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The Price of Porn & Pugilism: Reconciling *Brown v. Entertainment Merchants Association* with *Ginsberg v. New York* Through a Media-Specific Approach

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THE PRICE OF PORN & PUGILISM: RECONCILING
BROWN V. ENTERTAINMENT MERCHANTS ASSOCIATION
WITH *GINSBERG V. NEW YORK* THROUGH A
MEDIA-SPECIFIC APPROACH

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INTRODUCTION: PRESS START

[W]hat sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment

1. Mike Krahulik & Jerry Holkins, *One of Many Possible Responses*, PENNY ARCADE, <http://penny-arcade.com/comic/2011/03/23> (last visited Mar. 23, 2013).

*would permit the government to protect children by restricting sales of that extremely violent video game only when the woman—bound, gagged, tortured, and killed—is also topless?*²

This quote from Justice Breyer's dissent in *Brown v. Entertainment Merchants Association (EMA)* best articulates an issue that continues to hover over the aftermath of the Supreme Court's decision in *EMA*.³ Many in the video game industry heralded this controversial case, which held that First Amendment protections extend to video games containing graphic depictions of violence, as a major step towards legitimizing video games as a form of both art and entertainment on par with literature, film, music, and television.⁴ Yet, while this Note sides with the result of the Court's decision in the case, it also seeks to answer some questions, like the one posed by Justice Breyer,⁵ that remain as to whether the Court relied on the proper reasoning to reach its conclusions, especially in the wake of the tragedy at Sandy Hook Elementary and President Barack Obama's call for the Centers for Disease Control and Prevention (CDC) to conduct a comprehensive study on the effects of violent video games.⁶

If one were to disregard all other issues that surrounded the controversial California law at issue in *EMA*, such as the vagueness of the statutory language,⁷ the debatable effectiveness of its implementation,⁸ and the questionable existence of any actual problem the law sought to address,⁹ there still remains the issue that the Court has affirmatively held that depictions of sexual material are obscene, while depictions of violent material are not obscene for either adults or minors.¹⁰ This Note argues that although such a finding is antiquated and not reflective of contemporary social mores, the Court's decision to overturn the law should still stand due to radical differences in the types of media through which violent and pornographic

2. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2771 (2011) (Breyer, J., dissenting).

3. *Id.* at 2729 (majority opinion).

4. See Frank Cifaldi, *Video Game Industry Celebrates Supreme Court Victory*, GAMASUTRA (June 27, 2011), http://gamasutra.com/view/news/35461/Video_Game_Industry_Celebrates_Supreme_Court_Victory.php; Brian Crecente, *Kotick, Riccitiello, Levine and More Praise Supreme Court Victory*, KOTAKU (June 27, 2011, 6:00 PM), <http://kotaku.com/5815921/kotick-riccitiello-levi>; Alexander Macris, *Games on Trial, Part Two*, ESCAPIST (June 27, 2011), <http://www.escapistmagazine.com/articles/view/columns/publishers-note/8983-Publishers-Note-Games-on-Trial-Part-Two>.

5. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2771 (Breyer, J., dissenting).

6. *CDC to Study Violence in Media*, DAILY HERALD (Jan. 16, 2013), <http://www.dailyherald.com/article/20130116/business/701169743/?interstitial=1>.

7. See *Entm't Merchs. Ass'n*, 131 S. Ct. at 2742 (Alito, J., concurring).

8. *Id.* at 2740 (majority opinion).

9. *Id.* at 2738.

10. See *id.* at 2734–35.

material are most commonly depicted. These differences in the type of medium, not the differences in the content they portray, create a greater need for government intervention in the sale of pornographic content to minors than in the sale of violent content to minors.

In supporting the argument that a media-specific approach rather than a content-based distinction is the most appropriate methodology to determine the First Amendment rights of producers of violent media, this Note begins with an examination of why game developers include violent content in their video games. An examination of the history of both violent content in video games and major efforts of the federal and state governments to curb the sale of such violent content to minors will be taken up, including an analysis of the *EMA* case itself. To help frame further discussion on the portrayal of violence and sex, this Note will attempt to summarize the current state of the mountainous body of work examining the psychological effects such portrayals have on minors.

Most importantly, the disparities between media traditionally used to portray violence and media traditionally used to portray sexuality will be discussed along with how these disparities, apart from any consideration of the two different kinds of content, justify granting these different types of media different levels of First Amendment protection. In conclusion, this Note advocates that a media-specific approach should be adopted to distinguish the First Amendment rights of video game developers from the First Amendment rights enjoyed by producers of adult entertainment.

I. RIGHTEOUS RAGE: WHY VIDEO GAMES RELY ON VIOLENCE

Violence has been a major part of video games throughout the industry's history.¹¹ All games, whether they are video games, board games, card games, or sports, rely on an artificial conflict to be compelling.¹² This conflict can occur between individuals or teams (as in sports), a player and artificial intelligence (such as in video games), or a player and luck (card games, for example).¹³ Many of the best games will combine multiple sources of conflict,¹⁴ such as in poker in which a player competes both against other players trying to make better hands, and luck, in trying to pull the necessary cards to make a winning hand.

11. See Claire Suddath, *Brief History: Video-Game Violence*, TIME, May 10, 2010, at 32, available at <http://www.time.com/time/magazine/article/0,9171,1985999,00.html>.

12. See KATIE SALEN & ERIC ZIMMERMAN, RULES OF PLAY: GAME DESIGN FUNDAMENTALS 249–50 (2004) (quoting CHRIS CRAWFORD, THE ART OF COMPUTER GAME DESIGN 13 (1984)).

13. *Id.* at 250.

14. See *id.* at 250–51.

Conflict can be represented many different ways, but one of the most compelling is through violence.¹⁵ While a game like poker is certainly compelling, the conflict is very abstract.¹⁶ The only reason it is better to hold an ace, a king, a queen, a jack, and a ten all of the same suit rather than any other combination of cards is because the rules say that a royal flush is the best hand.¹⁷ A conflict centered around violence is more compelling because it is based directly on the physical limitations of human beings, something we can understand intuitively without ever picking up a rule book.¹⁸

Because it is based on the physical limitations of human beings, violent conflict in any form of entertainment allows for the exploration of themes related to the human condition. As Justice Scalia pointed out in the majority opinion in *EMA*,¹⁹ acts of violence have been central to the plots of such classic pieces of literature as Homer's *Odyssey*,²⁰ Dante's *Inferno*,²¹ and Golding's *Lord of the Flies*.²² All of these works use violence to explore deep themes about human existence and human interaction.²³

A compelling source of conflict is important in games, as well as any other form of entertainment.²⁴ Games rely on an artificial conflict, but they take place in actual physical space.²⁵ This means that

15. While little research has been conducted into why violence itself is compelling in a games context, it has been suggested that displays of violence provide satisfaction to remnants of ancient hunter-gatherer instincts still present in the human brain by helping to train those instincts. See PAUL BLOOM, *HOW PLEASURE WORKS: THE NEW SCIENCE OF WHY WE LIKE WHAT WE LIKE* 193 (2010); CARL SAGAN, *THE DRAGONS OF EDEN: SPECULATIONS ON THE EVOLUTION OF HUMAN INTELLIGENCE* 60 (1977); see also Michael E. May & Craig H. Kennedy, *Aggression as Positive Reinforcement in Mice Under Various Ratio- and Time-Based Reinforcement Schedules*, 91 J. EXPERIMENTAL ANALYSIS BEHAV. 185, 195 (2009) (finding that aggression in and of itself can be a positively reinforcing event for mice that they will freely seek out if given the opportunity).

16. See SALEN & ZIMMERMAN, *supra* note 12, at 97 (quoting BERNARD SUITS, *GRASSHOPPER: GAMES, LIFE, AND UTOPIA* 38–39 (1990)) (explaining that games typically involve accomplishing unnecessary tasks through inefficient means, i.e., a better way to win a hand of poker would be to grab the entire deck and as many possible cards from opposing players rather than limiting one's self to a hand of five cards).

17. *Basics of Poker*, BICYCLE PLAYING CARDS, <http://www.bicyclecards.com/card-games/rule/basics-of-poker> (last visited Mar. 23, 2013).

18. SAGAN, *supra* note 15, at 60.

19. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2736–37 (2011).

20. HOMER, *THE ODYSSEY* 223 (Robert Fagles trans., Viking Press 1996).

21. DANTE ALIGHIERI, *INFERNO* 383, 385 (Robert & Jean Hollander trans., First Anchor Books 2000).

22. WILLIAM GOLDING, *LORD OF THE FLIES* 162–63 (1954).

23. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2736–37.

24. See SALEN & ZIMMERMAN, *supra* note 12, at 80 (“[A game is] a system in which players engage in an artificial conflict, defined by rules, that results in a quantifiable outcome.”).

