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NOTES

RATED M FOR MATURE:

VIOLENT VIDEO GAME LEGISLATION AND THE OBSCENITY STANDARD

BY JENNIFER CHANG*

It's your typical dark and stormy night at the insane asylum. You wake up in your cell to find that a freak electrical problem has left the door wide open. A sinister voice beckons you to follow it and advises you to stay in the shadows so as not to be seen by the other cell dwellers. You sneak past the first two but the third catches a glimpse of you and goes wild, throwing feces in your general direction. You're told to grab the syringe from the floor as it will be a useful weapon. Up ahead, a nurse facing the other way stands between you and a door to the next room. You neither know who he is, nor does he know that you're standing there lurking behind him. The voice commands you to kill, and you protest. Suddenly, your heart races, your palms get sweaty, and your vision blurs. The sound of the syringe plunging into the nurse's flesh mixes with his garbled screams. Congratulations, you've just made your first of many gruesome kills. All of this happens in the first five minutes of *Manhunt 2*, a video game

released in 2007.¹

Did you find this description disturbing? Should you? Is there any harm caused by violent video games? What if a twelve-year-old child was playing this game? Is it appropriate content at any age? Who, if anyone, should have a say in what types of games to which minors can be exposed? These are the questions that form the basis of an on-going dialogue about video game violence and the First Amendment.

Current video games have evolved past the pixilated monochromatic days of virtual table tennis and now feature stunning, life-like, three-dimensional graphics.² The enormous sales of next generation consoles like Microsoft's Xbox 360 and Sony's Play Station 3 prove that players are hungrily looking for enhanced, high-definition experiences and are more than willing to spend the money for such devices.³ Games have also developed in terms of storylines, characters, and level of player interaction and involvement.⁴ Role-playing games like *Fable* and *The Elder Scrolls IV: Oblivion* present a format that allows players to make ethical choices, affecting their character's development and the overall storyline.⁵ Massive multiplayer online role-playing games (hereinafter MMORPGs), like the popular *World of Warcraft*, allow gamers to assume customized alter-egos while exploring lush environments populated by other players.⁶ Other new

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¹ YouTube.com, *Manhunt 2 – Wii – Episode 01 – Awakening & Intro* [1/2], <http://www.youtube.com/watch?v=LAGdXs0hCY0&feature=related> (last visited May 15, 2010) (showing video of gameplay during first mission); GAMESPOT, *Manhunt 2*, <http://www.gamespot.com/ps2/action/manhunt2/review.html> (last visited May 15, 2010) (reporting the release date as Oct. 29, 2007).

² See PBS, *The Video Game Revolution: History of Gaming*, http://www.pbs.org/kcts/videogame/revolution/history/timeline_flash.html (last visited May 15, 2010) (documenting milestones in video game development from 1952-2003); GAMESPOT, *The History of Video Games*, http://www.gamespot.com/gamespot/features/video/hov/p10_02.html (last visited May 15, 2010) [hereinafter *History of Video Games*] (outlining the evolution of video games from 1971-2001).

³ See Scott Hillis, *Microsoft Sees Xbox 360 Sales Growth in '08*, REUTERS, Dec. 19, 2007, <http://www.reuters.com/article/technology-media-telco-SP/idUSN1963334520071219?pageNumber=1&virtualBrandChannel=10003>) (expecting continued sales in Europe market); Jeremy Dunham, *Sony Happy with PS3 Launch*, IGN, <http://ps3.ign.com/articles/747/747178p1.html> (reporting PS3 launch comments of Sony executives and expectations of reaching goal of 1 million units sold).

⁴ See PBS, *supra* note 2 (summarizing the development of games); see also *History of Video Games, supra* note 2 (charting the advancement of games).

⁵ *History of Video Games, Fable for Xbox*, <http://www.gamespot.com/xbox/rpg/fable/index.html?tag=result;title;1> (last visited May 15, 2010) (reporting the release date as Sept. 14, 2004); GameSpot, *The Elder Scrolls IV: Oblivion, available at* <http://www.gamespot.com/pc/rpg/theelderscrollsivoblivion/index.html?tag=result;title;0> (last visited May 15, 2010) (listing the release date as Mar. 20, 2006).

