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The Blame Game: Analyzing Constitutional Limitations Imposed on Legislation Restricting Violent Video Game Sales to Minors after St. Louis

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Case Notes

THE BLAME GAME: Analyzing Constitutional Limitations Imposed on Legislation Restricting Violent Video Game Sales to Minors after *St. Louis*

Colleen Carey*

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I. Introduction

Since the early nineties, the topic of youth violence has spawned a heated debate over causes,¹ as well as proposed solutions, to the problem.² One of the most targeted “causes” of youth violence has been children’s exposure to violent content in movies, television, music, and video games.³ The excessive attention has resulted in “society’s accepted view that violence is harmful to children.”⁴ This viewpoint stems from a common misconception that researchers have proven that exposure to violent entertainment causes violent behavior in children.⁵

1. See, e.g., *VIOLENCE: OPPOSING VIEWPOINTS* (Laura Egendorf ed., 2001) (containing essays exploring brain damage, race, drugs, gun-control laws, parenting, media violence and American culture as causes of violence); Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 567 ANNALS 123 (Jan. 2000) (exploring the effects of poverty and inequality on youth violence).

2. Kathleen M. Heide, *Six Concentrated Areas to Reduce Juvenile Violence In The 21st Century*, 1 BARRY L. REV. 143 (2000) (examining what parents, the educational system, the community, government leaders, the media and individuals can do together to prevent youth violence); Laura Beresh-Taylor, *Preventing Violence in Ohio’s Schools*, 33 AKRON L. REV. 311 (2000) (suggesting alternative education programs to prevent juvenile violence).

3. See, e.g., Letter to the Attorney General and the Chairman of the Federal Trade Commission on a Study on Youth Violence and Media Marketing, 1999 Vol. I PUB. PAPERS 864 (June 1, 1999); James Sullivan & Jesse Hamlin, *A Raging Debate; The Argument Over Violent Images, Violent Actions and Who’s to Blame*, S.F. CHRON., Apr. 29, 2001, (Sunday Datebook), at 59.

4. *Interactive Digital Software Ass’n. v. St. Louis County*, 200 F. Supp. 2d 1126, 1137 (E.D. Mo. 2002) *rev’d*, 329 F.3d 954 (8th Cir. 2003), *reh’g en banc denied*, No. 02-3010, 2003 U.S. App. LEXIS 13782 (8th Cir. July 9, 2003).

5. See *The of Impact of Interactive Violence on Children: Hearing Before the Senate Comm. on Commerce, Sci. and Transp.*, 106th Cong. (2000) (written testimony of Jeffrey Goldstein, Ph. D.) [hereinafter Goldstein testimony], *reprinted at* 2000 WL 11069631.

The initial movement against media violence focused on the television industry, and resulted in Congress passing the Telecommunications Act of 1996, which required a V-chip to be installed in every television greater than thirteen inches.⁶ The V-chip enables parents to program their televisions to block out programs they do not want their children to view.⁷ Congress left it up to the television industry to create a rating system for its programming.⁸ The chip allows parents to use the industry's rating system to screen shows based on the sexual content, language, or violent content of the program.⁹ The Federal Communications Commission approved the technical standards for the chip in 1998 and all television sets sold after January 1, 2000 had to be fitted with the chip.¹⁰

Within the past five years the focus has shifted more heavily onto children's video game playing and the possible negative effects of such play.¹¹ The attention has resulted in government legislation restricting the sale of video games with violent content to minors as a way of reducing or preventing youth violence. The City of Indianapolis; St. Louis County, Missouri; and the State of Washington have passed such legislation. In addition, a bill has been introduced in the United States Senate in 2003.¹²

Prior articles have discussed both sides of the debate over whether video games constitute speech within the meaning of the First Amendment,¹³ whether violent content can properly be

6. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56 (1996).

7. Heather Fleming, *FCC Approves V-Chip to Block Violent Television Programs from Children*, SEATTLE POST-INTELLIGENCER, Mar. 13, 1998, at E2.

8. Telecommunications Act § 551.

9. Fleming, *supra* note 7.

10. *Id.*

11. See, e.g., Zachary R. Dowdy, *Study Links Games, Violence / Senator Urges Ban On Video Sales To Youths*, NEWSDAY, May 19, 2000, at A33; John Strauss, *Peterson Seeks to Curb Violent Video Games: Mayoral Candidate Says Such Games Should be Banned from City Properties*, THE INDIANAPOLIS STAR, May 28, 1999, at D3.

12. INDIANAPOLIS, IND., CODE § 831-5 (2000); St. Louis County, Mo., Ordinance 20,193 pmb. (Oct. 26, 2000); Violent Video Games Statute, H.B. 1009 § 2, 58th Leg., 1st Reg. Sess. (Wash. 2003); Protect Children from Video Games Sex and Violence Act of 2003, H.R. 669, 108th Cong. § 2732 (2003).

13. Compare William Li, Note, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on the Publishers of Violent Video*

regulated as an exception to First Amendment protection¹⁴ and whether manufacturers of video games can be liable in tort for violent acts committed by children who emulate a game.¹⁵ In the wake of several federal court rulings finding that video games are protected expression within the meaning of the First Amendment,¹⁶ this article will focus on whether the government will be able to meet the requirements of the First Amendment when it attempts to ban the sale of violent video games to minors.

This note will focus on the recent decision in *Interactive Digital Software Assoc. vs. St. Louis County* and the effect it will have on future legislative attempts to restrict the sale of these games to minors. Part II of this note will discuss prior cases struggling to determine whether video games were a medium of expression protected by the First Amendment. Part III will examine the *St. Louis* decision, focusing on the court's determination that First Amendment protection encompasses video games. Part IV of the note will argue that legislative efforts to restrict a minor's purchase of these games should be deemed unconstitutional, considering that such efforts fail to survive heightened scrutiny. The government is unable to prove actual harm to support a compelling interest because the available research on the effects of violent video games has not provided evidence of a causal relationship between video game exposure and youth violence. In addition, because people over the age of eighteen make the vast majority of video game purchases, no

Games, 45 ARIZ. L. REV. 467 (Summer 2003), with Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. REV. MICH. ST. U.- DETROIT C. L. 51 (2003).

14. Scott A. Pyle, Note, *Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance That Passes Constitutional Muster*, 37 VAL. U. L. REV. 429 (2003); Saunders, *supra* note 13.

15. *James v. Meow Media, Inc.*, 300 F.3d 683 (2002); David C. Kiernan, Note, *Shall the Sins of the Son Be Visited Upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L. J. 207, (2000); Li, *supra* note 13; Stephen G. Nesbitt, Note, *James v. Meow Media, Inc.: When Life Imitating Art Goes Awry, Should We Silence Its Expression?*, 30 N. KY. L. REV. 229 (2003).

16. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Video Software Dealers Ass'n v. Maleng*, No. C03-1245L (Order granting Plaintiff's Mot. for Prelim. Inj. 9), available at <http://www.mediacoalition.org/legal/Maleng/order%20granting%20plaintiff%20motion%20for%20preliminary%20injunction.pdf>.

regulation will be able to show that it is necessary to alleviate the “harm,” reducing children’s access to violent interactive media, because the research indicates that this is not how children are gaining access to the games. Part V will discuss, in further detail, the new and pending legislative efforts to ban minors’ purchase of video games with violent content and the Constitutional hurdles these efforts face.