25. See *id.*

a player's surroundings most likely do not match the surroundings he would expect to see if the game was real.²⁶ As such, game designers rely on a concept known as "the magic circle" to make the players believe in whatever conflict the designer is trying to create.²⁷ A player has entered the magic circle when he psychologically suspends his belief that the space around him is a normal environment and instead sees it as a game space.²⁸ This is why we see the circle around a group of marbles as part of the game of marbles and not just a circle drawn on the sidewalk in chalk. The more a player suspends her or his disbelief in the actual physical space, the more immersed she or he becomes in the game, and he or she will be more likely to continue playing.²⁹ This is one reason why people dress up like their characters when they play *Dungeons & Dragons*,³⁰ or use military jargon when talking to other players while playing *Call of Duty*.³¹ This is also why video game publishers and developers continue to push for the most realistic and technologically advanced graphics in their games: it helps players to suspend their disbelief that what they are seeing is reality.³² In a similar vein, game designers rely on compelling conflict in order to encourage player immersion, and violent conflict is some of the most compelling.³³

This helps to explain why video games have relied on violence throughout the course of the industry's history, and it may also help explain some of the very big differences between Americans' receptions of violent and sexual content. For much of the United States' cultural history, sex and sexuality has been a topic often discussed in

26. *See id.* at 94.

27. *Id.* at 96.

28. *Id.* at 95.

29. Ryan Hodge, *The Psychology of Videogame "Immersion"—It's Not Just a Buzzword*, GAMESRADAR (Aug. 26, 2010), <http://www.gamesradar.com/the-psychology-of-videogame-immersion-its-not-just-a-buzzword/>; Laurie N. Taylor, *Video Games: Perspective, Point-of-View, and Immersion* 12–13 (2002) (unpublished M.A. thesis, University of Florida), available at http://www.laurientaylor.org/research/taylor_1.pdf. *But see* SALEN & ZIMMERMAN, *supra* note 12, at 451–53 (arguing that society's preference for immersive experiences is cyclical and not, as the games industry tends to advocate, a steady push toward greater levels of immersion).

30. *DUNGEONS AND DRAGONS* (Wizards of the Coast 1974); *see also* SergeT3, *Tips for Behaving in Dungeons and Dragons*, TOP TIER TACTICS, <http://www.toptiertactics.com/4340/tips-for-behaving-in-dungeons-and-dragons/> (last visited Mar. 23, 2013).

31. *CALL OF DUTY* (Infinity Ward 2003); *see also* Poll: *Military Jargon in Games*, THE ESCAPIST, <http://www.escapistmagazine.com/forums/read/9.179960-Poll-Military-Jargon-in-Games?page=2> (last visited Mar. 23, 2013) (containing several comments in which individuals express that the use of military jargon in video games is one of their favorite aspects of the games).

32. Hodge, *supra* note 29.

33. *See* Mike Rozak, *Immersion-emotion feedback loop*, DEEPLY RANDOM THOUGHTS (June 25, 2008), <http://www.mxac.com.au/drt/ImmersionEmotionFeedbackLoop.htm>.

whispered voices and depicted only in dime novels or back alley movie theaters.³⁴ And while our cultural sexual mores have certainly relaxed, especially over the last sixty years,³⁵ the level of acceptance for open depictions of violence is still leaps and bounds ahead of the level of acceptance for open depictions of sexuality.³⁶

This dichotomy raises a certain level of concern. We have discussed why violence is compelling in media and how it can be necessary to explore certain themes,³⁷ but the same is true of sexuality, which, like violence, is also based in the physical experience. So why is there this cultural preference for violence over sex? This is an especially disconcerting question when you consider that not everyone will experience a truly violent encounter at some point in their life,³⁸ but almost everyone will have at least one sexual encounter during his or her lifetime.³⁹ Additionally, while sex can be associated with a variety of destructive results, such as rape,⁴⁰ human trafficking,⁴¹ and the spread of sexually transmitted diseases,⁴² sexuality also carries with it a plethora of positive social consequences, i.e., procreation, an

34. See John C. Burnham, *The Progressive Era Revolution in American Attitudes Toward Sex*, 59 J. AM. HIST. 885, 886 (1973); Judith Treas, *How Cohorts, Education, and Ideology Shaped a New Sexual Revolution on American Attitudes Toward Nonmarital Sex, 1972–1998*, 45 SOC. PERSP. 267, 273–76 (2002) (discussing a statistical decline in Americans' disapproval of premarital and homosexual sex while disapproval of extramarital and teen sex increased or at least remained strong).

35. Burnham, *supra* note 34, at 885; Treas, *supra* note 34, at 273–76.

36. Timothy Egan, Op-Ed., *Opinionator: Sex and the Supremes*, N.Y. TIMES (July 7, 2011, 8:30 PM), <http://opinionator.blogs.nytimes.com/2011/07/07/sex-and-the-supremes/>; Logan Frederick, *What They Play Poll Finds Parents Fear Sex in Games*, ESCAPIST (Apr. 15, 2008, 9:35 AM), <http://www.escapistmagazine.com/news/view/83160-What-They-Play-Poll-Finds-Parents-Fear-Sex-in-Games>.

37. See *supra* notes 11–23 and accompanying text.

38. See, e.g., Press Release, U.N. Women, Progress of the World's Women: FactSheet: Global (2011–12), available at <http://progress.unwomen.org/wp-content/uploads/2011/06/EN-Factsheet-Global-Progress-of-the-Worlds-Women.pdf> (estimating that up to 60 percent of women have experienced physical or sexual violence in their lifetimes).

39. See EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 179 (1994) (reporting that only 1.3 percent of people aged 55 to 59 have had no sexual partners since the age of 18).

40. E.g., *Crime in the United States*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls> (last visited Mar. 23, 2013) (reporting 84,767 incidents of forcible rape in the United States in 2010).

41. E.g., ILO, ILO ACTION AGAINST TRAFFICKING IN HUMAN BEINGS 3 (2008), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_090356.pdf (reporting that 43 percent of human trafficking victims were trafficked for sexual exploitation).

42. E.g., *STD Trends in the United States: 2010 National Data for Gonorrhea, Chlamydia, and Syphilis*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/std/stats10/trends.htm> (last updated Nov. 17, 2011) (estimating that there are 19 million new infections in the United States every year).

expression of human intimacy, and a means of self-discovery. Yet, violent confrontation rarely carries any similarly positive social capital.⁴³

Most of continental Europe seems to have adopted this view: open depictions of sexuality are much more plentiful in Europe whereas depictions of violence common in America may be outlawed overseas.⁴⁴ All of this seems to suggest that if one had to choose between which type of content she or he would be forced to endure if both were objectionable, she or he would rationally choose sexual content over violent content. And yet, the exact opposite seems to be the case within the United States.⁴⁵

II. CONSOLE WARS: A HISTORY OF VIOLENCE IN VIDEO GAMES

As stated earlier, violence has been depicted in video games for almost the entire history of the industry.⁴⁶ This violence can be as mundane as Mario jumping on enemy Goombas in the classic *Super Mario Bros.*,⁴⁷ or as outrageous as players urinating on the dismembered corpses of victims in *Postal II*.⁴⁸ Early forms of video game violence consisted of players running over “gremlins” with tiny cars in *Death Race*⁴⁹ and helping a naked General Custer dodge arrows as he crosses a desert in order to rape a Native American woman in *Custer’s Revenge*.⁵⁰ Both games consist of blocky pixelated graphics

43. See Deborah M. Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 411–12 (2007) (emphasizing that employment is the dominant form of social capital and measure of social standing in the United States).

44. See, e.g., Alfred McAlistier et al., *Attitudes Towards War, Killing, and Punishment of Children Among Young People in Estonia, Finland, Romania, the Russian Federation, and the USA*, 79 BULL. WHO 382, 385–86 (2001), available at [http://www.who.int/bulletin/archives/79\(5\)382.pdf](http://www.who.int/bulletin/archives/79(5)382.pdf) (discussing differing U.S. and European reactions to violence); Sylvie Kauffmann, Op-Ed., *France, the U.S. and Strauss-Kahn*, N.Y. TIMES (July 5, 2011), <http://www.nytimes.com/2011/07/06/opinion/06iht-edkauffmann06.html>; Jas Purewal, *The U.S. Violent Games Case: Americans Are From Mars, Europeans Are From Venus*, GAMER/LAW (Dec. 7, 2011), <http://www.gamerlaw.co.uk/2011/the-US-violent-games-case-americans-are-from-mars-europeans-are-from-venus/>.

45. McAlistier et al., *supra* note 44, at 386; Kauffmann, *supra* note 44; Purewal, *supra* note 44.

46. Carly A. Kocurek, *The Agony and the Exidy: A History of Video Game Violence and the Legacy of Death Race*, 12 GAME STUD.: INT’L. J. COMPUTER GAME RES. (Sept. 2012), http://www.gamestudies.org/1201/articles/carly_kocurek.