⁶ See GAMESPOT, *World of Warcraft*, <http://www.gamespot.com/pc/rpg/worldofwarcraft/index.html?tag=result;title;0> (last visited May 15, 2010) (showing the release date as Nov. 23, 2004); see also Albert C. Lin, *Article: Virtual Consumption: A Second Life Earth?*, 2008 B.Y.U. L. Rev. 47, 49 (2008)

gaming systems have added an element of physical interaction between the game and the gamer. The release of the Nintendo Wii has launched a new way for players to control the action using motion sensing controllers.⁷ The industry continues to advance and produce new and unique interactive entertainment but, as a consequence, the controversy over video game violence continues to develop as well.⁸

In the past few years, governments worldwide have responded to video game violence in very interesting ways. The British Board of Film Classification banned the sale of *Manhunt 2*, calling it “distinguishable from recent high-end video games by its unremitting bleakness and callousness of tone in an overall game context which constantly encourages visceral killing with exceptionally little alleviation or distancing.”⁹ The Board has not banned a game since 1997’s *Carmageddon*, a game in which players scored points for running over pedestrians.¹⁰ Ireland also banned the sale of *Manhunt 2* when the Irish Film Censor’s Office found the game “gross” and stated that while violence in a game did not by itself warrant censorship, “there is no such context, and the level of gross, unrelenting and gratuitous violence is unacceptable.”¹¹ The debate over video game violence has even erupted in Japan.¹² In 2005, the Osaka Prefecture Government planned to ban the sale of violent video games to minors. The local government made this decision in response to a seventeen-year-old

(defining massively multiplayer online reality games).

⁷ See Aimee Green, *Nintendo Wii Revolutionizes Gaming*, LINCOLN J. STAR, Dec. 15, 2006, at X28 (describing her initial skepticism and subsequent delight with the Wii controller’s capabilities); see also Nintendo.com, *Controllers at Nintendo:Wii:What is Wii?*, <http://www.nintendo.com/wii/what> (last visited May 15, 2010) (explaining the mechanics of the Wii console controllers, which are used to play the games).

⁸ See Eric Benderoff, *‘Grand Theft Auto’ Back -- and Driving Critics Nuts; Latest Release Renews Debate on Game Violence*, CHI. TRIB., Apr. 28, 2008, at C1 (claiming that the debate over video game violence is renewed with each release of more realistic games); see also Alex Pham, *Debate Flares Anew Over Violence in Video Games; State Lawmakers Try to Regulate the Sale of Some Titles, but the Industry Contends Such Efforts Amount to Censorship.*, L.A. TIMES, Oct. 5, 2005, at C1 (asserting that the increased realism of newer games helps fuel the debate over violence in games).

⁹ Matt Slagle, *Britain Bans Sales of Rockstar’s New Game*, MSNBC, June 19, 2007, <http://www.msnbc.msn.com/id/19313409/>.

¹⁰ See Richard Ord, *When Death and Violence Is the Name of the Game – Are Video Games Turning Our Youngsters Into Tomorrow’s Psychopaths?*, EVENING CHRON. (Newcastle), Nov. 24, 1997, at 20 (describing *Carmageddon* as a game in which players mow down pedestrians “who literally explode on connection with your car”); see also Slagle, *supra* note 9 (stating that the Board’s 2007 ban of *Manhunt 2* is the first video game ban since *Carmageddon* was banned in 1997).

¹¹ Shawn Pogatchnik, *Ireland Bans Its 1st Video Game, Calling It “Gross”*, MSNBC, June 20, 2007, <http://www.msnbc.msn.com/id/19332572/?GT1=10056>.

¹² See John Anderson et. al., *Debate Over Game Violence Boils Over in Japan*, GAME SPOT, June 20, 2005, <http://www.gamespot.com/news/6127821.html?tag=result;title;7> (discussing a Japanese Prefecture’s decision to ban the sale of violent video games to minors); see also Fernando Dutra, *Cultural Divide Evident in Debate Over Game Content*, DAILY CAMPUS, Feb. 1, 2008, (contrasting American restrictions on sexual content with Japanese restrictions on graphic violence in video games).

boy's stabbing spree at a local elementary school. A former classmate claimed that the boy had been obsessed with violent games involving the killing of ordinary people. In 2008, Brazil similarly chose to ban the sales of two other games called *Counter Strike* and *Ever Quest*.¹³ The former is a popular first-person tactical shooting game that pits a team of counter-terrorists against terrorists while the latter is a fantasy-based MMORPG.¹⁴ The Brazilian federal government claimed that the games incited violence and were "harmful to consumer's health."¹⁵

At home in the United States, video game violence has been the concern of both legislators and the courts. Legislators have been eager to address what they and their constituents feel is an important issue. They rely on two main arguments to justify regulation: (1) empirical examples of how certain games have influenced minors and young adults to commit some of the most publicized and heinous crimes and (2) scientific studies on aggression elicited by violent video games. The most recent of these empirical examples is the Northern Illinois University shooting, where the shooter was said to have been addicted to *Counter-Strike*.¹⁶ The scientific studies cited by legislators showed that there is a correlation between violent games and aggression in children.¹⁷ However, a number of gaming

¹³ See *Brazil Bans Popular Video Games Seen to Incite Violence*, AFP, Jan. 18, 2008, available at http://afp.google.com/article/ALEqM5hBkj-Bi6dzGMMrid_jOE2PHFsw4g (according to the consumer protection agency in the central state of Goias, the prohibition was being applied across the country); see also Pulkit Chandna, *Counter Strike, Everquest Face Ban in Brazil*, GAMER TELL, Jan. 22, 2008, available at <http://www.gamertell.com/gaming/comment/counter-strike-everquest-face-ban-in-brazil/> (noting the ban marked the first time games have been blamed for "inciting seditious anti-state tendencies").