II. Video Games as “Expression” Within the Meaning of the First Amendment

Video game jurisprudence has evolved over the past twenty years, recognizing that the games themselves have advanced into elaborate works containing extensive character development, plot and themes.¹⁷

In *America’s Best Family Showplace Corp. v. City of New York*, the plaintiff challenged several New York City zoning and licensing laws, which restricted the number of coin-operated video games that could be contained in a restaurant.¹⁸ The Court was not persuaded that video games were a form of expression and did not grant them First Amendment protection.¹⁹ It recognized that entertainment could be protected speech but went on to state “it seems clear that before entertainment is accorded First Amendment protection there must be some element of information or some idea being communicated. That element is clearly lacking here.”²⁰ The court then characterized video games as “pure entertainment” and likened them to a game of pinball or chess.²¹

Almost ten years later, in *Rothner v. City of Chicago*, the Seventh Circuit examined whether a Chicago ordinance that prohibited businesses from allowing children under the age of seventeen to use arcade games between 8:00 am and 3:00 pm on school days infringed on an arcade operator’s First Amendment

17. In summarizing past decisions addressing First Amendment protection for video games, the note will only discuss major cases to highlight the progression of video games as protected speech. For more detailed background information see generally Li, *supra* note 13 and Saunders, *supra* note 13.

18. 536 F. Supp. 170, 171 (E.D.N.Y. 1982).

19. *Id.* at 173.

20. *Id.*

21. *Id.* at 174.

rights.²² The court did not rule on the question of whether video games were protected speech, because it decided that even if they were protected, the city had enacted a valid time, place or manner restriction on expression.²³ Instead, the court felt the city's interest in ensuring that its children received an education was important enough to warrant the intrusion, that the ordinance was narrowly tailored and left open alternative channels for communication.²⁴

A federal court finally had the occasion to re-evaluate video games as "expression" within the meaning of the First Amendment in *American Amusement Machine Assoc. v. Kendrick*.²⁵ *Kendrick* involved an Indianapolis ordinance that barred minors' access to violent arcade games.²⁶ The district court found that video games, even some of the "violent" ones, were protected speech.²⁷ It then evaluated the ordinance, however, according to the standard of whether the city had a reasonable basis for enacting it.²⁸ The court felt that the violent material could be classified as obscene to minors and evaluated the ordinance in accordance with the Supreme Court holding in *Ginsberg v. New York*.²⁹

On appeal, the Seventh Circuit ruled that even children have First Amendment rights and that video game violence could not be classified as obscenity, because Indianapolis sought to proscribe the conduct not for its offensiveness, but for the harmful effect it had on minors.³⁰ The court, therefore, required the government to show a compelling interest before it could restrict the games.³¹ The Seventh Circuit found that Indianapolis was not able to show a compelling interest for the ordinance

22. 929 F.2d 297, 298 (7th Cir. 1991).

23. *Id.* at 303.

24. *Id.* at 303-04.

25. 244 F.3d 572 (7th Cir. 2001).

26. *Id.* at 573.

27. *Am. Amusement Mach. v. Cottey*, 115 F. Supp. 2d 943, 954 (S.D. Ind. 2000), *rev'd sub nom. Kendrick*, 244 F.3d at 580.

28. *Id.* at 962.

29. *Id.* at 961-62. In *Ginsberg* the Supreme Court upheld the constitutionality of a New York obscenity law that was broader in scope for children than adults and determined that the state could define obscenity in a variable manner. 390 U.S. 629, 636-37 (1968).

30. *Kendrick*, 244 F.3d at 572.

31. *Id.* at 576.

because the studies submitted did not show “that violent video games are any more harmful to the consumer or to the public safety than violent movies.”³² As these cases reveal, video game jurisprudence has progressed from the view that video games do not contain expression, towards an acceptance that at least some video games contain enough expressive elements to bring them within the purview of the First Amendment.

III. Interactive Digital Software Assoc. v. St. Louis County

A. *Facts of the case*

The plaintiffs were companies and associations that created, published, or sold video, computer, and arcade games.³³ They brought suit against St. Louis County to prevent the enactment of a St. Louis ordinance they believed violated their First Amendment rights.³⁴ The preamble to the ordinance stated that violence by children had become a severe threat³⁵ and pointed to studies linking violent video games and antisocial behavior.³⁶ St. Louis County felt that it had a compelling interest to enact the ordinance to protect the health of children and assist parents in controlling the games to which their children could be exposed.³⁷ The enacted ordinance read, “[i]t shall be unlawful knowingly to sell or rent a video game which is harmful to a minor unless that minor is accompanied by a parent or guardian who consents to the purchase or sale.”³⁸ The ordinance also required owners to segregate those games that were “harmful to minors,” designate the area as “Restricted-17” and made it a crime for any person to knowingly allow a minor

32. *Id.* at 579.

33. *St. Louis*, 200 F. Supp. 2d. at 1129 (“The plaintiffs were Interactive Digital Software Association, Missouri Retailers Association; Video Software Dealers Association, American Amusement Machine Association, Amusement & Music Operators Association, Interactive Entertainment Merchants Association, BFC Enterprises, Inc., J.S. Morris and Sons Novelty Company, Vending Enterprises and Wonder Novelty Company.”).

34. *Id.*

35. *Id.* (citing St. Louis County, Mo., Ordinance 20,193 pmb. (Oct. 26, 2000), referencing recent school shootings in Columbine, Colorado; Jonesboro, Arkansas; and Paducah, Kentucky).

36. *Id.*

37. *St. Louis*, 200 F. Supp. 2d at 1129-30 (citing St. Louis County, Mo., Ordinance 20,193 pmb. (Oct. 26, 2000)).

38. St. Louis County, Mo., Ordinance 20,193 (Oct. 26, 2000).

to enter into a restricted area.³⁹ Finally, the St. Louis ordinance contained a rebuttable presumption that “video games rated ‘M’ or ‘AO’ by the Entertainment Software Ratings Board (“ESRB”)⁴⁰ were harmful to minors.”⁴¹

The plaintiffs filed the action seeking a declaratory judgment that the ordinance was unconstitutional.⁴² They argued primarily that the statute “improperly restrict[ed] speech protected by the First Amendment.”⁴³ They supported this argument by stating that video games were speech and that the ordinance was a content-based restriction on speech, requiring St. Louis to meet the test of strict scrutiny.⁴⁴ The plaintiffs further argued that St. Louis had not met this burden, because it did not have a compelling interest for enacting the statute and the ordinance was not narrowly tailored. Finally, they also argued that the ordinance was impermissibly vague.⁴⁵

B. *The District Court decision*

The plaintiff has the burden of proving First Amendment application to a medium and there is no presumption of First Amendment protection.⁴⁶ The district court relied predominantly on *America’s Best* and required “at least some type of communication of ideas in that medium” before it would be

39. *Id.*

40. The ESRB was established in 1994 as the self-regulatory body of the interactive entertainment software industry. See generally ESRB, ABOUT ESRB, at <http://www.esrb.org/about.asp>. The Entertainment Software Association founded the ESRB to monitor computer software, entertainment software, video games and computer games. *Id.* The ESRB’s responsibilities include applying and enforcing ratings, advertising guidelines and online privacy principles. *Id.* Games are rated either as “EC-Early Childhood,” “E-Everyone,” “T-Teen,” “M-Mature” or “AO-Adults Only.” ESRB, ESRB GAME RATINGS: GAME RATING AND DESCRIPTOR GUIDE, at http://www.esrb.org/esrbratings_guide.asp#symbols. An “M” rating means the title has “content that may be suitable for persons ages 17 and older. Titles in this category may contain mature sexual themes, more intense violence and/or strong language.” *Id.* An “AO” rating has “content suitable only for adults. Titles in this category may include graphic depictions of sex and/or violence. Adult Only products are not intended for persons under the age of 18.” *Id.*

41. St. Louis County, Mo., Ordinance 20,193 (Oct. 26, 2000).

42. *St. Louis*, 200 F. Supp. 2d at 1128.

43. *Id.* at 1131.

