2010

Section 1: Moot Court

Institute of Bill of Rights Law at The College of William & Mary School of Law

I. Moot Court

In This Section:

Schwarzenegger v. Entertainment Merchants Association

08-1448

Ruling Below: Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), *cert. granted*, Schwarzenegger v. Entm't Merchs. Ass'n, 2010 U.S. LEXIS 3573 (2010).

Governor Schwarzenegger signed into law an Act that imposes civil penalty of up to $1,000 on any person that sold or rented a violent video game to a minor. The Act also requires violent video games to be labeled as such. Before the Act took effect, various video game associations filed suit against the Governor and the State for declaratory relief against the Act on the grounds that it unconstitutionally restricted freedom of expression on its face based on content regulation and the labeling requirement, was unconstitutionally vague, and violated equal protection. The district court granted summary judgment in favor of the video game associations and the State of California appealed. The State urged the appellate court to extend the "obscenity as to minors" standard first mentioned in *Ginsberg v. New York*, which permitted a state to prohibit the sale of sexually explicit material to minors that it could not ban from distribution to adults, to include materials containing violence. The appellate court, however, declined to extend *Ginsberg* and held that the Act is a presumptively invalid content-based restriction on speech and strict scrutiny remained the applicable review standard. Additionally, the court found that the evidence presented by the State did not support the purported interest in preventing psychological or neurological harm to minors. None of the research established or suggested a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable. As a result, the State had not met its burden to demonstrate a compelling interest. Because the Act was invalid and, as a result, there was no state-mandated age threshold for the purchase or rental of video games, the State's mandated label would arguably convey a false statement that certain conduct was illegal when it was not.

Questions Presented: (1) Does the First Amendment bar a state from restricting the sale of violent video games to minors? (2) If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

VIDEO SOFTWARE DEALERS ASSOCIATION; Entertainment Software Association, Plaintiffs-Appellees,

v.

Arnold SCHWARZENEGGER, in his official capacity as Governor State of California; Edmund G. Brown, Jr., in his official capacity as Attorney General, State of California, Defendants-Appellants, and George Kennedy, in his official capacity as Santa Clara County District Attorney; Richard Doyle, in his official capacity as City Attorney for the City of San Jose; Ann Miller Ravel, in her official capacity as County Counsel for the County of Santa Clara, Defendants.

United States Court of Appeals for the Ninth Circuit

Filed February 20, 2009

[Excerpt; some footnotes and citations omitted.]

CALLAHAN, Circuit Judge:

Defendants-Appellants California Governor Schwarzenegger and California Attorney General Brown (the "State") appeal the district court's grant of summary judgment in favor of Plaintiffs-Appellees Video Software Dealers Association and Entertainment Software Association ("Plaintiffs"), and the denial of the State's cross-motion for summary judgment. Plaintiffs filed suit for declaratory relief seeking to invalidate newly enacted California Civil Code sections 1746-1746.5 (the "Act"), which impose restrictions and a labeling requirement on the sale or rental of "violent video games" to minors, on the grounds that the Act violates rights guaranteed by the First and Fourteenth Amendments.

We hold that the Act, as a presumptively invalid content-based restriction on speech, is subject to strict scrutiny and not the "variable obscenity" standard from *Ginsberg v. New York*, 390 U.S. 629 (1968). Applying strict scrutiny, we hold that the Act violates rights protected by the First Amendment because the State has not demonstrated a compelling interest, has not tailored the restriction to its alleged compelling interest, and there exist less-restrictive means that would further the State's expressed interests. Additionally, we hold that the Act's labeling requirement is unconstitutionally compelled speech under the First Amendment because it does not require the disclosure of purely factual information; but compels the carrying of the State's controversial opinion. Accordingly, we affirm the district court's grant of summary judgment to Plaintiffs and its denial of the State's cross-motion. Because we affirm the district court on these grounds, we do not reach two of Plaintiffs' challenges to the Act: first, that the language of the Act is unconstitutionally vague, and, second, that the Act violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment.

I.

A.

On October 7, 2005, Governor Schwarzenegger signed into law Assembly Bill 1179 ("AB 1179"), codified at Civil Code §§ 1746-1746.5. The Act states that "[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor." Violators are subject to a civil penalty of up to $ 1,000.

* * *

The Act also imposes a labeling requirement. It requires that each "violent video game" imported into or distributed in California must "be labeled with a solid white '18' outlined in black," which shall appear on the front face of the game's package and be "no less than 2 inches by 2 inches" in size.

A.B. 1179 states that the State of California has two compelling interests that support the Act: (1) "preventing violent, aggressive, and antisocial behavior"; and (2) "preventing psychological or neurological harm to minors who play violent video games." A.B.

1179 also "finds and declares" that:

> (a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.
>
> (b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

The State included in the excerpts of record several hundred pages of material on which the Legislature purportedly relied in passing the Act. While many of the materials are social science studies on the asserted impact of violent video games on children, other documents are varied and include legal analyses, general background papers, position papers, etc. Dr. Craig Anderson, whose work is central to the State's arguments in this case, is listed as an author of roughly half of the works included in the bibliography.

B.

The content of the video games potentially affected by the Act is diverse. Some of the games to which the Act might apply are unquestionably violent by everyday standards, digitally depicting what most people would agree amounts to murder, torture, or mutilation. . . .

The video game industry has in place a voluntary rating system to provide consumers and retailers information about video game content. The Entertainment Software Rating Board ("ESRB"), an independent, self-regulated body established by the Entertainment Software Association, rates the content of video games that are voluntarily submitted. ESRB assigns each game one of six age-specific ratings, ranging from "Early Childhood" to "Adults Only." It also assigns to each game one of roughly thirty content descriptors, which include "Animated Blood," "Blood and Gore," "Cartoon Violence," "Crude Humor," "Fantasy Violence," "Intense Violence," "Language," "Suggestive Themes," and "Sexual Violence."

C.

On October 17, 2005, before the Act took effect, Plaintiffs filed suit against the Governor, the Attorney General, and three city and county defendants, all in their official capacities, for declaratory relief against the Act on the grounds that it violated 42 U.S.C. § 1983 and the First and Fourteenth Amendments. Plaintiffs argued that the Act unconstitutionally restricted freedom of expression on its face based on content regulation and the labeling requirement, was unconstitutionally vague, and violated equal protection.

The district court granted Plaintiffs' motion for a preliminary injunction. *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005). Subsequently, the parties filed cross-motions for summary judgment. The district court granted Plaintiffs' motion and denied the State's cross-motion. The district court's summary judgment order invalidated the Act under strict scrutiny, and did not reach Plaintiffs' claims regarding vagueness, equal protection, or the Act's labeling requirement. The district court permanently enjoined enforcement of the Act. The State

timely appealed.

II.

* * *

III.

[The Court concludes that the entire Act is not invalidated even though the State concedes on appeal that the alternate definition of a "violent video game" in section 1746(d)(1)(B) is unconstitutionally broad. The remaining provisions can be severed.]

IV.

Our next task is to determine what level of scrutiny to apply in reviewing the Act's prohibitions. . . .

The Supreme Court has stated that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." The State does not contest that video games are a form of expression protected by the First Amendment. It is also undisputed that the Act seeks to restrict expression in video games based on its content.