47. SUPER MARIO BROS. (Nintendo 1985); see also Josh Romero, *Classic NES Review—Super Mario Bros.*, VIDEO GAMES BLOGGER (Oct. 8, 2006), <http://www.videogamesblogger.com/2006/10/08/classic-nes-review-super-mario-bros.htm>.

48. POSTAL 2 (Running with Scissors 2003); *Video Game: Postal*, TVTROPES, <http://tv.tropes.org/pmwiki/pmwiki.php/VideoGame/Postal?from=Main.Postal> (last visited Mar. 23, 2013).

49. DEATH RACE (Exidy 1976); see also Levi Buchanan, *Death Race: Watch the Movie, Then Revisit the Original Violent Videogame*, IGN (Aug. 23, 2008), <http://www.ign.com/articles/2008/08/23/death-race>.

50. CUSTER’S REVENGE (Mystique 1982); see also Fragmaster, *Game of the Week: Custer’s Revenge*, CLASSIC GAMING, <http://classicgaming.gamespy.com/View.php?view=GameMuseum.Detail&id=282> (last visited Mar. 23, 2012).

that barely resemble the subjects they are trying to represent.⁵¹ Yet despite the lack of quality graphics, both games sparked public outcry over their violent content.⁵² Game console producer Atari even sued *Custer's Revenge* developer Mystique over their production of the game, but Atari lost the lawsuit.⁵³ The industry continued to develop games unchecked for several years until the North American video game market crashed in 1983 and '84.⁵⁴

After the Nintendo Entertainment System (NES) was released in 1985 and it became clear that the NES would lead a revival of the video game industry in the U.S.,⁵⁵ Nintendo of America adopted a code of content regulation that limited what games could be published for use with the NES.⁵⁶ This code was similar to the content regulation code used by Nintendo of America's parent company, Nintendo of Japan, but while both codes barred depictions of nudity and sexuality, only the American code barred depictions of blood and domestic violence.⁵⁷ While Nintendo of America's main competitor, Sega of America, adopted a more liberal code of content regulation shortly after the release of its Sega Genesis console in 1989,⁵⁸ controversy surrounding new games like *Night Trap*,⁵⁹ *Lethal Enforcers*,⁶⁰ and *Mortal Kombat*⁶¹ led Sega to abandon the content code in 1993 and instead create the Videogame Rating Council (VRC).⁶² The VRC assigned every game released for Sega systems in the U.S. a rating of

51. See Buchanan, *supra* note 49; Fragmaster, *supra* note 50.

52. See, e.g., Mike Z. Yao et al., *Sexual Priming, Gender Stereotyping, and Likelihood to Sexually Harass: Examining the Cognitive Effects of Playing a Sexually-Explicit Video Game*, 62 SEX ROLES 77, 78 (2010), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2807025/pdf/11199_2009_Article_9695.pdf; Andy Greenberg, *A History of Virtual Violence*, FORBES.COM (June 18, 2007, 6:00 AM), http://www.forbes.com/2007/06/15/games-violence-columbine-tech-cx_ag_0618videogames.html.

53. See LEONARD HERMAN, PHOENIX: THE FALL & RISE OF VIDEOGAMES 88 (1997).

54. Arnie Katz, *1984: The Year That Shook Electronic Gaming*, ELECTRONIC GAMES, Jan. 1985, at 30, available at http://ia600707.us.archive.org/5/items/electronic-games-magazine-1985-01/Electronic_Games_Issue_35_Vol_03_11_1985_Jan.pdf.

55. *The Business of Play: Nintendo's Revival of a Tarnished Industry in America*, GREGALOR (Dec. 11, 2012), <http://www.gregalor.com/2012/12/the-business-of-play-nintendo/>.

56. STEVEN A. SCHWARTZ WITH JANET SCHWARTZ, PARENT'S GUIDE TO VIDEO GAMES 23–24 (1994).

57. Jim C. Cullough, *Nintendo's Era of Censorship*, FILIBUSTER CARTOONS, <http://www.filibustercartoons.com/Nintendo.php> (last visited Mar. 23, 2013).

58. See *id.*

59. NIGHT TRAP (Digital Pictures 1992); see also *Night Trap*, GIANT BOMB, <http://www.giantbomb.com/night-trap/61-18648/> (last visited Mar. 23, 2013).

60. LETHAL ENFORCERS (Konami 1992); see also *Night Trap*, *supra* note 59.

61. MORTAL KOMBAT (Midway 1993); see also *Night Trap*, *supra* note 59.

62. Andy Chalk, *Inappropriate Content: A Brief History of Videogame Ratings and the ESRB*, ESCAPIST (July 20, 2007, 9:00 PM), <http://www.escapistmagazine.com/articles/view/columns/the-needles/1300-Inappropriate-Content-A-Brief-History-of-Videogame-Ratings-and-the-ESRB>.

either GA for general audiences, MA-13 for mature audiences thirteen years of age and older, or MA-17 for games not appropriate for minors.⁶³ This was the first time any member of the video game industry worked to create any kind of ratings system that was more detailed than a general parental warning.⁶⁴

The ratings system would prove somewhat ineffective as Sega never provided literature to parents explaining what made a game qualify for a specific rating.⁶⁵ Also, in an effort to compete with Nintendo, Sega toned down the Genesis version of *Mortal Kombat*.⁶⁶ The Super Nintendo Entertainment System (SNES) version of *Mortal Kombat* had replaced all depictions of blood with white “sweat,” and while the finishing moves in the SNES version were not as violent as the finishing moves in the arcade version, they were still more violent than the finishing moves in the Genesis version.⁶⁷ This allowed Sega to proscribe *Mortal Kombat* an MA-13 rating instead of an MA-17 rating, while the SNES version carried no warning at all.⁶⁸ Players could, however, unlock the full amount of blood and violence in the Genesis version by inputting a secret code.⁶⁹ Some critics theorize that the Genesis version easily outsold the SNES version due in part to the ease with which the full level of violence could be unlocked and because the Genesis version carried a somewhat forbidden mystique based on the MA-13 rating.⁷⁰

Growing public concern over violence in video games and the effects such violence was having on the nation’s youth resulted in Senate hearings led by Senators Joe Lieberman and Herbert Kohl.⁷¹ The hearings resulted in Congress threatening to take legislative action if the video game industry could not establish a system to rate the age-appropriateness of all video games released in the United States.⁷² Motivated by the fear of surrendering content control over to Congress, Nintendo, Sega, and other industry-leading publishers put aside the animosity that had defined much of their previous relationships with one another and formed the Interactive Digital

63. *Id.*

64. *Id.*

65. Videogame Rating Council, SEGA RETRO, http://segaretro.org/videogame_Rating_Council (last modified July 4, 2012).

66. Travis Fahs, *The History of Mortal Kombat: Follow Its Bloody Legacy From 1992 to Present Day*, IGN (May 5, 2011), <http://ign.com/articles/2011/05/05/the-history-of-mortal-kombat>.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.*

71. Chalk, *supra* note 62.

72. *Id.*

Software Association (IDSA),⁷³ a trade organization devoted specifically to the representation of video game developers separate and apart from the more general interests of all software developers.⁷⁴

The IDSA quickly put forth a proposal for the Entertainment Software Ratings Board (ESRB), which still exists today and functions in a fashion similar to the Motion Picture Association of America's film ratings system.⁷⁵ Games are rated by a group of anonymous, non-industry personnel based on a plethora of factors including: blood and gore, intense violence, strong sexual themes, use of drugs/alcohol, and strong language.⁷⁶ The current ratings system will assign a rating of EC for Early Childhood (appropriate for three years of age and over), E for Everyone (six and up), E10+ for Everyone (ten and up), T for Teen (thirteen and older), M for Mature (seventeen and older), or AO for Adults Only (eighteen and over).⁷⁷ Although participation in the rating system is optional, all large commercial retailers of video games refuse to stock unrated games.⁷⁸ Also, console producers refuse to license any game for use on their systems in North America without an ESRB rating.⁷⁹ Previous attempts by the federal government to make the ratings system mandatory have all died in Congress.⁸⁰

The AO rating has garnered a large amount of criticism from members of the industry.⁸¹ Although the ESRB maintains that any game may be rated as AO if there are enough graphic depictions of excessive violence and gore,⁸² only three games have ever received the AO rating solely for this reason.⁸³ Instead, it seems that any game that receives an AO rating receives such a rating due to sexual content

73. *Id.*

74. See Chris Kohler, *July 29, 1994: Videogame Makers Propose Ratings Board to Congress*, WIRED (July 29, 2009), http://www.wired.com/thisdayintech/2009/07/dayintech_0729/.