44. *Id.*

45. *Id.*

46. *Id.* at 1132-33.

granted protection.⁴⁷ The court characterized prior decisions as “almost unanimously [holding] that video games lacked the expressive element necessary to trigger the First Amendment.”⁴⁸ It then dismissed the recent decision in *Kendrick* as unpersuasive, reasoning that the Seventh Circuit was only affirming the decision of the district court on that point⁴⁹ and was not tackling the issue directly. As a result, the Seventh Circuit decided that some video games were protected, but the medium as a whole was not.⁵⁰ The “First Amendment does not allow us to review books, magazines, motion pictures or music and decide that some of them are speech and some of them are not.”⁵¹ After reviewing the four video games presented by St. Louis County,⁵² the court did not find any conveyance of ideas or expression that could amount to speech, likening the games to board games instead of motion pictures.⁵³ The court stated that games are not entitled to constitutional protection merely because technology transforms them into video form, using the example that Bingo is not entitled to First Amendment protection, therefore, its video counterpart should not be given protection.⁵⁴ The district court ignored the importance of the scripts that were submitted by the plaintiffs because it felt that every creation starts with a

47. *St. Louis*, 200 F.Supp. 2d at 1133.

48. *Id.* (citing *America's Best*, 536 F. Supp. at 173-74).

49. The district court's reasoning was as follows:

Based on the evidence in this record, the court finds that at least some contemporary video games include protected forms of expression. The court cannot deny a preliminary injunction based on the City's sweeping theory that video games simply do not fall within the scope of the First Amendment. The court has no difficulty determining that any speech elements of “Silent Scope 2,” “The House of the Dead 2,” and several of the other games described in the record are relatively inconsequential — perhaps even so inconsequential as to remove the game from the protection of the First Amendment. However, at least some games are protected by the First Amendment.

Cotley, 115 F. Supp. 2d at 954.

50. *St. Louis*, 200 F. Supp. 2d at 1134.

51. *Id.*

52. The County submitted videotapes of Resident Evil, Mortal Kombat, Doom and Fear Effect. All of these games are rated Mature by the Entertainment Software Rating Board. The content descriptors for these games indicate that they contain violence, blood and gore. ESRB, ESRB GAME RATINGS: GAME RATING AND DESCRIPTOR GUIDE, at http://www.esrb.org/esrbratings_guide.asp#symbols.

53. *St. Louis*, 200 F. Supp. 2d at 1134.

54. *Id.*

concept and it is “possible to find some kernel of expression in almost every activity . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”⁵⁵ In addition, the Court had to evaluate whether the final product was expressive; since the games themselves were not submitted, it decided reviewing the scripts alone would be insufficient.⁵⁶ Thus, the Court ruled that video games were not expression within the meaning of the First Amendment and therefore, the government did not have to meet the requirements of strict scrutiny before restricting their sale.⁵⁷

Even though the Court believed the First Amendment did not protect video games, it evaluated the St. Louis ordinance in accordance with the strict scrutiny test normally applied to content-based restrictions on protected speech to see if the law passed constitutional muster.⁵⁸ St. Louis asserted a compelling interest in assisting parents to be the guardians of their children, and the Court believed that parents’ “primary responsibility for children’s well being [was] entitled to the support of laws designed to aid discharge of that responsibility.”⁵⁹ In addition, the Court felt that the government had an independent interest in children’s well being, which was found to be legitimate in the abstract.⁶⁰ The court ruled that St. Louis could “rely on society’s accepted view that violence is harmful to children.”⁶¹ It was not necessary for the County to make a scientific demonstration of the harmful effects of violent video games on minors, since the video game industry imposed its own ratings system, and admitted that there were video games that were not suitable for minors.⁶²

The St. Louis ordinance was found to be narrowly tailored because it regulated only the speech that was necessary to address the compelling interest. “[T]he video game industry is only restricted in conveying their violent ‘message’ to those under seventeen years of age whose parents do not want their

55. *Id.* at 1135 (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)).

56. *Id.*

57. *St. Louis*, 200 F. Supp. 2d at 1135.

58. *Id.* at 1136.

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

60. *Id.*

61. *Id.* at 1137.

62. *St. Louis*, 200 F. Supp. 2d at 1138.

children” exposed to the game.⁶³ Violent video games could be played by a majority of video game purchasers, since a majority of video game purchasers are over seventeen years of age.⁶⁴ Finally, the ordinance makes it “as easy as possible for parents to give their consent.”⁶⁵

The plaintiff’s assertion that the statute was “impermissibly vague, and therefore, [was] likely to restrict a far broader range of video games than even the County would claim it [was] seeking to regulate” was also found to be without merit.⁶⁶ The court described the vagueness test as requiring that “a statute must ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited’ and ‘provide explicit standards for those who apply the statute.’”⁶⁷ In determining vagueness, the court must evaluate the entire text of the ordinance, not just isolated phrases.⁶⁸ After reviewing the ordinance, the District Court ruled that the language used was more precise than that which was used in the statute in *Video Software Dealers Assoc. v. Webster*, which was struck down for failing to define violence.⁶⁹ Unlike *Webster*, the St. Louis ordinance defined graphic violence.⁷⁰ The plaintiffs, however, asserted that the definition of graphic violence raised more questions by using the term “realistic.”⁷¹ The court’s response to this argument was to state that the plaintiffs use that exact language to promote their games and therefore, the term “realistic” should evoke a common understanding.⁷² In addition, the court ruled that the ordinance did not improperly delegate, to

63. *Id.*

64. *Id.*

65. *Id.*

66. *St. Louis*, 200 F. Supp. 2d at 1138.

67. *Id.* at 1139 (quoting *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992)).

68. *Id.* (challenging the phrases “Minors Morbid Interest in Violence,” “Graphic Violence” and “Patently Offensive” as impermissibly vague).

69. *Id.* at 1139-40 (finding the statute impermissibly vague since Missouri argued that it was targeting “slasher videos” but the statute did not define the word “slasher” or even mention it at all).

70. “Graphic Violence shall mean the visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration.” *St. Louis County, Mo., Ordinance 20,193* (Oct. 26, 2000).

71. *St. Louis*, 200 F. Supp. 2d at 1140.

72. *Id.*

the video game industry, the job of determining what games were harmful to minors.⁷³ Even though the ordinance had a rebuttable presumption that games rated “M” or “AO” were classified as harmful to minors, the ordinance also contained a separate definition of “harmful to minors”⁷⁴ that was not based on the rating system.⁷⁵ Thus, the Court denied the plaintiffs’ request for a declaration that the ordinance was unconstitutional and the plaintiffs took appeal to the Eighth Circuit.

C. *The Eighth Circuit’s review*

The Eighth Circuit began its review by noting that the Supreme Court has protected “entertainment, as well as political and ideological speech.”⁷⁶ The Court disagreed with the lower court’s finding that a new medium of expression is required to exhibit a “particularized message” in order to gain constitutional protection.⁷⁷ In direct contradiction to the District Court, the Eighth Circuit’s own review of the record found that the games submitted contained “stories, imagery, ‘age-old themes of literature,’ and messages, ‘even an “ideology,” just as books and movies do.’”⁷⁸ The Eighth Circuit determined that “there [was] no justification for disqualifying video games as speech simply because they are constructed to be interactive,” giving the example of “choose-your-own nightmare” books and pointing out that these types of books could be just as interactive as video games.⁷⁹

73. *Id.*

74.

Harmful to minors shall mean a video game that predominantly appeals to minors’ morbid interest in violence or minors’ prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, lacks serious literary, artistic, political or scientific value as a whole for minors, and contains either graphic violence or strong sexual content.

St. Louis County, Mo., Ordinance 20,193 (Oct. 26, 2000).

75. *St. Louis*, 200 F. Supp. 2d at 1140.

76. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65, 68 (1981)), *reh’g en banc denied*, No. 02-3010, 2003 U.S. App. LEXIS 13782 (8th Cir. July 9, 2003).

77. *Id.*

78. *Id.* (quoting *Kendrick*, 244 F.3d at 577-78).

79. *Id.* at 957-58.