"Content-based regulations are presumptively invalid." We ordinarily review content-based restrictions on protected expression under strict scrutiny, and thus, to survive, the Act "must be narrowly tailored to promote a compelling Government interest." "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."

The State, however, urges us to depart from this framework because the Act concerns minors. It argues that we should analyze the Act's restrictions under what has been called the "variable obscenity" or "obscenity as to minors" standard first mentioned in *Ginsberg* [*v. New York*]. In essence, the State argues that the Court's reasoning in *Ginsberg* that a state could prohibit the sale of sexually-explicit material to minors that it could not ban from distribution to adults should be extended to materials containing violence. This presents an invitation to re-consider the boundaries of the legal concept of "obscenity" under the First Amendment.

In *Ginsberg*, the Court held that New York State could prohibit the sale of sexually-explicit material to minors that was defined by statute as obscene because of its appeal to minors. Therefore, the state could prohibit the sale of "girlie magazines" to minors regardless of the fact that the material was not considered obscene for adults. The Court stated that "[t]o sustain the power to exclude material defined as obscenity by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." The Court offered two justifications for applying this rational basis standard: (1) that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"; and (2) the state's "independent interest in the wellbeing of its youth."

The State suggests that the justifications underlying *Ginsberg* should apply to the regulation of violent content as well as sexually explicit material. The assertion, however, fails when we consider the category of material to which the *Ginsberg* decision applies and the First Amendment

principles in which that decision was rooted.

Ginsberg is specifically rooted in the Court's First Amendment obscenity jurisprudence, which relates to non-protected sex-based expression—not violent content, which is presumably protected by the First Amendment. *Ginsberg* explicitly states that the New York statute under review "simply adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests of such minors." The definition of obscenity that *Ginsberg* adjusted was the Court's obscenity test announced in *Roth v. United States*, which dealt with obscene materials defined with reference to sex. The *Ginsberg* Court applied a rational basis test to the statute at issue because it placed the magazines at issue within a sub-category of obscenity—obscenity as to minors—that had been determined to be not protected by the First Amendment, and it did not create an entirely new category of expression excepted from First Amendment protection. The State, in essence, asks us to create a new category of non-protected material based on its depiction of violence.

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. Such was the case in *Roth* and *Memoirs v. Massachusetts*, which modified *Roth*. And though it post-dates *Ginsberg*, the Court in *Miller v. California* expressly cabined the First Amendment concept of obscenity in terms of sexual material.

Circuit courts have resisted attempts to broaden obscenity to cover violent material as well as sexually-explicit material. In *American Amusement Machine Association v. Kendrick*, which involved a video game restriction that mixed the regulation of sexual and violent material, the Seventh Circuit discussed why "[v]iolence and obscenity are distinct categories of objectionable depiction," explaining that obscenity is concerned with "offensiveness," whereas ordinances like the one at issue in Kendrick (and here) are concerned with conduct or harm. In *Video Software Dealers Association v. Webster*, the Eighth Circuit held that videos "that contain[ ] violence but not depictions or descriptions of sexual conduct cannot be obscene." Likewise, in *Eclipse Enterprises, Inc. v. Gulotta*, the Second Circuit declined to place trading cards which depicted heinous crime that was allegedly harmful to minors in the category of unprotected obscenity. Further, in *James v. Meow Media, Inc*., the Sixth Circuit, in discussing excessively violent movies and video game material, "decline[d] to extend [its] obscenity jurisprudence to violent, instead of sexually explicit, material."

Finally, we note that the *Ginsberg* Court suggested its intent to place a substantive limit on its holding. It stated:

> We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see.

Though not the clearest of disclaimers, this language telegraphs that the Court's concern in *Ginsberg* was with the relationship

between the state and minors with respect to a certain subject matter—"sex material" as it relates to the interests of minors.

In light of our reading of *Ginsberg* and the cases from our sister circuits, we decline the State's invitation to apply the *Ginsberg* rationale to materials depicting violence, and hold that strict scrutiny remains the applicable review standard. Our decision is consistent with the decisions of several other courts that have addressed and rejected the argument that the *Ginsberg* standard be extended from the field of sex-based content to violence in video games. At oral argument, the State confirmed that it is asking us to boldly go where no court has gone before. We decline the State's entreaty to extend the reach of *Ginsberg* and thereby redefine the concept of obscenity under the First Amendment.

V.

Accordingly, we review the Act's content-based prohibitions under strict scrutiny. As noted above, "[c]ontent-based regulations are presumptively invalid," and to survive the Act "must be narrowly tailored to promote a compelling Government interest. Further, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."

A.

. . . The State's focus is on the actual harm to the brain of the child playing the video game. Therefore, we will not assess the Legislature's purported interest in the prevention of "violent, aggressive, and antisocial behavior."

The Supreme Court has recognized that "there is a compelling interest in protecting the physical and psychological well-being of minors." Notwithstanding this abstract compelling interest, when the government seeks to restrict speech "[i]t 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." Although we must accord deference to the predictive judgments of the legislature, our "obligation is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence."

In evaluating the State's asserted interests, we must distinguish the State's interest in protecting minors from actual psychological or neurological harm from the State's interest in controlling minors' thoughts. The latter is not legitimate. . . .

In *Kendrick*, the Seventh Circuit commented on a psychological harm rationale in the violent video game context:

> Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault is aware. To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.

Because the government may not restrict speech in order to control a minor's thoughts, we focus on the State's psychological harm rationale in terms of some actual effect on minors' psychological health.

Whether the State's interest in preventing psychological or neurological harm to minors is legally compelling depends on the evidence the State proffers of the effect of video games on minors. Although the Legislature is entitled to some deference, the courts are required to review whether the Legislature has drawn reasonable inferences from the evidence presented. Here, the State relies on a number of studies in support of its argument that there is substantial evidence of a causal effect between minors playing violent video games and actual psychological harm.

The State relies heavily on the work of Dr. Craig Anderson, pointing to Dr. Anderson's 2004 updated meta-analysis called *An update on the effects of playing violent video games*. This article states that it "reveals that exposure to violent video games is significantly linked to increases in aggressive behaviour, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behaviour." Even upon lay review, however, the disclaimers in this article, alone, significantly undermine the inferences drawn by the State in support of its psychological harm rationale. First, Dr. Anderson remarks on the relative paucity of the video game literature and concedes that the violent video game literature is not sufficiently large to conduct a detailed meta-analysis of the specific methodological features of other studies, many of which were themselves flawed. Second, he further states that "[t]here is not a large enough body of samples . . . for truly sensitive tests of potential age difference in susceptibility to violent video game effects," and jettisons mid-article his exploration of the effect of age differences (i.e., over-eighteen versus under-eighteen). It appears that he abandoned the age aspect of the study, in part, because "there was a hint that the aggressive behaviour results might be slightly larger for the 18 and over group." He concludes the meta-analysis with the admission that there is a "glaring empirical gap" in video game violence research due to "the lack of longitudinal studies."

Thus, Dr. Anderson's research has readily admitted flaws that undermine its support of the State's interest in regulating video games sales and rentals to minors, perhaps most importantly its retreat from the study of the psychological effects of video games as related to the age of the person studied. Although not dispositive of this case, we note that other courts have either rejected Dr. Anderson's research or found it insufficient to establish a causal link between violence in video games and psychological harm.