75. Chalk, *supra* note 62.

76. *See id.*

77. *ESRB Ratings Guide*, ENTMT SOFTWARE RATING BD., http://www.esrb.org/ratings/ratings_guide.jsp (last visited Mar. 23, 2013).

78. *Frequently Asked Questions*, ENTMT SOFTWARE RATING BD., <http://www.esrb.org/ratings/faq.jsp> (last visited Mar. 23, 2013).

79. *See id.*

80. See Family Entertainment Protection Act, S. 2126, 109th Cong. (2005); *S. 2126 (109th): Family Entertainment Protection Act*, GOVTRACK, <http://www.govtrack.us/congress/bills/109/s2126> (last visited Mar. 23, 2013).

81. *The Ratings Game: The Controversy Over the ESRB*, GAMEINFORMER (Oct. 4, 2006, 6:55 PM), <http://web.archive.org/web/20061023055510/http://www.gameinformer.com/News/Story/200610/N06.1004.1635.57594.htm> (accessed through the Internet Archive WayBackMachine).

82. See *ESRB Ratings Guide*, *supra* note 77.

83. Chalk, *supra* note 62; see Chris Morris, *Snuff Games and Ratings*, CNNMONEY (Nov. 26, 2003, 11:00 AM), http://money.cnn.com/2003/11/26/commentary/game_over/column_gaming/.

depicted in the game.⁸⁴ This became painfully apparent in 2005 after the release of *Grand Theft Auto: San Andreas (GTA:SA)*.⁸⁵ The developers originally planned to include a sex “mini-game” accessed whenever the main character brought one of his girlfriends back to her house after a date.⁸⁶ The developers decided to scrap the mini-game, but rather than strip the code for the mini-game out of the final product, they simply made that code inaccessible through normal gameplay and released the game with an M rating.⁸⁷ Yet, players found that they could still access and play the hidden mini-game by hacking the game.⁸⁸ When the “Hot Coffee” scenes, as they came to be called, were brought to the attention of the public, the ESRB changed the rating of *GTA:SA* to AO.⁸⁹ Stores removed it from their shelves and Rockstar, the game’s developer, had to release a new version of the game that had the scene completely removed.⁹⁰ *GTA:SA* contained graphic depictions of violence but was originally released with an M rating; it was only when additional sexual content was discovered (content that was not even accessible through normal gameplay) that the rating was raised to AO.⁹¹ *GTA:SA* is just one example of the minimal sexual content sufficient to receive an AO rating while extensive, gratuitous violent content is often allowed to slide by with an M rating.⁹² This is especially disconcerting when one considers that the youngest age for which an AO game is appropriate is just one year older than the youngest member of an M game’s audience.⁹³ Yet, AO games are almost completely commercially unviable because major retailers refuse to stock them,⁹⁴ and console producers refuse to license them.⁹⁵

After the Columbine massacre in 1999, violent video games became a popular target for the media in a swath of reports on school shootings over subsequent years.⁹⁶ Investigators discovered that the

84. Morris, *supra* note 83.

85. GRAND THEFT AUTO: SAN ANDREAS (Rockstar North 2004).

86. See *Hidden Sex Scenes Hit GTA Rating*, BBC NEWS, <http://news.bbc.co.uk/2/hi/technology/4702737.stm> (last updated July 21, 2005).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. See Chalk, *supra* note 62; Morris, *supra* note 83.

93. *ESRB Ratings Guide*, *supra* note 77.

94. Morris, *supra* note 83.

95. Brendan Sinclair, *Sony, Nintendo Forbid AO-Rated Manhunt 2*, GAMESPOT (June 20, 2007, 2:37 PM), <http://www.gamespot.com/news/sony-nintendo-forbid-ao-rated-manhunt-2-6172830>.

96. Lauren Gonzalez, *When Two Tribes Go to War: A History of Video Game Controversy*, GAMESPOT (last visited Mar. 23, 2011), <http://www.gamespot.com/features/when-two-tribes-go-to-war-a-history-of-video-game-controversy-6090892/>.

Columbine shooters, Eric Harris and Dylan Klebold, were avid fans of *Doom*,⁹⁷ a popular, violent shooting game shown from the first person perspective, otherwise known as a first-person shooter (FPS).⁹⁸ Harris also recreationally designed new maps for the game.⁹⁹ The media often attributed the boys' playing of *Doom* or their preference for Marilyn Manson's music as causes for the shooting, but this simplistic explanation has been widely criticized.¹⁰⁰ The media continues to latch onto violent video games as a cause for violent behavior while studies continue to debate the effect video game violence has on players, young or otherwise.¹⁰¹

The IDSA became the Entertainment Software Association (ESA) in 2003.¹⁰² Around this time there was growing public concern over a rating system that may serve no purpose if retailers allowed minors to buy M rated games.¹⁰³ Around 2005, the ESA and the ESRB began to campaign for retailers to check the identification of minors trying to purchase M rated games without a parent or guardian present.¹⁰⁴ A Federal Trade Commission (FTC) study in 2000 found that undercover minor shoppers were able to buy M rated games eighty-five percent of the time,¹⁰⁵ but a similar study by the FTC in 2011 found that only thirteen percent of secret shoppers were allowed to buy M rated games without proper identification.¹⁰⁶ This means that video game retailers have become the most successful enforcers of a voluntary ratings system compared to any other entertainment retailer, such as movie theater box offices and music CD retailers.¹⁰⁷

Despite the growing success of the ESRB ratings system, there have been multiple efforts at the state and federal legislative levels to make the ratings system mandatory for all games and to make non-enforcement of the ratings system by retailers punishable under

97. DOOM (id Software 1993).

98. Gonzalez, *supra* note 96.

99. Kevin Simpson & Jason Blevins, *Did Harris Preview Massacre on "Doom?"*, DENVER POST (May 4, 1999), <http://extras.denverpost.com/news/shot0504f.htm>.

100. *See* Gonzalez, *supra* note 96.

101. Shankar Vedantam, *It's A Duel: How Do Violent Video Games Affect Kids?*, NPR (July 7, 2011, 12:01 AM), <http://www.npr.org/2011/07/07/137660609/its-a-duel-how-do-video-games-affect-kids>.

102. Chalk, *supra* note 62.

103. *See id.*

104. *Frequently Asked Questions*, *supra* note 78.

105. Press Release, FTC, FTC Undercover Shopper Survey on Enforcement of Entertainment Ratings Finds Compliance Worst for Retailers of Music CDs and the Highest Among Video Game Sellers (Apr. 20, 2011), *available at* <http://www.ftc.gov/opa/2011/04/violentkidsent.shtm>.

106. *Id.*

107. *See id.*

criminal sanctions.¹⁰⁸ The ESA was able to defeat such efforts in Illinois,¹⁰⁹ Michigan,¹¹⁰ and Louisiana.¹¹¹ While the Illinois and Michigan laws were very similar to the California law at issue in *EMA*, neither state appealed the district courts' decisions that the laws were unconstitutional under the First Amendment, unlike California.¹¹²

Proposed by California State Senator Leland Yee in 2005, Assembly Bill 1179 sought to criminalize the sale of violent video games to minors.¹¹³ Cal. Civ. Code §§ 1746–1746.5 then codified the bill.¹¹⁴ Section 1746(d)(1) defined a violent video game as:

[A] video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.¹¹⁵

108. See, e.g., *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 825 (M.D. La. 2006); Anne Broache, *Court Rejects Illinois Video Game Law*, CNET (Nov. 28, 2006, 2:02 PM), http://news.cnet.com/8301-10784_3-6139030-7.html; *Judge Rules Michigan Video Game Law Is Unconstitutional*, USA TODAY, http://www.usatoday.com/tech/gaming/2006-04-04-michigan-law_x.htm (last updated Apr. 4, 2006).

109. Broache, *supra* note 108.

110. *Judge Rules Michigan Video Game Law Is Unconstitutional*, *supra* note 108.

111. *Foti*, 451 F. Supp. 2d at 825.

112. See Andrew Hoffman, *Breaking News: California Appeals Video Game Law to Supreme Court*, EXAMINER (May 20, 2009), <http://www.examiner.com/article/breaking-news-california-appeals-video-game-law-to-supreme-court>.

113. Assem. B. 1179, 2005 Leg., Chap. 638 (Cal. 2005); S. Gregory Boyd, *Video Game Regulation and the Supreme Court: Schwarzenegger v. Entertainment Merchants Association*, GAMASUTRA (Nov. 1, 2010), http://www.gamasutra.com/view/feature/6191/video_game_regulation_and_the_.php.

114. CAL. CIV. CODE §§ 1746–46.5 (Deering 2006).

115. *Id.* § 1746(d)(1).