After finding that video games were a form of protected speech, the Court explained that a content-based restriction is presumptively invalid and the government must meet the test of strict scrutiny to uphold the law.⁸⁰ The Eighth Circuit's review revealed that St. Louis County had not met the burden of showing that the "ordinance [was] necessary to serve a compelling state interest and that it [was] narrowly tailored to achieve that end."⁸¹ In evaluating St. Louis's interest in protecting the well being of minors,⁸² the Court explained that the interest could be compelling, but not in the abstract.⁸³ The County had to show that the harm was real, not just conjectural.⁸⁴ There was no evidence in the record to support the conclusion that exposure to violent video games caused harm to minors' psychological health.⁸⁵ The "small number of ambiguous, inconclusive, or irrelevant (conducted on adults, not minors) studies" submitted were not enough to support such a conclusion.⁸⁶ The Court characterized Dr. Anderson's study as a "vague generality" because the "immediate" increase in aggression he reported to have found had not been studied further to see if there were any long-term effects of exposure.⁸⁷ The rest of the record consisted of statements from city council members and a high school principal with no information to demonstrate a link between video game violence and negative effects in minors.⁸⁸ The Eighth Circuit concluded that "the County may not simply surmise that it is serving a compelling state interest because 'society in general believes that continued exposure to violence can be harmful to children.'"⁸⁹

After determining that the County had not provided sufficient evidence to support a compelling interest in protecting the well being of minors, the Court evaluated the County's contention that it had a compelling interest in assisting parents to pro-

80. *Id.* at 958 (restricting video games that contain violence is classified as a content-based restriction).

81. *St. Louis*, 359 F.3d at 958.

82. St. Louis County, Mo., Ordinance 20,193 (Oct. 26, 2000).

83. *St. Louis*, 329 F.3d at 958.

84. *Id.*

85. *Id.*

86. *Id.* at 959.

87. *Id.* at 958-59.

88. *St. Louis*, 329 F.3d at 959.

89. *Id.* (quoting *St. Louis*, 200 F. Supp. 2d at 1137).

tect their children.⁹⁰ The Eighth Circuit criticized the County's reliance upon *Ginsburg v. New York*, because, in that case, the Supreme Court utilized the rational basis standard of review⁹¹ and not the higher standard of strict scrutiny appropriate for protected speech.⁹² "Nowhere in *Ginsberg* (or any other case that we can find, for that matter) does the Supreme Court suggest that the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to governments to regulate what minors read and view."⁹³

The court instead referred to the Supreme Court's directive in *Erznoznik v. City of Jacksonville* when it said that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."⁹⁴

In summary, the Eighth Circuit's decision confirmed that video games constitute protected speech within the meaning of the First Amendment, thereby creating heightened requirements before a government may enact legislation restricting their sale.⁹⁵ St. Louis was not able to meet the requirements of strict scrutiny because the County failed to prove a compelling interest in order to justify the content-based restriction on protected speech.⁹⁶ As a result, the Court did not need to pass judgment on whether the ordinance was unconstitutionally vague or whether the lower court erred when it dismissed the case *sua sponte*.⁹⁷ The Eighth Circuit reversed the case and ordered the issuance of an injunction barring enforcement of the

90. St. Louis County, Mo., Ordinance, 20,193 pmb. (Oct. 26, 2000).

91. *Ginsberg* dealt with a stationary store operator who was convicted of selling obscenity to a 16-year old boy. 390 U.S. at 630. As obscenity is an exception to First Amendment protection, the Supreme Court was addressing whether it was reasonable for a government to have a broader ability to restrict access of children to the material. *Id.* at 639.

92. *St. Louis*, 329 F.3d at 959.

93. *Id.* at 959-60.

94. *Id.* at 960 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975)).

95. *Id.* at 958.

96. *Id.* at 960.

97. *St. Louis*, 329 F.3d at 960.

ordinance.⁹⁸ A subsequent request for rehearing *en banc* was denied.⁹⁹

IV. Laws Restricting Minors from Purchasing Violent Video Games Cannot Meet the Requirements of Strict Scrutiny

A. *The government cannot demonstrate a compelling justification for this type of legislation because video game research has not revealed a causal link between violent video games and antisocial behavior in children.*

The government's stated purpose in enacting this type of legislation is to prevent youth violence.¹⁰⁰ One can infer from this purpose that the government believes exposure to violent video games causes violent behavior in children who play them. The evidence, however, suggests an alternate conclusion: that youth violence is a result of a number of different factors including the availability of guns and issues of social class and poverty, but not video game playing.¹⁰¹

[A]ll the games we're talking about here are sold all over the world, and it is of note that the incidence of violent crime, the incidence of murder, the incidence of gun violence in this country dwarfs those in other countries by a factor of 10, 20, 30 times. So, there are deeper issues.¹⁰²

The U.S. Office of Juvenile Justice and Delinquency Prevention found that between the years of 1994 and 1999 there was a dramatic decrease in violent crime among people ages fifteen to

98. *Id.*

99. *Interactive Digital Software Ass'n v. St. Louis County*, 2003 U.S. App. LEXIS 13782, at *1 (8th Cir. July 9, 2003).

100. *St. Louis County, Mo.*, Ordinance 20,193 pmbl. (Oct. 26, 2000).

101. VIOLENCE, *supra* note 1; Kramer, *supra* note 1, at 123. For an alternative argument as to the sufficiency of these studies see Libby Hampson, Note, *The Eighth Circuit Holds that a City Ordinance Restricting the Provision of Violent Video Games to Minors without Parental Consent is an Unconstitutional Violation of Free Speech: Interactive Digital Software Association v. St. Louis County, Missouri*, 8 COMP. L. REV. & TECH. J. 435, 438-42 (2004).

102. FED. TRADE COMM'N, MKTG. VIOLENT ENTMT TO CHILDREN: A WORKSHOP ON INDUSTRY SELF-REGULATION 248 (Oct. 29, 2003) [hereinafter FTC WORKSHOP] (statement of Doug Lowenstein, President, Entertainment Software Association), available at <http://www.ftc.gov/bcp/workshops/violence/transcript.pdf>.

thirty-nine.¹⁰³ The largest change in the crime rate was for children aged fifteen to seventeen, with a 39% decrease.¹⁰⁴ The decrease in youth violent crime coincided with a 50% increase in the sale of computer and video games during that time period.¹⁰⁵ Logic suggests that if violent video game play caused youth violence there would have been increases in the rates of youth violence for the period between 1994 to 1999, not the decreases that actually occurred.

“[M]ost researchers are reluctant to make definitive judgments at this point in time about the impact of violent electronic games on youth because of the limited amount of empirical analysis that has so far taken place.”¹⁰⁶ This statement accurately sums up the state of research studying violent video games. The Eighth Circuit in *St. Louis* was in accord with this statement, since it concluded that that the studies it reviewed were ambiguous, inconclusive or irrelevant, and thus insufficient to support the County’s compelling interest.¹⁰⁷

Several studies have attempted to assess whether there is a link between violent video games and aggressive behavior. One such study was aimed at assessing the links between a child’s preference for violent games and certain traits, such as academic performance, social acceptance and self-esteem.¹⁰⁸ The 1996 Funk and Buchman study reported that the preference for violent video games was correlated with adjustment problems in some groups of children.¹⁰⁹ The authors, however, went on to state that the research “cannot determine causal relationships”¹¹⁰ and cannot be used to show that the play of these games caused the problems in the children. Other researchers have downplayed the results of this study, noting that some

103. INTERACTIVE DIGITAL SOFTWARE ASS’N, VIDEO GAMES & YOUTH VIOLENCE: EXAMINING THE FACTS 6 (2001) (citing U.S. Dep’t of Justice Office of Juvenile Justice and Delinquency Program), available at <http://www.theesa.com/IDSAfinal.pdf>.

104. *Id.*

105. *Id.*

106. *Id.* at app. A 13.

107. *St. Louis*, 329 F.3d at 959.