The State also relies on a study of the effects of video game violence on adolescents, conducted by Dr. Douglas Gentile, which studied eighth and ninth graders and concluded that "[a]dolescents who expose themselves to greater amounts of video game violence were more hostile" and reported getting into more arguments and fights and performing poorly in school. The extent to which this study supports the State's position is suspect for similar reasons as Dr. Anderson's work. First, this study states that due to its "correlational nature" it could not directly answer the following question: "Are young adolescents more hostile and aggressive because they expose themselves to media violence, or do previously hostile adolescents prefer violent media?" Second, this study largely relates to the player's violent or aggressive behavior toward others—which, as noted above, is not the interest relied on by the State here—rather than the psychological or neurological harm to the player. Moreover, the study glaringly states that "[i]t is important to note . . . that this study is limited by its correlational nature. *Inferences about causal*

direction should be viewed with caution." Finally, Dr. Gentile's study suggests that "[a]dditional experimental and longitudinal research is needed."

Additionally, the State relies on a study by Dr. Jeanne Funk for the proposition that video games can lead to desensitization to violence in minors. Like the others, this study presents only an attenuated path between video game violence and desensitization. It specifically disclaims that it is based on correlation principles and that "causality was not studied."

Finally, the State relies on a two-page press release from Indiana University regarding the purported connection between violent video games and altered brain activity in the frontal lobe. The research described, conducted in part by Dr. Kronenberger, has been criticized by courts that have reviewed it in depth.

In sum, the 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. In fact, some of the studies caution against inferring causation. Although we do not require the State to demonstrate a "scientific certainty," the State must come forward with more than it has. As a result, the State has not met its burden to demonstrate a compelling interest.

B.

Even if we assume that the State demonstrated a compelling interest in preventing psychological or neurological harm, the State still has the burden of demonstrating that the Act is narrowly tailored to further that interest, and that there are no less restrictive alternatives that would further the Act. We hold that the State has not demonstrated that less restrictive alternative means are not available.

Instead of focusing its argument on the possibility of less restrictive means, the State obscures the analysis by focusing on the "most effective" means, which it asserts is the one thousand dollar penalty imposed for each violation. Specifically, the State argues that the ESRB rating system, a voluntary system without the force of law or civil penalty, is not a less-restrictive alternative means of furthering the Legislature's purported compelling interest. Acknowledging that the industry has implemented new enforcement mechanisms, the State nevertheless argues that the ESRB does not adequately prevent minors from purchasing M-rated games. The State also dismisses the notion that parental controls on modern gaming systems could serve the government's purposes, arguing that there is no evidence that this technology existed at the time the Act was passed.

Further, the State does not acknowledge the possibility that an enhanced education campaign about the ESRB rating system directed at retailers and parents would help achieve government interests. The State appears to be singularly focused on the "most effective" way to further its goal, instead of the "least restrictive means," and has not shown why the less-restrictive means would be ineffective.

Even assuming that the State's interests in enacting the Act are sufficient, the State has not demonstrated why less restrictive means would not forward its interests. The Act,

therefore, is not narrowly tailored. Based on the foregoing, and in light of the presumptive invalidity of content-based restrictions, we conclude that the Act fails under strict scrutiny review.

VI.

Finally, we evaluate the constitutionality of the Act's labeling provision, which requires that the front side of the package of a "violent video game" be labeled with a four square inch label that reads "18." Plaintiffs argue that section 1746.2 unconstitutionally forces video game retailers to carry the State of California's subjective opinion, a message with which it disagrees. The State counters that the "labeling provision impacts the purely commercial aspect regarding retail sales of the covered video games" and, under the resulting rational basis analysis, the labeling requirement is rationally related to the State's "self-evident purpose of communicating to consumers and store clerks that the video game cannot be legally purchased by anyone under 18 years of age."

Generally, "freedom of speech prohibits the government from telling people what they must say." Commercial speech, however, is generally accorded less protection than other expression. The Court has upheld compelled commercial speech where the state required inclusion of "purely factual and uncontroversial information" in advertising. Compelled disclosures, justified by the need to "dissipate the possibility of consumer confusion or deception," are permissible if the "disclosure requirements are reasonably related to the State's interest in preventing deception of customers.

Ordinarily, we would initially decide whether video game packaging constitutes separable commercial speech or commercial speech that is "inextricably intertwined" with otherwise fully-protected speech. That analysis would direct what level of scrutiny to apply to the labeling requirement. However, we need not decide that question because the labeling requirement fails even under the factual information and deception prevention standards set forth in *Zauderer*. Our holding above, that the Act's sale and rental prohibition is unconstitutional, negates the State's argument that the labeling provision only requires that video game retailers carry "purely factual and uncontroversial information" in advertising. Unless the Act can clearly and legally characterize a video game as "violent" and not subject to First Amendment protections, the "18" sticker does not convey factual information.

Moreover, the labeling requirement fails *Zauderer's* rational relationship test, which asks if the "disclosure requirements are reasonably related to the State's interest in preventing deception of customers." Our determination that the Act is unconstitutional eliminates the alleged deception that the State's labeling requirement would purportedly prevent: the misleading of consumers and retailers by the ESRB age ratings that already appear on the video games' packaging. Since the Act is invalid and, as a result, there is no state-mandated age threshold for the purchase or rental of video games, there is no chance for deception based on the possibly conflicting ESRB rating labels. In fact, the State's mandated label would arguably now convey a false statement that certain conduct is illegal when it is not, and the State has no legitimate reason to force retailers to affix false information on their products.

VII.

We decline the State's invitation to apply the variable obscenity standard from *Ginsberg* to the Act because we do not read *Ginsberg* as reaching beyond the context of

restrictions on sexually-explicit materials or as creating an entirely new category of expression—speech as to minors—excepted from First Amendment protections. As the Act is a content based regulation, it is subject to strict scrutiny and is presumptively invalid. Under strict scrutiny, the State has not produced substantial evidence that supports the Legislature's conclusion that violent video games cause psychological or neurological harm to minors. Even if it did, the Act is not narrowly tailored to prevent that harm and there remain less-restrictive means of forwarding the State's purported interests, such as the improved ESRB rating system, enhanced educational campaigns, and parental controls. Finally, even if the Act's labeling requirement affects only commercial speech in the form of video game packaging, that provision constitutes impermissibly compelled speech because the compelled label would not convey purely factual information. Accordingly, the district court's grant of summary judgment to Plaintiffs and denial of the State's cross-motion for summary judgment is **AFFIRMED**.

"High Court Takes Video Game Case"

USA Today
April 29, 2010
Joan Biskupic

Taking up a new First Amendment test of disturbing images, the Supreme Court agreed Monday to hear California's appeal of a decision that struck down a state law prohibiting the sale or rental of violent video games to minors.

The justices' decision to accept the case, which will be heard in the term that begins next fall, comes a week after the justices threw out a federal law that swept too broadly in banning depictions of animal cruelty. The court by an 8-1 vote rejected arguments by the federal government that it could carve out a new exception to the First Amendment—as exists for obscenity—for images of animal cruelty, such as dogfighting.