¹⁴ See *Everquest*, GAMESPOT, <http://www.gamespot.com/pc/rpg/everquest/index.html?tag=result;title;1> (last visited May 15, 2010) (noting the release date of *Everquest* on Mar. 16, 1999); see also *Half-Life: Counter-Strike*, GAMESPOT, <http://www.gamespot.com/pc/action/halflifecounterstrike/index.html?tag=result;title;4> (last visited May 15, 2010) (noting the release date of *Counter-Strike* on Nov. 8, 2000).

¹⁵ See AFP, *supra* note 13 (stating that some psychologists have described the games as addictive as drugs); see also Chandna, *supra* note 13 (suggesting that the games came under attack because they were too riveting and addictive).

¹⁶ See, e.g., Poll: *Did Video Games Cause Illinois Shooting?*, GAME DAILY, <http://www.gamedaily.com/articles/galleries/poll-did-counterstrike-cause-illinois-shooting/?page=1> (last visited May 15, 2010) (asking whether video games were responsible for the NIU school shooting); see also Winda Benedetti, *Why Search Our Souls When Video Games Make Such an Easy Scapegoat?*, MSNBC, Feb. 18, 2008, <http://www.msnbc.msn.com/id/23204875/> (commenting upon the speculation being made by Jack Thompson that video games were to blame for the shooting at Northern Illinois University).

¹⁷ See generally N.L. Carnagey & C.A. Anderson, *Violent Video Game Exposure and Aggression: A Literature Review*, 45 MINERVA PSICHIATRICA 1, 7, (2004), available at <http://www.psychology.iastate.edu/faculty/caa/abstracts/2000-2004/04CA.pdf> (explaining the effects of violent video games); see also Patrick R. Byrd, *It's All Fun and Games Until Someone Gets Hurt: The Effectiveness of Proposed Video-Game Legislation on Reducing Violence In Children*, 44 HOUS. L. REV. 401, 410-13 (2007) (highlighting "evidence supporting a causal link between video games and violence in children").

industry supporters have shown that these studies are inconclusive.¹⁸ These supporters have also been successful at getting courts to agree that the various legislative attempts of controlling access to minors are unconstitutional.¹⁹

Courts have decided that the content of video games is protected by the First Amendment right to free speech.²⁰ Their position on this issue indicates how much Americans revere this right; people can speak, display, and express their thoughts and ideas in almost any medium with little censorship from the government.²¹ The courts are generally reluctant to allow the government to limit the content of speech unless it causes some immediate harm or is obscene speech, not protected by the First Amendment.²² Content-based regulations are presumptively unconstitutional and are subjected to strict scrutiny review.²³ Thus, when regulating protected content, the government must show that they are imposing the least restrictive means possible.²⁴ To date, neither the federal government nor the state governments have successfully drafted legislation

¹⁸ See discussion *infra* Part III.

¹⁹ See *Id.*; see also Kevin E. Barton, Note, *Game Over! Legal Responses to Video Game Violence*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 147 (2002) (noting the continuing practice of allowing the gaming industry to self-regulate); Jessica Williams, Note, *Faulting San Andreas: The Call to Arms for Sensible Regulation of Violent Video Games*, 29 HASTINGS COMM. & ENT. L.J. 121, 138 (2006) (analyzing court's consideration of expert testimony in *Entertainment Software Association v. Blagojevich*).

²⁰ See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) ("If the first amendment is versatile enough' shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,' we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to a similar protection.").

²¹ See *Interactive Digital Software Ass'n*, 329 F.3d at 957 (stating the First Amendment protects entertainment along with political speech); see also Ryan P. Kennedy, Note, *Ashcroft v. Free Speech Coalition: Can We Roast the Pig Without Burning Down the House in Regulating "Virtual" Child Pornography?*, 37 AKRON L. REV. 379, 405 (2004) (discussing the idea that banning violence in video games without a strong connection between the speech in the game and an individual's action would lead to arbitrary speech suppression by legislators).

²² See Christopher Dean, Note, *Returning the Pig to Its Pen: A Pragmatic Approach to Regulating Minors' Access to Violent Video Games*, 75 Geo. Wash. L. Rev. 136, 143 (2006) (recounting history of obscenity standard); see also Nathan Phillips, *Constitutional Law: Note, Interactive Digital Software Ass'n v. St. Louis County: The First Amendment and Minors' Access to Violent Video Games*, 19 BERKELEY TECH. L.J. 585, 586 (2004) (listing the various exceptions to First Amendment speech protection).