The law provided that any retailer who sells a violent game to a minor without guardian approval and is reported will have to pay a civil fine up to \$1,000 per infraction.¹¹⁶ It also required that all violent games must be labeled with a solid white “18” outlined in black on their outside packaging.¹¹⁷ The ESA prepared to file suit with the help of the Video Software Dealers Association (VSDA),¹¹⁸ now known as the Entertainment Merchants Association (EMA).¹¹⁹ The VSDA was a trade association dedicated to advancing the interests of producers of all forms of home entertainment, not just video game developers and publishers.¹²⁰ The VSDA filed suit in United States District Court for the Northern District of California and the ESA later joined as co-plaintiffs.¹²¹ The parties succeeded in obtaining a preliminary injunction against the law’s enforcement in December of 2005.¹²² In August 2007, U.S. District Judge Ronald Whyte found in favor of the plaintiffs holding that the law violated the First Amendment and that the defendant’s claim of a causal link between video game violence and violence in real life lacked sufficient proof.¹²³

California’s then-Governor Arnold Schwarzenegger appealed the ruling to the Ninth Circuit.¹²⁴ The appellants insisted that the “variable obscenity” standard of scrutiny, as articulated in *Ginsberg v. New York*,¹²⁵ be used to assess the law’s constitutionality.¹²⁶ Yet because the *Ginsberg* Court had placed careful limitations on the type of content they were reviewing, specifically sexual content, the Ninth Circuit refused to apply “variable obscenity” and instead assessed the law under strict scrutiny due to the law’s imposition of content-based restrictions.¹²⁷ The Ninth Circuit found that the law failed strict

116. *Id.* § 1746.3.

117. *Id.* § 1746.2.

118. *Media Coalition Slams California Appeal of Violent Video Game Law*, GAME POLITICS.COM (May 21, 2009), <http://www.gamepolitics.com/2009/05/21/media-coalition-slams-california-appeal-violent-video-game-law#.UPmH&6FU5hg>.

119. *EMA History*, ENTMT MERCHS. ASS’N, <http://www.entmerch.org/about-ema/ema-history.html> (last visited Mar. 23, 2013).

120. *Id.*

121. *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

122. *Id.* at 1048.

123. *Video Software Dealers Ass’n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 WL 2261546, at *9–12 (N.D. Cal. Aug. 6, 2007).

124. Jason Dobson, *Schwarzenegger to Appeal California Game Law Ruling*, GAMASUTRA (Aug. 10, 2007), http://www.gamasutra.com/php-bin/news_index.php?story=15064.

125. 390 U.S. 629, 635–37 (1968).

126. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 957–58 (9th Cir. 2009).

127. *Id.* at 958–60 (quoting *Ginsberg*, 390 U.S. at 635).

scrutiny because the law was not narrowly tailored to promote a compelling state interest and because appellants had failed to demonstrate that less-restrictive means were not available to promote the state interest.¹²⁸ The first element went unmet because California could not prove that video game violence caused actual harm to the psychological development of minors.¹²⁹ The second element went unmet because evidence existed to demonstrate that the current ratings system already adequately addressed the problem.¹³⁰ Thus, the Ninth Circuit affirmed the Northern District's decision.¹³¹

The case was appealed again, this time to the Supreme Court. The Court granted certiorari in May of 2010.¹³² Many were surprised that the Court agreed to hear the case given that both the district and appellate court had found the law unconstitutional, and their holding was directly in line with similar laws being declared unconstitutional in other circuits.¹³³ A plethora of game developers and trade associations from other forms of media, afraid that if the California law was found constitutional, similar laws would be passed to the detriment of their industries, filed amicus briefs on behalf of the EMA and ESA.¹³⁴ The American Civil Liberties Union,¹³⁵ the Electronic Frontier Foundation,¹³⁶ the National Youth Rights Association,¹³⁷ and a coalition of states, including Georgia, Oklahoma, South Carolina, and Washington, also supported the appellees.¹³⁸ A group of states, including those who had tried to pass similar laws, supported California,¹³⁹

128. *Id.* at 964–65.

129. *Id.* at 964.

130. *Id.* at 964–65.

131. *Id.* at 967.

132. Joan Biskupic, *High Court Takes Video Game Case*, USA TODAY (Apr. 29, 2010, 12:54 PM), http://www.usatoday.com/tech/gaming/2010-04-26-scotus-video-games_N.htm.

133. See Boyd, *supra* note 113.

134. Kris Graft, *Major Entertainment Industry Groups Unite Against California Video Game Law*, GAMASUTRA (Sept. 17, 2010), http://www.gamasutra.com/view/news/30491/Major_Entertainment_Industry_Groups_Unite_Against_California_Video_Game_Law.php.

135. Brief for the ACLU et al. as Amici Curiae Supporting Respondents at 1–3, *Schwarzenegger v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 3697182 [hereinafter Brief Supporting Respondents].

136. *California Ban on Violent Videogames Violates First Amendment*, ELEC. FRONTIER FOUND. (Sept. 17, 2010), <http://www.eff.org/press/archives/2010/09/17>.

137. Brief Supporting Respondents, *supra* note 135, at 3.

138. Tony Mauro, *States Join Media Groups in Briefs Opposing California's Violent Video Game Ban*, BLOG OF LEGAL TIMES (Sept. 17, 2010, 10:40 PM), <http://legaltimes.typepad.com/blt/2010/09/states-file-brief-opposing-californias-violent-video-game-ban.html>.

139. Chris Remo, *Eleven States Join to Support California Game Legislation in Supreme Court*, GAMASUTRA (July 19, 2010), http://www.gamasutra.com/view/news/29499/Eleven_States_Join_To_Support_California_Game_Legislation_In_Supreme-Court.php.

as well as the American Academy of Pediatrics, the California Psychological Association,¹⁴⁰ and Common Sense Media.¹⁴¹

During oral arguments on November 2, 2010, all the Justices seemed to agree that finding the California law constitutional would be “a novel extension of First Amendment principles to expressions concerning violence.”¹⁴² In a similar vein, there was heavy debate about whether *Ginsberg*, which had only addressed the sale of sexual content to minors, provided California authority to regulate violent content.¹⁴³ Justice Scalia voiced concern about what was actually considered violent content and if that definition may be extended to something as commonplace as *Grimm’s Fairy Tales*,¹⁴⁴ a concern that would be discussed in his future opinion of the case.¹⁴⁵ There was also heavy debate over the notion of whether the interactive nature of video games somehow made them distinguishable from other forms of media like movies and comic books.¹⁴⁶ Ultimately, the Court was unconvinced by California’s arguments, and on June 27, 2011, the Court issued a seven-to-two opinion affirming the appellate and district courts’ decisions.¹⁴⁷

III. SEE NO EVIL, HEAR NO EVIL, PLAY NO EVIL: WHAT THE SCIENCE SAYS ABOUT PORNOGRAPHY AND VIOLENCE (AND WHAT IT DOESN’T SAY)

Information surrounding the effects of violent video games on minors is expanding.¹⁴⁸ It is a hotly debated topic in academia, and multiple studies have been controverted either due to their methodology,

140. Brief for California State Senator Leland Y. Yee et al. as Amici Curiae Supporting Petitioners at 1–2, *Schwarzenegger v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 2937557.

141. Alex Pham, *Common Sense Media Fires Opening Salvo in Battle Over California Law Banning Sale of Violent Video Games to Kids*, L.A. TIMES BLOGS: COMPANY TOWN (Aug. 18, 2010, 11:06 AM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/08/california-violent-video-game-bill-supreme-court-common-sense-media.html>.

142. Adam Liptak, *Law Blocking Sale of Violent Video Games to Minors is Debated*, N.Y. TIMES, Nov. 3, 2010, at A16.

143. See Jess Bravin, *Justices Split on Violent Games*, WALL ST. J., Nov. 3, 2010, <http://online.wsj.com/article/SB10001424052748704462704575590333558912068.html>.

144. See Jeffrey H. Anderson, *Weekly Standard: Violent Video Games Are No Fairy Tale*, NPR (July 1, 2011, 7:52 AM), <http://www.npr.org/2011/07/01/137547360/weekly-standard-violent-games-are-no-fairy-tale>.

145. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2736 (2011).

146. Chris Morris, *Analysis: Inside the U.S. Supreme Court On ‘Schwarzenegger v. EMA’*, GAMASUTRA (Nov. 2, 2010), http://www.gamasutra.com/view/news/31316/Analysis_from_the_Supreme_Court_Schwarzenegger_v_EMA.php.

147. *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2732, 2742.