In the new dispute, ***Schwarzenegger v. Video Software Dealers Association***, California officials urge the justices to create an exemption for a class of violent videos that appeals "to the deviant or morbid interest and has no socially redeeming value for minors."

Led by Attorney General Jerry Brown, state officials say studies point to "growing evidence that these games harm minors."

Paul Smith, a lawyer who represents associations of companies that create and sell videos, disputed the danger of the games and termed them "a modern form of artistic expression. Like motion pictures and television programs, video games tell stories and entertain audiences."

The 2005 law, challenged by the Video Software Dealers Association and Entertainment Software Association, bars the sale or rental of "violent" video games to minors and calls for fines of up to $1,000.

The law defines a violent game as one that depicts "killing, maiming, dismembering or sexually assaulting an image of a human being" in a way that appeals to a deviant interest of minors and lacks "serious literary, artistic, political or scientific value."

As an example of a game the law might cover, California officials cited one in which "girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them."

A federal appeals court ruled last year that the California law was too broadly written and that state lawyers had failed to justify any First Amendment exception for video games. The appeals court questioned the connection to psychological harm to youths and said, "Even if the state had a compelling interest in preventing psychological or neurological harm allegedly caused by violent video games, the law was not narrowly tailored to further that interest."

In its appeal, California argues that "excessively violent material is no more worthy of First Amendment protection than sexual material" when children are involved. The state's argument relies largely on a 1968 case, *Ginsberg v. New York*, that upheld restrictions on the sale of sexual material to minors.

Smith had countered that the obscenity exception to the First Amendment has long been confined to sexually explicit, not

violent, materials. Regarding video games generally, Smith said, “Like great literature, games often involve themes such as good vs. evil, triumph over adversity, struggle against corrupt powers and quest for adventure.

David Hudson, a lawyer at the First Amendment Center at Vanderbilt University, said the case “gives the court a pristine opportunity to explain whether the ‘harmful to minors’ standard applies outside of sex and into violence.”

"Supreme Court to Hear Videogames Case"

The Wall Street Journal
April 27, 2010
Brent Kendall

The U.S. Supreme Court on Monday agreed to decide the constitutionality of a California law that seeks to ban the sale of violent videogames to minors.

Two lower courts struck down the law as an unconstitutional restriction on freedom of speech.

How the high court rules could affect videogame makers such as Activision Blizzard Inc., producer of "Call of Duty," and Take-Two Interactive Software Inc.'s Rockstar Games, which makes "Grand Theft Auto." The case could also have implications for the broader entertainment industry, specifically for producers of violent movies and television shows.

Last week the court took a broad view of the First Amendment when it struck down a federal law banning depictions of animal cruelty. The court said the law was too sweeping in restricting speech.

California argued in its petition to the Supreme Court that lawmakers should be able to ban sales of violent videogames to those younger than 18 just as they can restrict the sale of sexual material to minors.

The state said violent videogames are "a new, modern threat to children" that cause psychological harm and make minors more likely to exhibit violent or aggressive behavior.

Two trade associations challenged the law before it went into effect, arguing that videogames are a modern form of artistic expression entitled to First Amendment protection.

Michael D. Gallagher, president of the Entertainment Software Association, which represents U.S. computer-game and videogame publishers, said the industry's voluntary rating system has successfully informed consumers and parents about the games' content.

Entertainment lawyer Stephen Smith, of the Greenberg Glusker law firm in Los Angeles, said games rated as "mature," such as "Call of Duty" and "Grand Theft Auto," are some of the industry's biggest sellers. He said the loss of teen customers could make it hard for companies to justify large budgets for creating and marketing such games. But he also said restricting sales wouldn't be easy because many games are purchased and played online.

It isn't clear which games would be affected by California's law, which defines a violent video game as one that "includes killing, maiming, dismembering or sexually assaulting an image of a human being."

In a statement, California Attorney General Edmund G. Brown Jr. said: "It is time to allow California's common-sense law to go into effect and help parents protect their children from violent video games."

The Supreme Court's decision to consider the case came as something of a surprise because lower courts have been unanimous in striking down laws similar to California's.

A federal trial judge in San Jose and the 9th U.S. Circuit Court of Appeals each ruled

that California didn't have sufficient evidence to support the claim that violent videogames harmed minors. The courts also said there were other, less restrictive ways to prevent minors from playing the games, such as parental controls on some gaming systems.

The case is ***Schwarzenegger v. Entertainment Merchants Assn.***, 08-1448. Oral arguments will take place during the court's next term, which begins in October.

"This is an important issue with national implications, particularly in light of the growing evidence that these games harm minors and that industry self-regulation through the existing rating system has proven ineffective," the state said in its petition.

"Governor Schwarzenegger's Video Game Act Terminated by the Ninth Circuit"

JOLT Digest
February 28, 2009
Brittany Blueitt

The United States Court of Appeals for the Ninth Circuit affirmed the order of the United States District Court for the Northern District of California, enjoining the enforcement of an Act that imposed a mandatory labeling requirement for all "violent" video games and prohibited the sale of such games to minors.

The Ninth Circuit held that the Act posed a presumptively invalid content-based restriction on speech in violation of the First Amendment of the United States Constitution. The Ninth Circuit also held that the Act's labeling requirement constituted unconstitutionally compelled speech because it did not require disclosure of purely factual information, but required the carrying of the State's opinion as to the nature of the video game. In so holding, the Court noted that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."

The Wall Street Journal highlights that the state, in defending the law, argued that violence and sex should be governed by analogous prohibitions: the government can prohibit the sale of explicit pornography to minors, and so it should also be able to limit the sale of ultra-violent video games.

Ars Technica notes that should this case reach the Supreme Court, it is unlikely that the Court will discover anything that the court of appeals failed to notice.

California Civil Code §§ 1746-1746.5 (the "Act") restricts the sale of violent video games to minors, and imposes a labeling requirement on such games. Video Software Dealers Association and Entertainment Software Association filed for declaratory relief seeking to invalidate the Act on the grounds that it violated rights guaranteed under the First Amendment. The District Court granted summary judgment for the plaintiffs.

In upholding the District Court's order and striking down the Act, the Ninth Circuit declined to "boldly go where no court has gone before" by extending the "variable obscenity" ("obscenity as to minors") standard set forth in *Ginsberg v. New York* 390 U.S. 629 (1968), which upheld the prohibition of sale of sexually-explicit material to minors that was defined by statute as obscene because of its appeal to minors. In doing so, the Court restricted *Ginsberg*'s application to sex-based expression, not expression containing only violent content. After declining to expand *Ginsberg*, the Court reviewed the Act in accordance with the presumption of invalidity applied to content-based restrictions, and finally determined that the State's asserted interest in "preventing psychological or neurological harm to minors" was insufficient to pass strict scrutiny.

According to the Court, the government's interest is compelling only when "the recited harms are real, not merely conjectural and [ ] the regulation will in fact alleviate these

harms in a direct and material way." The Court found the research proffered by the State to support its assertion of harm insufficient because the research suggested only correlation between actual psychological harm and violent video games and not causation. Furthermore, the Court found that even if there was a direct causal relationship between the asserted harms and violent video games, the State failed to demonstrate that the Act was narrowly tailored to achieve the State interest.