108. *The Impact of Interactive Violence on Children: Hearing Before the Senate Comm. on Commerce, Sci. and Transp.*, 106th Cong. (2000) (written testimony of Jeanne B. Funk, Ph. D.), reprinted at 2000 WL 11070123.

109. *Id.*

110. *Id.*

troubled children seek out video games as a coping mechanism and this could be an alternative explanation for the results.¹¹¹

One of the most prominent studies used to support the viewpoint that violent video games are harmful to children is the 2000 study by Anderson and Dill.¹¹² This study looked at the impact of video games on college students.¹¹³ Anderson and Dill reported a positive correlation between violent video game play, aggression and delinquency.¹¹⁴ Critics of this study have noted, "highly aggressive youngsters are attracted to violent video games."¹¹⁵ Furthermore, the aggression measure in the study, the volume of a horn one opponent chose to blow at the other, does not necessarily equate to real life aggression, as in one participant intending to cause injury to another.¹¹⁶ In addition, the other aggression measure was how fast students who had played a violent video game could notice aggressive words flashed across a screen.¹¹⁷ The researchers concluded from this measure that "the violent video game primed aggressive thoughts" in the students.¹¹⁸ Critics of the results have brought into question whether reacting to an aggressive word on screen equates to having aggressive thoughts of one's own.¹¹⁹ Finally, Anderson and Dill themselves admit that "causal statements are risky at best. It could be that the obtained video game violence links to aggressive and nonaggressive delinquency are wholly due to the fact that highly aggressive individuals are especially attracted to violent video games."¹²⁰

Other researchers criticize the current evidence of the effects of violent video games. Goldstein "argues that a common

111. Goldstein testimony, *supra* note 5.

112. Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCHOL. 772 (2000).

113. *Id.* at 776. The *St. Louis* Court pointed out that this study had little applicability in determining the effects of video game play on minors since it was conducted on college age students. 329 F.3d at 959.

114. Anderson & Dill, *supra* note 112, at 787.

115. Goldstein testimony, *supra* note 5 (citing Jeffrey Goldstein, *Why We Watch*, in *WHY WE WATCH: THE ATTRACTIONS OF VIOLENT ENTERTAINMENT* (Jeffrey Goldstein ed., 1998)).

116. *Id.*

117. Anderson & Dill, *supra* note 112, at 786.

118. *Id.*

119. Goldstein testimony, *supra* note 5.

120. Anderson & Dill, *supra* note 112, at 782.

flaw in most of the experimental studies is the failure to distinguish between aggressive play and aggressive behavior."¹²¹ Most studies, he finds, measure aggressive play instead of aggressive behavior, which is defined as an intent to cause actual harm to someone.¹²² He further points out that in the few studies that measure the difference between aggressive play and aggressive behavior violent video games only increase aggressive play and do not affect aggressive behavior.¹²³ "[M]edia may give form to aggressive behavior. But I am aware of no evidence that the media motivate individuals to commit aggression if they are not otherwise inclined to do so."¹²⁴

In a Surgeon General's report examining the causes of youth violence it was noted that the "findings to date suggest that media violence has a relatively small impact on violence."¹²⁵ Other researchers have noted that too much emphasis has been placed on media violence and have argued that it is more likely a symptom of the increase in our violent behavior than a cause for it.¹²⁶

Although higher rates of violence in the United States as compared with other industrialized nations may be blamed on media (although the United States shares much of its media with other nations), a more likely catalyst for violent behavior within the United States may be Americans' easy access to handguns (a circumstance not shared with most other industrialized nations).¹²⁷

In addition, the State of Washington's Department of Health concluded "that the research evidence is not supportive

121. FED. TRADE COMM'N, MKTG. VIOLENT ENTMT'T TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAMES INDUSTRIES [hereinafter FTC REVIEW] app. A 12 (Sept. 2000), available at <http://www.ftc.gov/reports/violence/appendicesviorpt.pdf> (citing Goldstein testimony, *supra* note 5).

122. Goldstein testimony, *supra* note 5.

123. *Id.* at 7 (citing Joel Cooper & Diane Mackie, *Video Games and Aggression in Children*, 16 J. APPLIED SOC. PSYCHOL. 726-744 (1986); Joop Hellendoorn & Frits J. H. Harinck, *War Toy Play and Aggression in Dutch Kindergarten Children*, 6 SOC. DEV. 340-54 (1997).

124. *Id.* at 9.

125. SURGEON GEN., YOUTH VIOLENCE ch. 4 app. 4-b § 3 (2001), available at <http://www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4bsec3.html>.

126. Christopher J. Ferguson, *Media Violence: Miscast Causality*, AM. PSYCHOLOGIST 446, 447 (June/July 2002).

127. *Id.*

of a major public concern that violent video games lead to real-life violence.”¹²⁸ Finally, at a Federal Trade Commission workshop held on October 29, 2003, Doug Lowenstein, president of the Entertainment Software Association,¹²⁹ stated that he “[w]as at a conference in Australia about a month ago and there were three scientists, no affiliation with the video game industry, who were roundly critical of some of the research that purports to show adverse effects” from playing violent video games.¹³⁰

Based on the overview of video game research to date it is clear that researchers are not at a point where they can confidently state that video games cause violent and anti-social behavior in children who play them. In fact, several governmental studies have pointed out that violent behavior has many causes, and that exposure to violent media is not a predominant factor.

Although you may intuitively believe that there is some kind of causal link, the reality is that . . . according to the Surgeon General, according to the State of Washington, according to the Government of Australia, there are plenty of authoritative sources that say, when you look at that long list [of why a human being might commit a criminal act], video games aren’t the top reasons for those types of acts. It’s an easy-out . . .¹³¹

It is unlikely that continued research will result in proof of a causal link. Without this connection, it will be difficult to demonstrate actual harm and to prove to a court that there is a compelling government interest justifying the restriction of protected speech. More importantly, however, frustration of legislative attempts to restrict the sale of violent video games to minors should force society to redirect its efforts and address

128. LILLIAN BENSLEY & JULIET VAN EENWYK, WASH. STATE DEP’T OF HEALTH OFFICE OF EPIDEMIOLOGY, VIDEO GAMES AND REAL-LIFE AGGRESSION: A REVIEW OF THE LITERATURE 3 (2000) (executive summary), available at <http://www.doh.wa.gov/cfh/Videoresearch.doc>.

129. Previously known as the Interactive Digital Software Association. See *supra* note 33.

130. FTC WORKSHOP, *supra* note 102 (statement of Doug Lowenstein, President, Entertainment Software Association), available at <http://www.ftc.gov/bcp/workshops/violence/transcript.pdf>.

131. FTC WORKSHOP, *supra* note 102 (statement of Janice Vance, President, Entertainment Software Rating Board), available at <http://www.ftc.gov/bcp/workshops/violence/transcript.pdf>.

bullying, social class, and poverty, proven root causes of youth violence.¹³² Only after an examination of these causes will society be able to take measures to prevent the recurrence of such tragedies as the Columbine and Jonesboro school shootings.¹³³

B. *The government is unable to show that the restriction will actually alleviate the "harm" since studies reveal that an overwhelming majority of video game purchases are made by adults.*

Laws aimed at banning the sale and rental of video games to minors based on the violent content of the games cannot meet the requirements of strict scrutiny since they are unable to show that the legislation is necessary to achieve the compelling interest. The necessary requirement of strict scrutiny means that the government must show that "the regulation will in fact alleviate [the] harm in a direct and material way."¹³⁴ In general, a legislature's stated purpose in enacting these laws is to reduce or prevent minors' access to violent video games, which the legislature believes are harmful to minors' well-being. In order to meet the necessary prong of strict scrutiny, the government must show that the legislation will actually prevent minor's access to violent video games.