148. See, e.g., Christopher J. Ferguson, *Video Games and Youth Violence: A Prospective Analysis in Adolescents*, 40 J. YOUTH & ADOLESCENCE 377, 378 (2011).

or by other studies coming to the opposite conclusion.¹⁴⁹ This Note does not seek to make a determination about whether violent video games cause any kind of permanent damage to a minor's psychological and social development. This Note only seeks to determine what contemporary studies of violence in video games clearly demonstrate to be true and what has not yet been proven. Likewise, this Note will also briefly discuss some of the proven effects that exposure to pornography has on minors.

First, it is difficult to say if violent video games cause violent behavior in minors because most studies are correlative studies, not causal.¹⁵⁰ Due to ethical concerns, rather than subject minors who normally do not play violent video games to such entertainment, psychologists look at the minor's propensity towards violence in relation to how often she or he plays a violent video game.¹⁵¹ This makes it difficult to determine if minors demonstrating violent behavior do so because of violent media, or other factors, such as poor home life, poverty, or lack of social engagement with other children.¹⁵² If the latter is the case, the minor may play more violent video games simply because her or his situation predisposes the minor to enjoying violent media more than other minors.¹⁵³ It bears noting that in the last twenty years, while the video game industry has been booming, violent youth crime has been dropping at a similarly quick pace.¹⁵⁴

One of the main things psychological studies have determined is that violent video games cause an increase in aggression.¹⁵⁵ However, there is little evidence to indicate that this increase in aggression is anything more than temporary.¹⁵⁶ Few studies actually define what aggression is or explain whether aggression differs in any way from the regular excitement a minor might experience while engaging with media.¹⁵⁷ For example, a recent study discovered that people who play sports video games experience greater increases in aggressive tendencies than people playing a violent shooting game.¹⁵⁸ Researchers

149. *See id.* at 377.

150. *E.g., id.* at 378.

151. *E.g., id.*

152. *Id.*

153. *Id.* at 379–80.

154. JEFFREY A. BUTTS, YOUTH CRIME DROP 5 (2000), available at <http://www.urban.org/Uploadedpdf/youth-crime-drop.pdf>.

155. *Violence in the Media—Psychologists Help Protect Children from Harmful Effects*, AM. PSYCHOL. ASS'N (Feb. 19, 2004), <http://www.apa.org/research/action/protect.aspx>.

156. *See Video Games Don't Make Kids Violent: Study*, LOCAL (Dec. 6, 2011, 10:02 AM), <http://www.thelocal.se/37756/20111206/#.UU-Uga534QQ>.

157. *Id.*

158. Andy Chalk, *Sports Games Stir More Aggression Than Shooters*, ESCAPIST (May 5, 2011, 10:14 AM), <http://www.escapistmagazine.com/news/view/109787-Sports-Games-Stir-More-Aggression-Than-Shooters>.

linked the increase in aggression to the more competitive nature of sports games and the tendency of the subjects' brains to see the sports games as more "real" than the shooting games.¹⁵⁹ If violent video games really do cause a permanent increase in aggressive behavior, this increase would only become permanent after several years of unchecked consumption of violent media by the minor.¹⁶⁰

The evidence surrounding the effects of a minor's exposure to pornography are less controverted but no less grim. Similar to violent video games, pornography has been linked to an increase in sexually aggressive behavior but not necessarily to an increase in sexually violent behavior in minors.¹⁶¹ Studies find that minors' exposure to pornography contributes to viewing sex as "recreational," rather than as an intimate and sometimes risky experience shared between adults.¹⁶² Boys were more likely to develop these attitudes than girls, especially when they believed the depictions they saw were realistic.¹⁶³ Boys were also more likely to view women as sexual objects if they viewed more explicit pornography.¹⁶⁴ Like violent video games with generally aggressive minors, pornography has been found to be a risk marker in sexually reactive children and adolescents (SRCAs).¹⁶⁵ An SRCA is more predisposed to act aggressively in sexual situations.¹⁶⁶ SRCAs who regularly consumed pornography tend to act more aggressive than SRCAs who were not exposed to pornography.¹⁶⁷

Based on the evidence presented, it seems that there are marked similarities between pornographic and violent media.¹⁶⁸ Both have been linked to increases in aggression but have never concretely been shown to establish a propensity for violent or sexual crimes.¹⁶⁹ These similarities provide the groundwork for the rest of this Note. If violent and pornographic media have similar effects on minors, then both types of content should be subject to the same standard of First Amendment protections. However, this view only applies if both kinds of content are within the same medium. As the following discussion

159. *See id.*

160. Transcript of Oral Argument at 30–31, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448) [hereinafter Transcript].

161. Tori DeAngelis, *Web Pornography's Effects on Children*, MONITOR ON PSYCHOL., Nov. 2007, at 50, available at <http://www.apa.org/monitor/nov07/webporn.aspx>.

162. *Id.*

163. *Id.*

164. *Id.*

165. Eileen M. Alexy et al., *Pornography Use as a Risk Marker for an Aggressive Pattern of Behavior Among Sexually Reactive Children and Adolescents*, 14 J. AM. PSYCHIATRIC NURSES ASS'N 442, 442 (2009).

166. *Id.* at 443.

167. *Id.* at 450.

168. *See supra* Part III.

169. *See supra* Part III.

shows, the medium used to convey violent or sexual content can make a world of difference in how easily minors can gain access to each type of content.

IV. THE PRICE OF PARENTING: HOW DIFFERENCES IN VIOLENT VIDEO GAMES AND PORNOGRAPHY DISTINGUISH ONE FROM THE OTHER

Given all of the evidence previously listed, there is substantial justification to find that violent content, if it does not have a worse effect than pornography on the psychological development of minors, at least has a similar effect.¹⁷⁰ This Note does not seek to argue the rationale or reasoning behind whether the Court's decision in *Ginsberg* is good public policy. Yet, if *Ginsberg* is used as a baseline for how content that is obscene to minors should be regulated, the evidence so far examined indicates that graphic depictions of excessive violence should receive the same limited First Amendment protections as graphic depictions of sex, at least to the extent that such depictions occur within the same type of media.¹⁷¹ This is because the two kinds of content are at least equally destructive when viewed by minors.¹⁷²

The Court refused to extend *Ginsberg's* variable obscenity standard, a standard that held that speech may be obscene for minors even when it clearly is not obscene for adults, to the facts in *EMA*.¹⁷³ The Court reasoned that, similar to how they refused to create new categories of what was obscene for the general population, *Ginsberg* had very specifically limited the application of variable obscenity to allow government regulation of minors' access only in the case of sexual material.¹⁷⁴ Based on the information discussed, the *EMA* Court could have justified its application of a variable obscenity standard to violent media. If it had done so, the California law at issue would have no longer had to meet the exhaustive justifications required under the strict scrutiny test applied to content regulations but instead would only be required to have a rational basis for its enactment.¹⁷⁵

However, even if the Court in *EMA* accepted this argument as true, such a finding should not automatically result in the application of variable obscenity. California argued to the Court that if the state has the ability to regulate the sale of pornography to minors under variable obscenity it should also be allowed to regulate the sale

170. *See supra* Part III.

171. *See supra* Part III.

172. *See supra* Part III.

173. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2735 (2011).

174. *Id.*

175. *Id.*

of violent video games to minors because exposure to violent content is equally harmful to minors as exposure to sexual content.¹⁷⁶ Yet, no one addressed an underlying assumption made by California that is clearly faulty—the assumption that without government regulation of minors’ access to either sexual or violent content, minors would enjoy the same level of access to both types of content.¹⁷⁷ This assumption is simply, patently false.¹⁷⁸ It is the position of this Note that before a court may apply the variable obscenity standard to a piece of speech, it should first look at a variety of factors regarding minors’ access to that media and not just consider the content contained within a piece of objectionable speech. A court must determine if, in the absence of government regulation, a minor would enjoy substantial access to content that would be deemed obscene for minors while a parent or guardian would be significantly hindered in preventing such access without the aid of said government intervention. As will be discussed below, had the *EMA* Court expanded the decision in *Ginsberg* to include such a requirement, it would have been able to affirm the lower courts’ holdings in *EMA*, extend full First Amendment protection to most (if not all) video games, and still avoid holding, as the majority of the Court does, that violence can never be obscene, at least as it relates to minors.

The following discussion will show how, without any kind of regulation over either sexual or violent content, minors would be much more able to gain access to depictions of graphic sexual content than they would depictions of excessive violence. The reasons in support of this conclusion lie in the fact that sexual content is substantially cheaper to buy than violent content and because sexual content is much more easily hidden from parents and guardians.¹⁷⁹ Also, sexual content demands greater government restriction because it traditionally has a greater degree of realism in its portrayal than does violent content.¹⁸⁰ These disparities in the different types of media call for the implementation of a media-specific approach in determining whether it is constitutional for a state to bar minors’ access to the media commonly used to display sexual or violent content.