Turning to the question of labeling, the Ninth Circuit noted that although commercial speech is accorded less protection than other speech, the Court has only upheld compelled commercial speech where the State required inclusion of "purely factual and uncontroversial information." The label required by the Act did not provide factual information but rather compelled speech concerning the government's opinion about the content of the video game. This type of compelled speech is cannot pass constitutional scrutiny.

"Why Nine Court Defeats Haven't Stopped States from Trying to Restrict 'Violent' Video Games"

The Free Expression Policy Project
August 15, 2007
Marjorie Heins

The August 6, 2007, decision by U.S. District Judge Ronald Whyte striking down California's video game censorship law was the ninth such ruling by a federal court in the past six years. Yet state and local legislators continue to press for laws restricting minors' access to games with "violence," "inappropriate violence," "ultra violence," or whatever other term they hope will ban the games they think harmful.

According to the website Game Censorship.com, Delaware, Indiana, Kansas, New York, North Carolina, and Utah are currently considering legislation restricting minors' access to games with violent content. The nine states or localities whose laws have been struck down include (in addition to California) Indianapolis, St. Louis, Michigan, Washington, Illinois, Louisiana, Minnesota, and Oklahoma.

Why do lawmakers continue to press for censorship of video games despite the clear unconstitutionality of the enterprise? The answer probably lies in the long history of media-violence politics, a history that goes back more than a century, to an era when concerns that crime and detective magazines would corrupt urban youth first led to laws banning stories of "bloodshed, lust, or crime." The concern resurfaced in the 1930s, once movies captured the national imagination, and again in the 1950s when television became our dominant mass medium, while crime-and-adventure comics were accused of causing juvenile delinquency. In the 1960s, 70s, and 80s, the government liberally funded researchers who sought to prove harmful effects from gunslinger shows and other televised violence, and politicians as well as the researchers often misrepresented the dubious results of their experiments.

Fast forward to 2000, when four professional associations issued a "Joint Statement" asserting that "well over 1000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children." The Statement was so rife with errors that it was difficult to understand how these groups—which included the American Medical Association (the AMA)—could have endorsed it.

Dr. Edward Hill, chair-elect of the AMA, shed some light on this question the following year during a panel discussion. Responding to questions about the Joint Statement, Dr. Hill explained that it was the AMA's desire for health education funding that drove its support of the Joint Statement. The AMA is "sometimes used by the politicians. We try to balance that because we try to use them also, so it's a contest. . . . There were political reasons for signing on. We're looking for a champion in Congress that will be willing to back our desire for funding for comprehensive school health in this country."

By the late 1990s, violent video games were

stirring new concerns. Their interactivity, some critics said, increased the risk of imitative behavior. Psychologist Craig Anderson became a prominent spokesman for this view; among his experimental findings were that subjects who had played violent games in a laboratory administered slightly longer "noise blasts" than a control group. They also recognized "aggressive words" slightly more quickly. (The difference was in fractions of a second.) Anderson posited that recognizing aggressive words reflects aggressive thoughts, and that aggressive thoughts lead to aggressive behavior.

Anderson's research may have been squishy, but several states and localities relied on it between 2000 and 2006 in passing laws to restrict minors' access to video games. St. Louis's ordinance, for example, criminalized selling, renting, or otherwise making available to minors any "graphically violent" video game, or permitting free play of such a game without the consent of a parent or guardian. The St. Louis County Council, before passing the law, heard testimony from Anderson that playing violent games for 10 to 15 minutes causes "aggressive behavior" and "that children have more aggressive thoughts and frequently more aggressive behavior after playing violent video games."

A federal district court relied on these statements in upholding the law, but the Court of Appeals reversed, finding the County's conclusions to be "simply unsupported in the record." Anderson's "vague generality" about aggressive thoughts and behavior, the judges said, "falls far short of a showing that video games are psychologically deleterious," and other testimony was equally "ambiguous, inconclusive, or irrelevant."

The judges in the St. Louis case cited a decision from a sister court, striking down Indianapolis's ordinance. In that case, the court observed that from Grimm's fairy tales to horror movies and epic poems, violent themes have been part of children's literature; to shield them from the subject "would not only be quixotic, but deforming." Neither Anderson's "aggressive word" and "noise blast" experiments nor any other evidence before the court showed that video games "have ever caused anyone to commit a violent act," or "have caused the average level of violence to increase anywhere."

In the Illinois case, the judge was particularly skeptical of expert witness testimony from Anderson and another psychologist, William Kronenberger. The judge noted that Anderson had acknowledged exaggerating the significance of studies that simply show a correlation between aggression and video game play (rather than a causative relationship); that the longer noise blasts his subjects gave after playing violent games were "a matter of milliseconds"; and that he had manipulated the data and methodology in his "meta-analyses." More credible, the court found, were the plaintiffs' experts, who testified that Anderson "not only had failed to cite any peer-reviewed studies that had shown a definitive causal link between violent video game play and aggression, but had also ignored research that reached conflicting conclusions." The judge was equally unsparing in his dissection of Dr. Kronenberger's testimony that studies of adolescent brain activity point to harm from violent video games.

None of this means, of course, that some violent media might not sometimes reinforce violent attitudes in some people, or even, occasionally, contribute to violent behavior. A lack of proof in court is simply that—a lack of proof. It doesn't mean that the

contrary has been proven. Certainly, there are isolated instances of direct imitation, and certainly, the sadistic or misogynistic ideas found in some games are disturbing. As the court decisions suggest, though, it's impossible to define what kind of violent images are harmful (just as it's impossible to pinpoint or quantify violent entertainment's possibly positive effects in relieving tension or processing aggressive feelings in a safe way).

The California law was typical in its (unsuccessful) attempt to craft a definition of "violent video game" that wouldn't be so broad as to encompass the universe of historical, sports, fantasy, sci-fi, action/adventure, knights-in-armor, simulated battlefield, or classic literature games. The definition had two parts: it banned distribution to minors of games that either (1) enable players to inflict virtual injury "in a manner which is especially heinous, cruel, or depraved," or that (2) "appeal to a deviant or morbid interest of minors," are "patently offensive to prevailing standards in the community as to what is suitable for minors," and "lack serious literary, artistic, political, or scientific value for minors."

That latter definition was borrowed from the familiar three-part test that courts have used to condemn sexual material that's deemed "obscene" or "harmful to minors." But as Judge Whyte explained, violent expression is generally protected by the First Amendment unless the government can show a "compelling" reason for its suppression; "obscene" sexual expression is not. As for the alternative definition ("heinous, cruel, or depraved"), he pointed out that it "has no exception for material with some redeeming value and is therefore too broad. The definition could literally apply to some classic literature if put in the form of a video game."

Despite the impossibility of drafting a video game censorship law that wouldn't be unconstitutionally vague and overbroad, politics will likely continue to drive this debate—at least until health professionals, legislators, and other policymakers agree to unite behind programs of media literacy education and genuine violence reduction rather than attacking entertainment and expression. Action-hero-turned-Governor Arnold Schwarzenegger, the defendant in the California case, would be an ideal candidate to lead such an initiative.