A study commissioned by former President William J. Clinton to evaluate self-regulation in the entertainment industry shows that adults make an overwhelming majority of video game purchases.¹³⁵ "Parents report substantial involvement in the selection and purchase of movies, games, and music."¹³⁶ The report showed that parents are involved in the purchase of

132. See SURGEON GEN., *supra* note 125, at ch. 4 (2001), available at <http://www.surgeongeneral.gov/library/youthviolence/chapter4/sec1.html> (discussing the risk factors for youth violence).

133. Ferguson, *supra* note 126, at 446.

134. Video Software Dealers Ass'n v. Maleng, No. C03-1245L (Order granting Plaintiff's Mot. for Prelim. Inj. 9), available at <http://www.mediacoalition.org/legal/Maleng/order%20granting%20plaintiff%20motion%20for%20preliminary%20injunction.pdf>.

135. FTC REVIEW, *supra* note 121, at app. F 8 (tbl. 2), available at <http://www.ftc.gov/reports/violence/Appen%20F.pdf> (table shows that adults are involved in 83% of video game sales for children).

136. *Id.* at 6.

83% of video games¹³⁷ and children reported that parents were involved with 72% of game purchases.¹³⁸ In addition, research by the video game industry shows that “over 90 percent of console games are purchased by people 18 or above and over 97 percent of PC games are purchased by people 18 or above.”¹³⁹ Surveys have shown that of the people under eighteen years of age who purchase video games, 84% obtain parental permission before the purchase.¹⁴⁰ The Federal Trade Commission (“FTC”) report also found that parents were concerned with the violent content of some video games, and therefore restricted game playing as a result of this concern.¹⁴¹

Based on the above statistics, it is clear that if minors are playing violent video games, it is not a result of their purchase of the game without parental knowledge. A majority of children are playing these games as a result of their parents’ purchase of the game for them or with them. Therefore, banning minors from purchasing violent video games will not have the intended effect. The government believes that children who are exposed to violent video games are “harmed.” In order to alleviate the “harm” the government would need to reduce children’s exposure to these games. The legislation will not reduce children’s exposure in either a direct or material way because children are not the ones buying the games.

A better and more effective focus for government would be to work in collaboration with the ESRB to help improve parents’ awareness of the content of video games and the ratings system. A vast majority of parents are the decision makers as to what their children see, hear and play. Video games “all carry lots of descriptors and, ultimately, it’s got to be a parent’s responsibility whether or not they want to bring that product home. It is

137. Meaning that they either make the game purchase or they are with the child when he/she makes the purchase.

138. FTC REVIEW, *supra* note 121, at app. F 8 (tbl. 2), available at <http://www.ftc.gov/reports/violence/Appen%20F.pdf>.

139. Video Software Dealers Ass’n v. Maleng, No. C03-1245L (Def.’s Resp. in Opp’n to Mot. for Prelim. Inj. 21), available at <http://www.mediacoalition.org/legal/Maleng/WA%20response%20to%20plaintiff%20motion%20for%20PI.pdf>.

140. INTERACTIVE DIGITAL SOFTWARE ASS’N, VIDEO GAMES & YOUTH VIOLENCE: EXAMINING THE FACTS 5 (2001), available at <http://www.theesa.com/IDSAfinal.pdf>.

141. FTC REVIEW, *supra* note 121, app. F 18, available at <http://www.ftc.gov/reports/violence/Appen%20F.pdf>.

not ours . . . It's not anybody's"¹⁴² Parents are in a more appropriate position to make decisions as to what exposure is suitable for their children. Each child has individualized needs and a blanket government prohibition does not take into account each child's individual development. Educating parents about the rating system is a simple and effective way to screen out video game violence or other content a parent finds inappropriate for his or her children. Not only are games given a rating based on age suitability, but the games also contain content descriptors, which allow parents to see exactly why the game got the rating that it did.¹⁴³ The Federal Trade Commission has

142. FTC WORKSHOP, *supra* note 102, at 102 (statement of Janice Vance, President, Entertainment Software Rating Board), *available at* <http://www.ftc.gov/bcp/workshops/violence/transcript.pdf>.

143. ESRB, GAME RATINGS: GAME RATINGS & DESCRIPTOR GUIDE, *at* http://www.esrb.org/esrbratings_guide.asp#symbols (last visited Nov. 16, 2004). Parents can tell whether a game will be educational or will include violence, sexual themes, alcohol, etc. *Id.* The definitions of the content descriptors are as follows:

ALCOHOL REFERENCE - Reference to and/or images of alcoholic beverages. ANIMATED BLOOD - Cartoon or pixilated depictions of blood. BLOOD - Depictions of blood. BLOOD AND GORE - Depictions of blood or the mutilation of body parts. CARTOON VIOLENCE - Violent actions involving cartoon-like characters. May include violence where a character is unharmed after the action has been inflicted. COMIC MISCHIEF - Scenes depicting slapstick or gross vulgar humor. CRUDE HUMOR - Moderately vulgar antics, including bathroom humor. DRUG REFERENCE - Reference to and/or images of illegal drugs. EDUTAINMENT - Content of product provides user with specific skills development or reinforcement learning within an entertainment setting. Skill development is an integral part of product. FANTASY VIOLENCE - Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life. GAMBLING - Betting like behavior. INFORMATIONAL - Overall content of product contains data, facts, resource information, reference materials or instructional text. INTENSE VIOLENCE - Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death. MATURE HUMOR - Vulgar and/or crude jokes and antics including "bathroom" humor. MATURE SEXUAL THEMES - Provocative material, possibly including partial nudity. MILD LANGUAGE - Mild references to profanity, sexuality, violence, alcohol, or drug use. MILD LYRICS - Mild references to profanity, sexuality, violence, alcohol, or drug use in music. MILD VIOLENCE - Mild scenes depicting characters in unsafe and/or violent situations. NUDITY - Graphic or prolonged depictions of nudity. PARTIAL NUDITY - Brief and mild depictions of nudity. SEXUAL VIOLENCE - Depictions of rape or other sexual acts. SOME ADULT ASSISTANCE MAY BE NEEDED - Early Childhood Descriptor only. STRONG LANGUAGE - Profanity and explicit references to sexuality, violence, alcohol, or drug use. STRONG LYRICS - Profanity and explicit references to sex, violence, alcohol, or drug use in music. STRONG SEXUAL CONTENT - Graphic depiction of sexual behavior, possibly

praised the ESRB, labeling it “the most comprehensive of the three industry systems”¹⁴⁴ and noting that “there is much in the game industry’s ratings disclosure requirements that merits duplication by others.”¹⁴⁵

The FTC report showed that only 61% of parents were aware of the ESRB rating, and of the 61%, 45% rarely or never used it when deciding what games to purchase.¹⁴⁶ The government’s energy and resources can be more effectively directed to improving these statistics. If the government believes that the violent content in some video games is not suitable for minors, then most likely a parent who has utilized the ratings system will also be of that opinion. Without this shift in focus, statutes barring the purchase of violent video games to minors will be unsuccessful in actually preventing game play by minors, the government’s objective, since adults purchase an overwhelming majority of video games. In order to achieve its goal, the government must educate parents on the content of games and encourage them to utilize rating systems, reviews and other mediums to decide if the game is appropriate for their child.¹⁴⁷

including nudity. SUGGESTIVE THEMES - Mild provocative references or materials. TOBACCO REFERENCE - Reference to and/or images of tobacco products. USE OF DRUGS - The consumption or use of illegal drugs. USE OF ALCOHOL - The consumption of alcoholic beverages. USE OF TOBACCO - The consumption of tobacco products. VIOLENCE - Scenes involving aggressive conflict.

Id. (emphasis in original).

144. FTC REVIEW, *supra* note 121, at 48, available at <http://www.ftc.gov/reports/violence.vioreport.pdf> (referring to the movie, music and game industries).