The media-specific approach is a First Amendment doctrine applied by the Supreme Court, and it states that due to the intrinsic nature of a specific type of media, that medium enjoys a different

176. See Transcript, *supra* note 160, at 10, 15.

177. See *id.* at 22–23. Paul Smith, representing Respondents, Justice Breyer, and Chief Justice Roberts briefly discussed the difficulty of minors accessing violent video games in frustration of their parents’ wishes. *Id.* at 29–31.

178. See *infra* notes 181–220 and accompanying text.

179. See *infra* notes 205–20 and accompanying text.

180. See *infra* notes 221–34 and accompanying text.

level of First Amendment protection than is traditionally applied to other media.¹⁸¹ The application of this doctrine results in different levels of First Amendment rights for users of different types of media, sometimes resulting in certain forms of expression being favored over others even when they are used to convey the same or similar content.¹⁸² It also makes an already fact-intensive analysis even more dependent upon the particularities of the case at hand.¹⁸³

The media-specific approach has only been applied by the Court in a handful of cases.¹⁸⁴ In *Red Lion v. FCC*, the Court unanimously upheld an FCC ruling requiring broadcast stations to personally notify individuals who had been verbally attacked on their broadcast programs, and the Court mandated that the station provide the individual with a chance to respond.¹⁸⁵ The Court argued that due to the scarcity of stations available on the broadcast spectrum there was less chance for competing voices to be heard equally, and thus government intervention was acceptable to ensure that stations were not ruled by a single viewpoint.¹⁸⁶ Just five years later, however, the Court held in *Miami Herald Pub. Co. v. Tornillo* that it was a violation of a newspaper's First Amendment rights to force the paper to print a response from a political candidate whose suitability for office had been attacked previously in the same paper.¹⁸⁷ The Court was not swayed by the scarcity argument in *Miami Herald* as it was in *Red Lion* even though it recognized the difficulty many politicians may face in the contemporary news market when trying to either find another newspaper to print their response or start their own newspapers.¹⁸⁸ The distinguishing factor between these cases was that the scarcity in *Red Lion* was a direct result of the scientific phenomenon the communication depends upon, the limited number of wavelengths in the broadcast spectrum, and as such government regulation through broadcasting licenses already existed to manage the scarcity issue.¹⁸⁹ In contrast, the scarcity in *Miami Herald* was a direct result of economic market forces, not government intervention.¹⁹⁰ This

181. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969).

182. *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 498 (1986) (Blackmun, J., concurring).

183. See Transcript, *supra* note 160, at 13 (discussing Justice Scalia's concern for manufacturers of video games understanding what level of violence is legal).

184. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 224–25 (1997); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Red Lion*, 395 U.S. at 386.

185. *Red Lion*, 395 U.S. at 367.

186. See *id.* at 400–01.

187. *Miami Herald*, 418 U.S. at 258.

188. See *id.* at 248–51.

189. *Red Lion*, 395 U.S. at 396.

190. *Miami Herald*, 418 U.S. at 248–50.

line of thinking also led the Court to uphold the FCC's must-carry laws in *Turner Broadcasting v. FCC*.¹⁹¹ The Court held that the FCC could require cable providers to include local broadcast stations in their cable packages.¹⁹² Otherwise, the sheer wealth of cable stations would drown out local broadcast stations who were limited to only a specific spectrum.¹⁹³

The Court has also relied on the media-specific approach and the issue of scarcity to uphold government codes of decency and content control.¹⁹⁴ In *FCC v. Pacifica*, the Court held that government regulations ensuring stations maintain a certain level of decency in their broadcasts were constitutional due to the tendency of radio and television broadcasts to invade the home while one is channel surfing.¹⁹⁵ The scarcity issue also played a role in the Court's decision in the last media-specific approach case before *EMA*, *Reno v. ACLU*.¹⁹⁶ In *Reno*, the Court held that due in part to the lack of scarcity in possible websites available to internet users, the government was only allowed to regulate content on the internet if such a law passed strict scrutiny or the content was obscene.¹⁹⁷ As a result, the Court struck down the vague and overbroad Communications Decency Act.¹⁹⁸

To be sure, the *EMA* case already contains some notions of a media-specific approach case.¹⁹⁹ Justice Scalia wrote that there is insubstantial evidence that the interactive nature of video games somehow requires them to enjoy different levels of First Amendment protections when compared to other media.²⁰⁰ This Note agrees that violent games should enjoy a different level of First Amendment protection than pornography. Yet this is not because of a game's interactivity or because of the type of content included in the different media, but rather because in the absence of government regulation, minors would have far greater access to pornographic magazines and videos when compared to violent video games.²⁰¹ This is because violent games cost substantially more than pornographic magazines and

191. 520 U.S. 180, 224–25 (1997).

192. *Id.*

193. *See id.* at 212.

194. *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 750–51 (1978).

195. *Id.* at 759–60.

196. 521 U.S. 844, 868–69 (1997).

197. *See id.* at 868–70.

198. *Id.* at 885.

199. *See, e.g.*, Transcript, *supra* note 160, at 5–8.

200. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2737–38 (2011).

201. It should be noted that this Note avoids discussion of both pornography and violent video games on the internet. This is because the California law at issue in *EMA* regulated only the physical sale of violent video games to minors. It did nothing to regulate retailers who sold violent video games over the internet or game developers whose creations were only available to play online.

DVDs,²⁰² violent games are more difficult to hide from parents and guardians than pornography,²⁰³ and violent games are far less realistic than pornography.²⁰⁴

A pornographic magazine can cost up to ten dollars.²⁰⁵ A pornographic DVD will traditionally cost thirty dollars or less.²⁰⁶ Although it is true that modern video games can cost thirty dollars or less, these are smaller games, games made for handheld systems, or games that are at least several years old.²⁰⁷ These games do not contain the excessive levels of violence that are at issue in the *EMA* case, or they are so old that contemporary displays of violence are far more graphic and realistic than what is found in these games.²⁰⁸ This is because the technology available in these games is not capable of handling the kind of advanced processing power needed to create realistic blood spatter, detailed character models, and effective character animations.²⁰⁹ The only games that are capable of containing such levels of graphical detail are big name major titles otherwise known as AAA or triple A titles.²¹⁰ These are huge titles that will spend several years in development with teams in the hundreds or thousands.²¹¹ As such, these games tend to be the most expensive, usually sixty dollars per title on the release date.²¹²

Although an increase from thirty dollars to sixty dollars is not a large change, none of these games can be played without a gaming console or a personal computer. A current generation game console that will play a majority of violent games costs at least 150 dollars for

202. See *infra* notes 205–15 and accompanying text.

203. See *infra* notes 216–20 and accompanying text.

204. See *infra* notes 221–34 and accompanying text.

205. E.g., *Penthouse Subscriptions*, PENTHOUSEMAGAZINE, <https://subscriptions.penthouse.com/pcd/document?iid=072g1IPHMAG> (last visited Mar. 23, 2013) (showing the price for twelve issues is regularly set at \$29.95, which averages to about \$2.50 per issue).

206. See, e.g., *Amateur DVD Titles*, ADULT DVD.COM, http://www.adultdvd.com/dvds_category.html?id=1 (last visited Mar. 23, 2013).

207. E.g., *View All: Games*, GAMESTOP, <http://www.gamestop.com/browse/games?nav=13ffff2418-3d> (searching for games for all platforms priced between \$20 and \$29.99) (last visited Mar. 23, 2013).

208. Compare Erik Brudvig, *Mass Effect 2 Review*, IGN (Feb. 8, 2010), <http://www.ign.com/articles/2010/02/08/mass-effect-2-review-2?page=2>, with Lucas M. Thomas, *The Amazing Spider-Man 3DS Game Review*, IGN (June 26, 2012), <http://www.ign.com/articles/2012/06/26/the-amazing-spider-man-3ds-game-review> (demonstrating that the handheld game received worse reviews for graphics and was also less violent).

209. See Tara Parker-Pope, *10 Video Games to Cross Off Your Child's Gift List*, N.Y. TIMES (Dec. 7, 2009, 11:47 AM), <http://well.blogs.nytimes.com/2009/12/07/ten-video-games-to-cross-off-your-gift-list/> (listing only major titles released in 2009).

210. Juuso Hietalahti, *What Are AAA Titles?*, GAME PRODUCER BLOG (Mar. 26, 2006), <http://www.gameproducer.net/2006/05/26/what-are-aaa-titles/>.

211. Colin Campbell, *Are AAA Hardcore Games Doomed?*, IGN (July 30, 2012), <http://www.ign.com/articles/2012/07/30/are-aaa-hardcore-games-doomed>; Hietalahti, *supra* note 210.