"The Court as Mr. Fix-It?"

The New York Times
April 30, 2010
Linda Greenhouse

Prohibition ended 77 years ago, yet Americans have still not kicked the habit of trying to fix social problems by banning things.

Half a century ago, the target was true-crime novels and magazines, those filled with "pictures or stories of criminal deeds of bloodshed, lust, or crime," in the words of a New York statute that made it a crime to print, sell or even to give away such matter. Nineteen other states had similar laws. The Supreme Court declared in 1948 that the statutes violated the First Amendment's guarantee of free speech, prompting a passionate dissent from Justice Felix Frankfurter. The former Harvard Law School professor complained that the majority was thwarting the states' effort "to solve what is perhaps the most persistent, intractable, elusive and demanding of all problems in society—the problem of crime and, more particularly, of its prevention."

The notion that reading a novel or magazine could turn a decent citizen into a criminal—or that banning one could make the streets safer—sounds preposterous today. So does the more recent effort by Nassau County, N.Y., to ban the sale to minors of trading cards depicting notorious criminals, an ordinance that the federal appeals court in New York declared unconstitutional in 1997.

The latest threat to public safety and morals, evidently, is the video game. Bans on the sale or rental of violent video games to minors are popping up all over the country—eight states so far, along with several local laws. Every one that has been challenged in court has been declared unconstitutional.

So it was baffling this week to find the Supreme Court weighing in where it doesn't appear to be needed. The court typically takes up only those questions that have produced contradictory rulings in the lower courts; a "conflict in the circuits" is the primary marker of a case the justices deem worthy of their attention. Yet the justices have agreed to hear California's appeal of a ruling by the United States Court of Appeals for the Ninth Circuit that struck down a state law imposing a fine of up to $1,000 for the sale or rental of a "violent video game" to a person under the age of 18. The 2005 statute defines "violent video game" as one that "appeals to a deviant or morbid interest of minors;" offends community standards; and lacks "serious literary, artistic, political, or scientific value for minors."

This definition mirrors the way the Supreme Court defines obscenity, a category of expression deemed to lack First Amendment protection. But obscenity, as a legal category, always has a sexual component. California is asking the Supreme Court for a new carve-out from the First Amendment, for depictions of violence when made available to minors. The state "is asking us to boldly go where no court has ever gone before," the Ninth Circuit panel observed.

Maybe the Supreme Court accepted the case, ***Schwarzenegger v. Entertainment Merchants Association***, simply in order to kill the state's stunningly broad theory in the cradle. The Roberts court has been highly protective of free speech (too much so,

according to critics of the recent campaign finance decision, *Citizens United v. Federal Election Commission*, which invalidated limits on corporate political speech). And just last week, in *United States v. Stevens*, the court voted 8 to 1 on First Amendment grounds to strike down a federal law that criminalized "crush videos" and other commercial depictions of animal cruelty.

Or maybe the justices want to spare other courts the need to keep reviewing and declaring unconstitutional an endless assortment of violent-video bans. If so, they could hardly do better than simply to adopt the opinion that Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit wrote in 2001, invalidating an Indianapolis violent-video ordinance. It's hard to top the Odyssey or the Divine Comedy for gruesome depictions of torture and mayhem, Judge Posner said, adding that shielding modern children from violent imagery "would leave them unequipped to cope with the world as we know it."

Whatever its motive, the Supreme Court's intervention at this point seems so gratuitous that I find it hard to shake the concern that some justices may actually think that social engineering of this sort may actually do some good. If so, let's hope that the history-minded conservatives check their history before signing on to this latest fad.

"A Closer Look at the Parallels between *US v. Stevens* and *EMA v. Schwarzenegger*"

GamesLaw
April 21, 2010
Liz Surette

This article is to supplement [Game Politics]'s coverage of *US v. Stevens* and its implications for the game industry. I will elaborate on why the Supreme Court refuses to analogize depictions of the unlawful killing, maiming, wounding, etc. of animals to child pornography and why it probably will not liken video game violence to it either in the pending case ***EMA v. Schwarzenegger***. Also, the somewhat less-discussed basis for the *Stevens* decision: overbreadth of the statute and why the EMA law will also likely be found overbroad and stricken.

1. Why the Court did not create a new category of unprotected speech, and why they probably will not do so in EMA either.

For those not familiar, First Amendment jurisprudence recognizes specific categories of speech that are minimally protected or not protected at all. If the speech restricted by the government, most often by statute in First Amendment cases, is outside of those specific, narrowly drawn categories, the court will apply the Strict Scrutiny test. In order to pass Strict Scrutiny, a content-based restriction on speech must be narrowly tailored to serve a compelling government interest and use the least restrictive means to do so—more on that later.

Here, the Government argues that even without historical precedent, new categories of unprotected speech can still be created if a weighing of the "value of the speech against its societal costs" falls more heavily on the latter. Because of *New York v. Ferber* (discussed below), the Government suggests that such a balancing test can be used to create new categories of unprotected speech all of the time.

As Chief Justice Roberts pointed out in the 8-1 majority opinion, to use this "balancing test" that the government relies on would put at risk of censorship a great amount, if not the vast majority, of the ordinary speech we make to each other every day because much of we say in ordinary conversation has little or no "religious, political, scientific, educational, journalistic, historical, or artistic" value. It is an alarming proposition that the states, municipalities, and the federal government could ban speech that they found objectionable "simply on the basis that some speech is not worth it." He goes on to acknowledge that while certain categories of speech, such as child pornography, have been described as having such slight or nonexistent value as to be outweighed by societal interests, those descriptions are just . . . well, "descriptions" and not the actual rationale behind the holdings.

In *New York v. Ferber*, the Supreme Court carved out a relatively new category of unprotected speech—child pornography. In the *Stevens* opinion, the Court made it quite clear that *Ferber* was very exceptional and that states will not be successful in analogizing just anything to it in order to create new exceptions to First Amendment protection. In *Ferber*, the state had a compelling interest in protecting children from abuse and the Court further found that the market for child pornography is

intrinsically related to actual child abuse. While it could be argued that the market for crush videos is intrinsically related to animal cruelty, the Court in *Stevens* did not say that preventing animal cruelty was a compelling state interest. (More on that later, too.) I read Stevens' interpretation of *Ferber* to mean that both a compelling state interest and an intrinsic relation between the prohibited conduct and the restricted speech (which could also inform a narrow tailoring analysis) are required at the very least to create a new category. If we were to apply that to the statute at issue in ***EMA***, we may have a compelling interest in protecting children from psychological harm, but we find no causal relationship between video game violence and psychological harm to children, let alone an intrinsic relation between depictions of violence in games and violence in reality. I wonder if the Court would even go as far as I just did, given that it considers *Ferber* to be very, very, unique.

The balancing test that has been adopted was done so by the people in our social contract with our government by virtue of the First Amendment is as follows: the benefits of restricting the government itself, in this case its ability to regulate and restrict speech, outweigh the costs. Though crush videos are disgusting, and some video game violence is outright gratuitous and excessive, the government cannot simply decide that it wants to prohibit certain types of speech based on its own whims as to what it finds valuable and what if finds harmful. That is why the Court will probably not decide that virtual depictions of "killing, maiming, dismembering, or sexually assaulting an image of a human being" are unprotected speech in ***EMA v. Schwarzenegger***.