145. FTC REVIEW, *supra* note 121, at 7, available at <http://www.ftc.gov/reports/violence/mvecrpt0206.pdf>.

146. FTC REVIEW, *supra* note 121, at app. F 3 Tbl. 2, available at <http://www.ftc.gov/reports/violence/mvecrpt0206.pdf>.

147. The ESRB website has what is called a “power search” that allows parents to search within an age suitability for games that have or don’t have specific content descriptors. ESRB, ESRB GAME RATINGS: POWER SEARCH, at http://www.esrb.org/power_search.asp?type=game (last visited Nov. 16, 2004). For example, a parent can search for games rated “T-Teen” and weed out any of those games that contain sexual violence, intense violence and blood and gore. *Id.* Parents can also go to other websites that give more detailed reviews of computer and video games. See, e.g., ELECTRONIC GAMING MONTHLY, HOME PAGE, available at <http://www.egm-mag.com>; GAMESPOT, HOME PAGE, available at <http://www.gamespot.com>.

V. Recent Government Attempts to Restrict Minors from Purchasing “Violent” Video Games

The City of Indianapolis and St. Louis County have been joined by other governmental entities that have passed or are contemplating similar laws aimed to restrict the sale of violent video games to minors.¹⁴⁸ Even in the wake of successful challenges to these statutes in *Kendrick* and *St. Louis*, the State of Washington¹⁴⁹ and the United States House of Representatives¹⁵⁰ are joining the crusade to keep violent video games out of the hands of minors.

A. *The State of Washington’s Violent Video Games Act*

On May 21, 2003, Governor Gary Locke signed into law Washington H.B. 1009.¹⁵¹ “A person who sells, rents, or permits to be sold or rented, any video or computer game they know to be a violent video or computer game to any minor has committed a class 1 civil infraction”¹⁵² The statute defines a violent video or computer game as one that “contains realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.”¹⁵³ Washington states that its compelling interest is to “curb hostile and antisocial behavior in Washington’s youth and to foster respect for public law enforcement officers” by restricting the sale of video games to minors.¹⁵⁴

A lawsuit was filed by the Video Software Dealers Association in the United States District Court for the Western District

148. Clay Calvert & Robert D. Richards, *The 2003 Legislative Assault of Violent Video Games: Judicial Realities and Legislative Rhetoric*, 11 VILL. SPORTS & ENT. L. FORUM 203, 206-08 (2004) (noting that legislation is pending in Delaware, Michigan, Minnesota, New York, New Jersey, South Carolina and Pennsylvania, and legislation was proposed and died in Arkansas, Florida and Louisiana).

149. WASH. REV. CODE § 9.91.180 (2003).

150. Protect Children from Video Games Sex and Violence Act of 2003, H.R. 669, 108th Cong. § 2732 (2003).

151. XBOX SOLUTIONS, *IDSAs Plans to Challenge Washington State HB 1009 as Unconstitutional*, at <http://www.xboxsolution.com/article803.html> (last visited Nov. 16, 2004).

152. § 9.91.180(1).

153. § 9.91.180(4).

154. H.B. 1009 § 1, 58th Leg., 1st Reg. Sess. (Wash. 2003).

of Washington challenging the constitutionality of the statute and requesting a preliminary injunction to prevent it from taking effect on July 25, 2003. On July 10, 2003, Judge Lasnik granted the order for a preliminary injunction.¹⁵⁵ Lasnik used the *St. Louis* case to support his conclusion that video games were protected speech.¹⁵⁶ He felt the plaintiffs had raised serious questions regarding the constitutionality of the statute because the studies presented by the defendants did not seem to show “real harm” to minors.¹⁵⁷

The plaintiffs filed for summary judgment, arguing that the State of Washington did not have a compelling interest in enacting the regulation, that it was not narrowly tailored and that it was unconstitutionally vague.¹⁵⁸ On July 15, 2004, Judge Lasnik granted the motion for summary judgment.¹⁵⁹ He permanently enjoined enforcement of the statute, granting all three contentions of the plaintiffs.¹⁶⁰ In his decision, he agreed with the Eighth Circuit ruling that video games were protected speech within the meaning of the First Amendment.¹⁶¹ “The games at issue in this litigation . . . involve intricate, if obnoxious, story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experience.”¹⁶² Judge Lasnik also pointed out that “it is the nature and effect of the message being communicated” that resulted in the state wanting to legislate in the area.¹⁶³

The Court went on to evaluate whether the State of Washington had a compelling interest in enacting the Act. Judge Lasnik admitted that the defendants had offered enough evidence to reasonably infer that depictions of violence in the media may have some effect on the level of aggression of some

155. Video Software Dealers Ass’n v. Maleng, No. C03-1245L (Order granting Plaintiff’s Mot. for Prelim. Inj. 9), available at <http://www.mediacoalition.org/legal/Maleng/order%20granting%20plaintiff%20motion%20for%20preliminary%20injunction.pdf>.

156. *Id.* at 4.

157. *Id.* at 9.

158. Video Software Dealers Ass’n v. Maleng, No. C03-1245L (Plaintiffs’ Mot. for Summ. J.), available at 2004 WL 1618547.

159. *Maleng*, 325 F. Supp. 2d at 1191.

160. *Id.*

161. *Id.* at 1184.

162. *Id.*

163. *Id.*

viewers and that video games' interactive nature could potentially be more harmful than other non-interactive mediums.¹⁶⁴ Nonetheless, the court found "that the current state of the research cannot support the legislative determinations . . . because there has been no showing that exposure to video games that 'trivialize violence against law enforcement officers' is likely to lead to actual violence against law enforcement officers."¹⁶⁵ In reaching this conclusion, Judge Lasnik noted that the State of Washington's own Department of Health concluded that there was no major concern of violent video games leading to real-life youth violence¹⁶⁶ and that the video game studies offered by the defendants did not prove causation or an increase in real-life aggression.¹⁶⁷

As an additional reason to strike down the Act, the Court found that section 9.91.180 of the Washington Revised Code was not narrowly tailored to further the government's interest because the Act impacted more speech than necessary to achieve the asserted goal.¹⁶⁸ Even though the defendants asserted that extremely violent video games cause aggression resulting in the need for government regulation, Judge Lasnik pointed out that the Act did not attempt to regulate video games based on the amount of violence contained or the type of depictions.¹⁶⁹ Instead, the Act regulates all games that contain depictions of harm to a "public law enforcement officer."¹⁷⁰ In so doing, the Act would end up regulating more games than necessary just because they contain minor violence against a public law enforcement officer, and in certain circumstances would still not reach some graphically violent games if the victim was not an officer.¹⁷¹

Finally, the Act was found to be unconstitutional because it was impermissibly vague.¹⁷² "Legislative enactments must 'give the person of ordinary intelligence a reasonable opportu-

164. *Maleng*, 325 F. Supp. 2d at 1188.

165. *Id.*

166. *Id.*; BENSLEY & VAN EENWYK, *supra* note 128, at 3.

167. *Maleng*, 325 F. Supp. 2d at 1188.

168. *Id.* at 1189.

169. *Id.* at 1190.

170. *Id.* (quoting § 9.91.180 (2003)).

171. *Id.*

172. *Maleng*, 325 F. Supp. 2d at 1191.

nity to know what is prohibited, so that he may act accordingly.’¹⁷³ Since the defendants refused to identify the range of video games the state sought to regulate, the Court found that there was a substantial risk that the plaintiffs’ exercise of their First Amendment rights would be chilled.¹⁷⁴ Specifically, the Act did not define “realistic,” “aggressive,” or “public law enforcement officer” and could result in retailers and video game manufacturers avoiding a wider scope of games than those made unlawful by the Act.¹⁷⁵

B. *Protect Children from Video Games Sex and Violence Act of 2003*

“Whoever sells at retail or rents, or attempts to sell at retail or rent, to a minor any video game that depicts nudity, sexual content, or other content harmful to minors, shall be fined”¹⁷⁶ This bill was introduced by Representative Joe Baca from California on February 11, 2003, and is currently with the Subcommittee on Crime, Terrorism and Homeland Security to which it was referred on March 6, 2003. The bill has forty-two cosponsors. The bill defines “content harmful to minors” as

video game content that predominantly appeals to minors’ morbid interest in violence or minors’ prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and lacks serious literary, artistic, political, or scientific value for minors, and contains—(A) graphic violence; (B) sexual violence; or (C) strong sexual content.¹⁷⁷

173. *Id.* at 1190 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

174. *Id.*

175.