212. Transcript, *supra* note 160, at 31.

a bare-bones model.²¹³ No such device is required to view a pornographic magazine, and a DVD player can be purchased for as little as thirty dollars.²¹⁴ As such, a minor would have to spend at least 210 dollars to play her or his first violent video game but only ten dollars for a pornographic magazine or sixty dollars for her or his first pornographic DVD.²¹⁵ This disparity in price creates a substantial barrier to a minor's access of violent video games when compared to her or his access to pornographic material without any government or industry intervention.

Yet, cost is not the only barrier to a minor's access of violent video games. It is substantially easier for parents to monitor their children for the inappropriate use of violent video games relative to the inappropriate use of pornography. The first reason this is true is because many minors will not buy a game console or DVD player by her or himself, but rather, their parents will purchase the console or player for the minor.²¹⁶ This purchase puts the parents on notice that their child may be exposed to violent or sexual content to which the parent may object.²¹⁷

Furthermore, video games are traditionally played for at least thirty minutes to an hour in a play session, usually on the family's television or computer, giving parents ample opportunity to monitor the appropriateness of the games played.²¹⁸ Even if the television and game system are in the minor's bedroom, this still provides a parent ample time to enter the room and discover the objectionable material.²¹⁹ Pornographic materials are utilized in a much shorter time limit and can be more easily stowed if the minor suspects an adult of entering his bedroom.²²⁰ When both of these points are considered, it becomes apparent that guardians are much better equipped to discover violent content that they may find objectionable than sexual content.

213. *E.g.*, *View All: Xbox 360*, GAMESTOP, <http://www.gamestop.com/browse/xbox-360/systems?nav=1385-c4> (following the "Game Systems" hyperlink under "Xbox 360" and "Xbox360 Hardware") (last visited Mar. 23, 2013).

214. *E.g.*, *DVD Players*, BEST BUY, <http://www.bestbuy.com/site/Blue-ray-DVD-Players/DVD-Players/abcat0102005.c?id=abcat0102005> (last visited Mar. 23, 2013).

215. *E.g.*, Transcript, *supra* note 160, at 30 (mentioning that it is the parent purchasing the game 90 percent of the time).

216. *Id.*

217. *See id.*

218. *Id.* at 30–31.

219. It is far easier, for example, to turn off a television or hide a pornographic magazine on a moment's notice than to shut down a video game system.

220. *Teens Spend Average of 87 Hours a Year Looking at Porn Online*, MAIL ONLINE (Feb. 9, 2009, 1:49 PM), <http://www.dailymail.co.uk/sciencetech/article-1139811/Teens-spend-average-87-hours-year-looking-porn-online.html> (stating that studies show teens average one hour and forty minutes a week looking at online pornography, which works out to less than fifteen minutes per day).

The final difference this Note will discuss between violent video games and pornography is not related to how easily minors can access either form of content. Yet, photorealism, as will be discussed, is an important difference between video games and pornography that deserves consideration when treating the two types of media separately. Photorealism is “realism in painting characterized by extremely meticulous depiction of detail.”²²¹ Pornographic materials are photorealistic representations of actual people engaged in sexual acts because the images are recorded with a camera. Video games may utilize photo technology to help in the creation of character models, animations, or sprites (moving images in two-dimensional games), but motion and image capture only go so far.²²² Modern computer animation suffers from a unique problem known as the uncanny valley.²²³ The theory of the uncanny valley states that as something that is inhuman begins to look more and more human-like, psychological tendencies create greater empathy for the inhuman thing.²²⁴ However, there is a certain point where the object starts to look so very close to being human, but not yet perfectly identical to an actual human, that we psychologically reject the notion that the object is human more forcefully than we would if the object looked less human.²²⁵ The theory is based on the fact that human beings have so many little nuances in the way they move, talk, walk, and act, that if an animation doesn’t portray all of these nuances perfectly, which is nearly impossible to do, these small flaws become that much more apparent in a closer approximation of a human being than in an approximation that is less human.²²⁶ This gap of forceful psychological rejection between when the brain empathizes with something human-like and when it accepts the representation as identical to a human being is called the uncanny valley.²²⁷

Because games are not, at least yet, photorealistic, they still suffer from the problems caused by the uncanny valley.²²⁸ A game has never yet fully crossed the uncanny valley in presenting near identical representations of human beings.²²⁹ When a video game displays

221. *Photorealism*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/photorealism> (last visited Mar. 23, 2013).

222. MARIO A. GUTIÉRREZ ET AL., STEPPING INTO VIRTUAL REALITY 55–57 (2008).

223. See Clive Thompson, *The Undead Zone: Why Realistic Graphics Make Humans Look Creepy*, SLATE (June 9, 2004, 5:20 PM), http://www.slate.com/articles/technology/gaming/2004/06/the_undead_zone.html.

224. *Id.*

225. Erik Sofge, *The Truth About Robots and the Uncanny Valley: Analysis*, POPULAR MECHANICS (Jan. 20, 2010), <http://www.popularmechanics.com/technology/engineering/robots/4343054>.

226. See Thompson, *supra* note 223.

227. Sofge, *supra* note 225.

228. Thompson, *supra* note 223.

229. *Id.*

gratuitous amounts of violence and gore, the developers try to make those depictions as realistic as possible to give them impact.²³⁰ However, they are also forced to reduce the photorealism or risk slipping into the uncanny valley.²³¹ As such, the uncanny valley acts as a psychological barrier between video games that portray graphic violence and the player seeing that violence as photorealistic.²³²

This is not the case in adult entertainment. Pornography captures photorealistic images on film. The visual representations display the model or actor exactly as he or she appeared in front of the camera. As a result, pornography has no uncanny valley. It is easier for viewers to accept that the image they are looking at is of a real person because it is nearly identical to that person.²³³ As such, there is more of a reason for a minor to accept that what is happening in pornography is happening to real people, in part because it did happen to real people at the time of filming, but also because there is no issue with the uncanny valley.²³⁴ Neither of these is true for violent video games.

CONCLUSION: GAME OVER

In conclusion, while the Supreme Court has chosen to rely on a content-based distinction in reaching their conclusion in *EMA* that graphic depictions of violence should not be considered obscene,²³⁵ such a holding is unnecessary and rash when considering that visual representations of violent content and sexual content are traditionally relegated to different types of media.²³⁶ The differences between these media result in minors having different levels of access to each medium. There are a host of factors that make it easier for a minor to obtain sexual material than for him or her to obtain violent material.²³⁷ The first factor is cost. Violent video games cost exceptionally more than pornographic magazines and movies.²³⁸ Second is the ease with

230. *E.g.*, *Video Game Ad Banned for 'Realistic' Violence*, REGISTER (Jan. 17, 2008), http://www.theregister.co.uk/2008/01/17/violent_video_game_ad_banned/. *But see* djchan08, *Video Game Violence, the Media, and a Thing Called "Realism,"* IGN (Feb. 11, 2013), <http://www.ign.com/blogs/djchan08/2013/02/11/video-game-violence-the-media-and-a-thing-called-realism>.

231. *See* Thompson, *supra* note 223.

232. *See id.* (illustrating that the accuracy of graphic portrayals of violence is held back by designers attempting to avoid falling into the uncanny valley).

233. DeAngelis, *supra* note 161 (implying that teens are able to understand that the acts are happening to real people based on their acceptance of this behavior and adopt the attitudes demonstrated on the screen).

234. *See id.*

235. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734–35 (2011).

236. *See supra* Part IV.

237. *See supra* Part IV.

238. *See supra* notes 202–15 and accompanying text.

which parents can regulate the presence of objectionable content within their households. Violent video games require far more time and energy to use and are much more difficult to hide when the minor is finished using them.²³⁹ Lastly, violent video games do not achieve the same level of photorealism that pornography does. Due to differences in the way each medium represents its subjects, video games have not achieved the same level of photorealism that pornography has already reached.²⁴⁰ Such a difference prevents the brain from fully accepting the subject it is observing as an actual human being, unlike in pornography.²⁴¹

As such, in response to the question posed by Justice Breyer,²⁴² this Note advocates that there is no sense in granting two different video games different levels of First Amendment protection based solely on whether the in-game content is violent or sexual in nature. This Note, however, also advocates that the inquiry does not end there. The sense of prohibiting that same 13-year-old boy from buying a pornographic magazine lies in the fact that he will have to pay substantially more for either video game than he would for the magazine, he will play the games for a longer time period than he will look at the magazine (at which point his parents can more easily discover the games), and the images contained in the games are far less photorealistic than the images contained in the magazine.²⁴³ All of these contributing factors eliminate the need for legislative intervention and work consistently well enough in giving parents the tools necessary to keep inappropriate violent video games out of the hands of minors.

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239. *See supra* notes 216–20 and accompanying text.

240. *See supra* notes 221–22 and accompanying text.

241. *See supra* notes 223–34 and accompanying text.

242. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2771 (2011) (Breyer, J., dissenting).

243. *See supra* Part IV.

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