2. Overbreadth—why the "safe harbor" exception won't save the EMA law.

Overbreadth is a common cause of the downfall of statutes, particularly in the First Amendment context. To put it plainly, a statute will be adjudged overbroad, and therefore invalid, if it just so happens to sweep in speech that the government has no right to restrict (even if the government did not intend it to), as well as speech that it can. The rationale behind invalidating a statute for this reason is that a person will decline to exercise their right to free speech for fear of running afoul of the law—thereby resulting in the dreaded chilling effect.

Many statutes of all kinds have "safe harbor" provisions—exceptions that are written in as an attempt to protect citizens against unintended applications of the law. For example, it is well settled (see *Miller v. California*) that a law restricting obscenity must have a safe harbor because we acknowledge that oftentimes patently offensive depictions of sex should be permitted and are often necessary for literary, artistic, educational, or scientific purposes, even if the work they are contained in appeals to the prurient interest when taken as a whole. The safe harbor protects such works if they exhibit serious value, and so the local bookstore can sell erotic literature without fear of prosecution even if it cannot sell Hustler.

The law at issue in *Stevens* contains such a clause, which the Government argues should save it. Any depiction that has "serious religious, political, scientific, educational, journalistic, historical, or artistic value" is immune from prohibition. However, the safe harbor was not enough to alleviate the statute's overbreadth because the word "serious" itself actually restricts the amount of protection that the safe harbor would give to speech that is outside of the crush videos, animal fighting (except Spanish bullfighting), or other extreme depictions of animal cruelty that the law was intended to prohibit. In addition to the high standard that

the word "serious" implies, there is the problem that much speech that is usually protected (by default, I might add) simply does not have serious religious, political, scientific, educational, journalistic, historical, or artistic value. The Court uses recreational hunting videos as an example of how speech that should ordinarily be protected would not fall under the safe harbor because it is merely "recreational." Also, the Government failed to justify its characterization of Spanish bullfighting videos as having inherent value and reconcile that with its notion that Japanese dog-fighting videos (one of which was one of the grounds for Stevens' conviction) do not. In short, no reading of the safe harbor results in the government banning only the speech that it has specifically intended to and that is why it is overbroad and invalid.

We could easily apply these ideas to the safe harbor clause in California's law restricting the sale of violent video games to minors. The statute exempts from its definition of "violent video game" (and therefore from the prohibition of sale to minors) games that do not "as a whole lack serious literary, artistic, political, or scientific value for minors." Again, we can see the burden that the word "serious" imposes. All games have artistic value, but whether that value is "serious" could be debatable in some cases depending on what any legislature's definition of "serious" is. Also, as above, video games are without question "recreational," and the vast majority of recreational speech is protected under the First Amendment by default. Even if a game does not have serious artistic value, it would still be entitled to First Amendment protection if it is not obscene (or if depictions of graphic violence are not an unprotected category of speech, following our assumptions above). However, the safe harbor would not protect such games from restriction and therefore would not be sufficient to preserve the statute's validity.

3. Conclusion and an observation.

In case you skimmed or skipped the wall of text (understandable), in sum, the statute at issue in ***EMA v. Schwarzenegger*** is analogous to the one in *US v. Stevens* and will probably be stricken down because the Court is loathe to create new categories of unprotected speech except in very extreme circumstances, and that the statute restricts speech that is protected, even if it also regulates speech that is unprotected.

I mentioned Strict Scrutiny way back up there in the second paragraph of section (chapter?) 1. It is interesting to note that the 3rd Circuit below upheld the striking down of the statute in *US v. Stevens* because it did not pass Strict Scrutiny—it found that the interest in preventing cruelty to animals was not compelling, that the statute was not narrowly tailored to serve that interest, and that it did not use the least restrictive means of doing so. Although the Supreme Court opinion struck the law down on the basis of overbreadth, the only time that overbreadth is mentioned in the 3rd Circuit opinion is in a footnote in which it notes that the law only "might" be overbroad. What I find most fascinating is that, aside from a summary of procedural history, there was no mention of Strict Scrutiny in the entire majority opinion. But all's well that ends well, I suppose.

The Court might choose to address Strict Scrutiny in ***EMA v. Schwarzenegger*** and maybe even overbreadth and vagueness. Not to mention the variable obscenity issue that would apply if the Court found that graphic violence is an unprotected category of speech. Time will tell.

"Let's Blast Video Violence"

The Globe and Mail
February 20, 2004
Douglas Gentile

Snipers. Rape. Cars targeting pedestrians. Heads exploding in a shower of gore.

These scenes can all be found in violent video games, and this month the *Journal of Adolescence* published several studies looking at their effects on youth. I was involved in one study (Gentile, Lynch, Linder, & Walsh, 2004). After looking at more than 600 Grade 8 and Grade 9 students, we found that playing a lot of violent video games was a serious risk factor linked with children's anti-social and aggressive behaviour—even after controlling for the amount the children play, their gender and whether they have naturally hostile personalities. Surprisingly, even the kids who are not naturally aggressive are almost 10 times more likely, if they play a lot of violent video games, to get into physical fights than kids who do not.

Our study is only one of about 40 peer-reviewed, published studies that demonstrate that playing violent video games increases aggressive feelings and behaviours. These games are not the Pac-Man and Pong of earlier generations; as technology has advanced, violent video games have become extremely graphic (in Grand Theft Auto: Vice City, a man encounters a prostitute, has sex and then beats her to death to get his money back).

Although such ultraviolent video games carry an M (mature) rating, a recent study by the American Federal Trade Commission found that children can buy them easily. In a separate study of nearly 800 Grade 4 to Grade 8 kids, 87 per cent of boys reported that they play M-rated games, and one in five admitted that he had bought an M-rated game without parental knowledge.

As the research evidence about the negative effects of violent games become more compelling, parents, educators, and policy-makers are increasingly concerned about what to do. From my perspective, there are three pillars of responsibility: the video-game industry, the rental and retail industry and parents.

The video-game industry must clearly and accurately label the content of games, so that parents know what they are getting before buying. Recently, the authors of a study of teen-rated games pointed out that there is a "significant amount of content in T-rated video games that might surprise adolescent players and their parents" (including violent sexual themes and drug use). The second responsibility of the video-game industry is to market its products appropriately. Yet advertisements for M-rated games have appeared in Sports Illustrated for Kids. It's unfair of the industry to label games as "not for kids" while marketing them to children. True, the industry has taken steps to reduce this, but there is still significant room for improvement.

The rental and retail industries also have responsibilities. First, they must create policies under which children under 17 may not buy or rent M-rated games without parental permission. Many stores, including large chains and superstores, have no such policies. Some of those who do don't enforce them. In one sting operation conducted by the National Institute on Media and the Family, children as young as

seven encountered no problems in about half of their attempts to buy M-rated games. Parents should be able to expect that stores won't allow children access to M-rated games—just as they expect movie theatres won't give children access to an R-rated movie when parents drop them off at the theatre.