Would a game built around *The Simpsons* or the *Looney Tunes* characters be ‘realistic’ enough to trigger the Act? Is the level of conflict represented in spoofs like *The Dukes of Hazard* sufficiently ‘aggressive’? Do the Roman centurions of *Age of Empires*, the enemy officers depicted in *Splinter Cell*, or the conquering forces of *Freedom Fighters* qualify as ‘public law enforcement officers’?

Id.; § 9.91.180 (4).

176. H.R. 669.

177. § 2731.

H.R. 669 faces several constitutional hurdles. It is almost exactly the same in its definition of “harmful to minors” as the Indianapolis ordinance found unconstitutional in *Kendrick* and the St. Louis County ordinance found unconstitutional in *St. Louis*.¹⁷⁸ The bill is also impermissibly vague. The definition of “content harmful to minors” does not evoke a common understanding. It would not be easy for the average person to determine what games lack “serious literary, artistic, political, or scientific value for minors,” are “patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors,” and contain either graphic violence, sexual violence or strong sexual content.¹⁷⁹ For example, games such as the Medal of Honor series,¹⁸⁰ Tom Clancy’s Rainbow Six series¹⁸¹ or the Socom: US Navy Seals series¹⁸² can be said to have value for minors in teaching them about United States history or the workings of the military. These games also contain what would be characterized as graphic violence by the legislation. House Bill 669 defines graphic violence as “the visual depiction of serious injury to human beings, actual or virtual, including aggravated assault,

178. Compare 244 F.3d at 573, with 329 F.3d at 960.

179. § 2731.

180. The Medal of Honor series is a first-person shooter game set during World War II. The most recent game in the series, Medal of Honor: Rising Sun, focuses on the Pacific battles including Pearl Harbor. Brad Shoemaker, GameSpot, *Medal of Honor Rising Sun* (Nov. 12, 2003), at <http://www.gamespot.com/ps2/action/medalofhonorrisingsun/review.html>. Between missions players get to see black and white footage of the war and the video game contains interviews with actual veterans of the war. *Id.* The game is rated T for teens by the ESRB with content descriptor for violence (scenes with aggressive conflict). See ESRB, CHECK THE RATING, at <http://www.esrb.org> (last visited Nov. 16, 2004).

181. The Rainbow six series is a first-person shooter in which players lead an elite group of counter terrorists through tactical missions, including saving hostages. Scott Osborne, GameSpot, *Tom Clancy's Rainbow Six 3: Raven Shield* (Nov. 12, 2003), at <http://www.gamespot.com/pc/action/tomclancysrainbowsix3rs/review.html>. Games in the series have been rated T-Teen and M-Mature for blood and gore and violence. See ESRB, CHECK THE RATING, at <http://www.esrb.org> (last visited Nov. 16, 2004).

182. The Socom series is a third-person shooter series in which the player becomes part of a Navy Seals tactical unit. Ryan MacDonald, GameSpot, *SOCOM: U.S. Navy Seals* (Oct. 27, 2002), at <http://www.gamespot.com/ps2/action/socomusnavyseals/review.html>. Missions involve stealth and there is heavy emphasis on teamwork. *Id.* This series is rated M-Mature for blood and violence. See ESRB, CHECK THE RATING, at <http://www.esrb.org> (last visited Nov. 16, 2004).

decapitation, dismemberment, or death.”¹⁸³ In each of these series, one of a game player’s objectives is to kill opposing armies who are preventing the player from completing a tactical mission, such as saving hostages. The definition of “harmful to minors” in the bill does not make it clear to a video store owner whether these types of games should be allowed to be sold to minors because of their educational value or whether they should be restricted due to their “graphic violence.”

VI. Conclusion

All of the attention placed on violence in movies, television and in video games since the various school shootings in the late nineties has been an overly simplistic and politically expedient way to avoid tougher probing inquiries into the causes of youth violence. It is much easier for people to blame a video game’s violent content for these tragedies than to look inside themselves for the answers. Media attention has not questioned the availability of guns to children or delved into issues of poverty, social class, bullying, and lack of parental supervision and guidance.¹⁸⁴ Instead, legislators, parent groups,¹⁸⁵ and the media have used the entertainment industry as a scapegoat even though many researchers have observed that youth violence existed before the development of entertainment mediums and therefore, cannot be the root cause of the problem.¹⁸⁶ In addi-

183. § 2731.

184. Ferguson, *supra* note 126 at 447; Kramer, *supra* note 1 at 124.

185. See, e.g., Mothers Against Violence in America, *Campaign For A Game Smart America*, at <http://www.mavia.org/news.html> (last visited Oct. 13, 2004); THE PARENT COACHING INSTITUTE, IMPORTANT RESEARCH ON MEDIA VIOLENCE, at http://www.thepci.com/articles/degaetano_MediaViolence.html (last visited Oct. 13, 2004).

186. Ferguson, *supra* note 126, at 446; Li, *supra* note 13, at 467-68.

Armed with guns and homemade bombs, a student went to school and triggered the fire alarm. He killed a janitor, climbed a tower, and fired on bystanders and emergency services personnel, killing two more people and wounding eleven others. A junior high school student who had been bullied for years killed his principal with an M-1A rifle and wounded three other people. Another student went to school with a semiautomatic pistol, 200 rounds of ammunition, and three firebombs. He killed one teacher and wounded another.

Many people would probably think that these appalling incidents happened in the 1990s, when school violence made the national headlines on a regular basis and some people blamed violent video games. These shootings, how-

tion, statistics have shown that youth violence has significantly decreased while video game sales during the same period increased 50%.¹⁸⁷

In the wake of *St. Louis*, legislators and parent organizations will have to re-evaluate their strategy. Legislation must meet the heightened requirements of strict scrutiny before a ban on the sale of violent video games to minors will be found constitutional.¹⁸⁸ Video games will not be able to be restricted without actual scientific proof as to the harm they inflict on children.¹⁸⁹ Based on the available research, it is doubtful that scientists will ever be able to make the necessary connection.¹⁹⁰ If in the future it becomes clear that video games cause youth violence, legislators must then draft legislation that will be able to accomplish their goal, preventing children from playing these games, not just from buying them. Hopefully, legislators will find the requirements of strict scrutiny too difficult to overcome, abandon the cause and redirect their energies. Society must re-examine itself without any preconceived notions as to the "answers" in order to identify the causes of youth violence and provide effective solutions to prevent tragedies such as school shootings in the future.

ever, actually occurred earlier than that. Anthony Barbaro committed the sniper attacks in the first example on December 30, 1974. James Alan Kearbey killed his principal in the second example on January 21, 1985. And Nicholas Elliott committed the third shooting on December 16, 1988. Most notably, these school shootings occurred well before the release of violent video games like 'Doom' and 'Quake.'

(citations omitted). Li, *supra* note 13, at 467-68.

187. INTERACTIVE DIGITAL SOFTWARE ASS'N, *supra* note 140, at 6 (citing U.S. Dep't of Justice Office of Juvenile Justice and Delinquency Prevention), available at <http://www.theesa.com/IDSAfinal.pdf>.

188. *St. Louis*, 329 F.3d at 958.

189. *Id.*

190. Goldstein testimony, *supra* note 5; SURGEON GEN., *supra* note 125, at ch. 4 app. 4-b § 3; BENSLEY & VAN EENWYK, *supra* note 128, at 3.