who says he does not sell M-rated games to children because it lets parents know the store is a safe place to let their children purchase games while the parents shop

During the 2008 presidential primaries, Mitt Romney created an ad about the deteriorating *water quality* (as it were) in America's cultural "ocean."²⁰⁹ In it, Romney said, "I'd like to see less violence and sex on TV, and in video games, and in movies. And if we get serious about this, we can actually do a great deal to clean up the water in which our kids and our grandkids are swimming."²¹⁰ It would be horribly naïve of someone to think that this, in the context of a presidential campaign, could mean anything but a threat to regulate content and access to content at the federal level.

The common thread of these regulations (threatened, proposed, and enacted alike) is that they don't seem to be linked to any significantly real effects of violent gaming or problems that can't be handled through self-regulation; rather, they represent an arbitrary moral condemnation of the content. Society must be wary of such of willfully arbitrary conduct and disingenuous fact-finding, ominously described by Benjamin Franklin in his autobiography: "So convenient a thing it is to be a reasonable creature, since it enables one to find or make a reason for everything one has a mind to do."²¹¹

At a fundraiser for the 2000 presidential election, Lieberman assured a gathering of entertainment industry supporters in Beverly Hills that "we will never put the government in the position of telling you by law, through law, what to make."²¹² This statement from Lieberman about his intent is patently false. During Lieberman's 1993 hearings, the Senator said pointblank to Sega's vice president that *Night Trap* was "gratuitous and offensive and ought not to be available to people in our society."²¹³ Not "children," mind you, but "people" was the word he chose to use in his comment. This is a correct interpretation of Lieberman's word use considering that later in the hearings he asked the industry, "Why do you need to go across that line and produce this stuff for adults or kids?"²¹⁴

For legislatures to continue to exert such pressure and for politicians to promise to redouble efforts in the future when Circuit Courts have repeatedly struck down identical video game censorship laws is nothing

elsewhere, consequently increasing consumers' trust and the owner's sales.

209. Video: Mitt Romney, Ocean Ad, *available at* <http://www.youtube.com/watch?v=mnyNID-7AtU&feature=related>.

210. *Id.*

211. BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 27 (Stanley Applebaum & Philip Smith eds., Dover Publications 1996) (1791).

212. David Lightman, *Film, Music Industries Take Heat From Lieberman*, HARTFORD COURANT, Jan. 26, 2001, at A4.

213. KENT, *supra* note 54, at 475.

214. Video: Icons, ESRB, (G4 television broadcast, episode 303), *available at* <http://www.youtube.com/watch?v=5fp0hl9gcxQ>.

short of legislative lawlessness.²¹⁵ Such behavior shows a wanton disrespect for First Amendment jurisprudence and a willingness to engage in demagoguery for empty political expediency. As a political matter, such behavior should be shunned, and as a legal matter, this should lead to swifter dispositions by courts when reviewing laws that treat video games differently than films.

But even if opponents of such regulations remained inert and failed to properly shun such conduct by politicians and legislatures, we will still see the video game censorship “fad” come to pass. Because video games are so closely analogous to films (in terms of content, historical development, self-censorship, and national notoriety) the game industry is destined to become equally ubiquitous in American culture. The average age of gamers in America is rising too—it was 35 as of 2009.²¹⁶ Gamers that played as children are growing up, which decreases the likelihood that they will be shocked or offended as new controversies arise.

If the movies are our guide, this increase in the consumption and in the average age of consumers should lead to a greater societal tolerance for games with violent content. But even if the video game industry has to continue to endure legal battles, it will end up as free of regulation as the film industry is if it just weathers the political storm until society has become desensitized.

For the time being, though, the message from the courts seems to be clear: Game on.

215. *See supra* Sections I, V, VII, VIII.

216. ENTERTAINMENT SOFTWARE ASSOCIATION, 2009 ESSENTIAL FACTS ABOUT THE COMPUTER VIDEO GAME INDUSTRY 2 (2009), *available at* http://www.theesa.com/facts/pdfs/ESA_EF_2009.pdf.