The third pillar of responsibility is parents—who must start by educating themselves about the differences among video-game ratings ("E" for everyone, "T" for teen, "M" for mature) and to learn why it is important to pay attention to the ratings. Here is where the research is so useful: Studies show that both amount and content matter. Children who play a lot of video games get poorer grades in school. Children who play violent games appear to become more aggressive over time.

Finally, parents need to act on their knowledge. Just as playing violent games is what scientists call a risk factor for negative outcomes for children, active parental involvement in children's video-game habits acts as a protective factor.

Should local, state, province or federal governments get involved?

The video-game industry is responsive to some parental concerns and to pressure from politicians. Still, there probably are areas where legislation could be helpful without rising to the level of censorship. Just like the 1996 U.S. Telecommunications Act, which mandated that TV shows be rated, new legislation could require that the TV, movie, and video-game industries create a universal rating system so that parents need not learn the full alphabet soup of different systems. Legislation could also mandate that the ratings be administered independently of each medium (currently, U.S. TV ratings are assigned by the TV networks, movie ratings by the Motion Picture Association of America, etc.) Legislation might also mandate the creation of an independent ratings-review board to do research on the validity of the ratings and maintain standards.

There have been legislative attempts to restrict the sale of M-rated games to minors in the United States. This approach seems reasonable: The video-game industry itself acknowledges that these games are not for children (hence the M-rating), and legal precedent in the United States has established that the government has an entirely appropriate role in limiting the influences and activities to which children are exposed.

In my country, state and local authorities routinely restrict minors' access to tobacco, guns, pornography, and gambling. In fact, the U.S. Supreme Court, in *Ginsberg v. New York* (1968), upheld limiting minors' access to pornography on the basis of whether it was "rational for the legislature to find that the minors' exposure to [such] material might be harmful."

The research conducted to date has clearly met that test, and shows that, for some children, exposure to violent media is harmful. Oddly, the video-game industry has fought every legislative attempt to restrict the sale of M-rated games to minors. That is puzzling; it suggests that the industry is unwilling to stand behind its own ratings. That fact alone makes it clear that parents should be very cautious before they buy that next "hot" game for their child.

Douglas A. Gentile is director of research at the National Institute on Media and the Family, and an assistant professor of psychology at Iowa State University.

"Effects of Violent Video Games"

Los Angeles Times
May 3, 2010
Jill U. Adams

The U.S. Supreme Court agreed last week to hear a case on California's attempt to restrict sales of violent video games to minors. Both the California lawmakers who approved the law in 2005 and the U.S. 9th Circuit Court of Appeals judges who overturned the law in 2009 claimed that scientific research was on their side.

Lawmakers and judges aren't the only ones at odds over how to interpret research studies. Scientists who study media violence and its effects on children also are divided on what their results mean.

"It's a highly polarized research field," says Chris Ferguson, a psychology professor at Texas A&M International University in Laredo.

A number of studies have shown that watching a lot of violence on television or playing violent video games such as Grand Theft Auto and Manhunt produces aggressive tendencies in kids. Rowell Huesmann, a professor of communications and psychology at the University of Michigan in Ann Arbor, says that the strength of the evidence is on par with data that say smoking cigarettes causes lung cancer.

Other researchers pooh-pooh such assertions and say that scientific findings have been decidedly mixed—with several studies finding no effects of violent video games on children and teens who play them.

In addition, such critics say, when effects are observed in studies, they have little or no relevance to psychological states that trigger violence in real-life situations.

"When scholars are making some of the claims that they make"—such as how consistent and strong the evidence is or that the size of effects can be compared to the link between smoking and lung cancer—"they are being deeply dishonest with the American public," Ferguson says.

Given these polarized opinions, it's not surprising that parents, especially those whose kids want to play the often violent video games their friends are playing, struggle to sort out what to do. Here's a closer look at whether playing violent video games is putting America's youth at risk.

American children spend plenty of time in front of screens, be it playing video games or watching television. One estimate says kids are playing video games for 13 hours each week, on average, and that more than 75% of teens who play report playing games rated M (for mature) by the Entertainment Software Rating Board, which often contain intense violence, blood and gore.

Research has shown that immediately after playing a violent video game, kids can have aggressive thoughts, angry feelings and physiological effects such as increased heart rate and blood pressure. In addition, studies that survey large populations of kids on their game-playing habits and measure aggressive personality traits or self-reported aggressive acts—physical fights, arguments with teachers—often find an association between games and aggression.

And yet, even when a strong correlation is

found, researchers cannot say that playing violent video games causes such behavior. It could be that kids with aggressive tendencies gravitate toward playing the most violent games.

The most compelling studies are ones that track kids over a period of time. For instance, a 2008 study published in the journal *Pediatrics* followed 362 third-, fourth- and fifth-graders in the U.S. and 1,231 youths ages 12 to 18 in Japan over a single school year.

Early in the school year, kids were asked about what games they played and for how many hours. The more violent content they were exposed to, the more likely subjects were to report later in the year that they'd been in physical fights.

"Is that every kid? No, it's not every kid," says study co-author Douglas Gentile, a psychology professor at Iowa State University in Ames. But the trend was statistically significant for both boys and girls, he says, and other studies that have lasted two years have found similar effects.

These so-called longitudinal studies start, at least, to address the what-comes-first problem, because they measure game-playing first and assess aggressive behavior later. Still, the approach doesn't solve the problem completely.

For instance, it can miss factors that influence violent video game-playing and aggressive behavior—absent or abusive parents, perhaps.

It is also hard to assess the strength of any video game aggression effect because exposure to violent games varies so much. Gentile says violent video games account for about 4% of the differences among kids in terms of aggressive behavior. Some researchers think the number is higher—Huesmann puts it at more like 10%. Neither number seems very high, but then everyone agrees that aggression is a complex human behavior that is going to have multiple causes.

"Usually when people are violent there's a whole set of converging factors," Huesmann says. "No reputable researcher that I know is arguing that media violence or video-game violence is the most important factor." Other known factors more strongly linked to child aggression are a history of abuse, poverty, genetics and personality—and the risk climbs higher when several factors are present in combination.

Still, Huesmann adds, "what's really irritating is when people say it isn't a factor at all—because the evidence is so compelling."

Ferguson, meanwhile, puts the strength of the effect squarely at 0%. He says that people are inventing a crisis where there is none.

"As video games have become more violent and more sophisticated and the sales of video games have skyrocketed in the last few decades, youth violence has plummeted," he says, citing evidence compiled by various federal agencies.

Ferguson—who is not the only scientist critical of violent-video-game research but may be the most vocal—says some researchers cherry-pick data, measuring a lot of effects and analyzing only the ones that show a difference between kids who play violent video games and those who don't. Further, he says, some reviews of the scientific literature exclude studies that show no effect or, in a few cases, an opposite effect (i.e., that consumers of media violence showed less aggression). He

published a detailed critique of these issues in the March issue of the journal *Psychological Bulletin.*

While researchers and legal types continue their row over violent video games, there are things parents can do, Gentile says.

Setting limits on the amounts of exposure is important, he says—the American Academy of Pediatrics recommends that kids' exposure to screen time (meaning TV, video, computer and video games) be limited to one to two hours a day. And so, Gentile adds, is "setting limits on content, and talking to kids about what they're seeing and hearing.

"Challenge it and make kids think it through critically."