²³ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (explaining that regulations on content are permitted, however, where the speech is of little social value); see also *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

²⁴ See *Sable Comm. of Cal., Inc. v. Fed. Commc'n Comm'n*, 492 U.S. 115, 126 (1989) (recognizing government's ability to regulate constitutionally protected speech because states have compelling interest to protect minors); see also Phillips, *supra* note 22, at 589-90 (noting children do not have the same expressive rights as adults).

that bans the sale of violent games to minors due to such protection and opposition from the gaming industry.²⁵

As the final result of a compromise between lawmakers and the gaming industry, current efforts to restrict access of violent video games rely on a combination of industry standards and parental supervision. Industry standards are represented by ratings given to each game produced ranging from EC (early childhood) to AO (adults-only).²⁶ These ratings are determined by the Electronic Software Ratings Board (ESRB) and are supposed to help parents make the right choices when purchasing games for their children.²⁷ Many critics of government regulation point to the fact that parents lack the education needed to make an informed choice and advocate parental education campaigns or programs as a solution to the access problem.²⁸ It is apparent, though, that while parents must be a part of the overall solution, they cannot be the only ones bearing this policing burden.²⁹ Undercover studies conducted by the Federal Trade Commission (hereinafter FTC) found that retailers still allow forty-two percent of unaccompanied minors between the ages of thirteen and sixteen to purchase Mature ("M") rated games.³⁰ Although this is a vast improvement from the eighty-five percent finding in 2000, it still indicates that a significant number of minors have access to games containing adult content.³¹

This note argues that the courts should support government regulation of violent video games.³² While they have not explicitly forbidden governments from regulating access to violent video games, the holdings of several pertinent cases have demonstrated that the courts are uncomfortable with these types of regulations. The courts have repeatedly refused to apply the obscenity standard set by the Supreme Court in *Miller v.*

²⁵ See discussion *infra* Part III.

²⁶ See *Game Ratings & Descriptors Guide*, Entertainment Software Ratings Board, http://www.esrb.org/ratings/ratings_guide.jsp (last visited May 15, 2010) (explaining seven levels of video game rating system).

²⁷ *Id.*

²⁸ See Byrd, *supra* note 17, at 431.

²⁹ See Barry K. Smith, *Student Article: The Fight Over Video Game Violence: Recent Developments In Politics, Social Science, And Law*, 30 LAW & PSYCHOL. REV. 185, 199 (2006) ("The responsibility for protecting children from potential harmful effects of playing violent video games lies with the parents, not with the government. Two actions parents can take that have been proven to reduce media-related aggression include reducing exposure to and changing children's attitudes toward violent video games and media violence.")

³⁰ *Undercover Shop Finds Decrease in Sales of M-Rated Video Games to Children*, Federal Trade Commission, Mar. 30, 2006, <http://www.ftc.gov/opa/2006/03/video games shop.shtm>.

³¹ *Id.*

³² Violence in video games can come in many forms, but the use of the term "violent video games" in this note refers to those that portray real-life violence rather than cartoon violence.

California to cases regarding violent video games.³³ The *Miller* case sets a clear standard for offensive sexual content, but in making its decision, the Court did not discuss how violent content should be evaluated. This note proposes that courts citing to *Miller* should not interpret the lack of discussion as an intentional exclusion. The Supreme Court's limitation of the obscenity doctrine exclusively to sexual content was not based on any particular legal precedent but was rather a choice made to prevent a floodgate of cases. The reactions of the international community and the barrage of proposed legislation towards certain violent video games is indicative of how violence can reach a level that shocks the community just as sexually explicit material can.

I. THE MILLER STANDARD

On June 21, 1973, a 5–4 U.S. Supreme Court decision, written by Chief Justice Warren E. Burger, established a foundation for the many local, state, and federal violent video game laws.³⁴ *Miller v. California* was a case that dealt with a mass mailing campaign, advertising adult material.³⁵ Miller was found to have violated a California penal law that stated, “Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.”³⁶ The mailing was unsolicited and received by a manager of a Newport Beach restaurant and his mother.³⁷ The Court had previously recognized that states had an interest in “prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”³⁸

Though it recognized the states' interest, the Court also warned against ill-designed regulations that might infringe upon First Amendment rights.³⁹ The Court ruled that “[a] state offense must also be limited to works which,

³³ *Miller v. California*, 413 U.S. 15, 15 (1973). See discussion *infra* Part I.

³⁴ *Miller*, 413 U.S. at 15.

³⁵ Appellant advertised the sale of illustrated books, euphemistically called “adult” material. See *id.* at 16. The brochures consisted primarily of images explicitly portraying men and women engaging in a variety of sexual activities, with genitals often prominently displayed. See *id.* at 18.

³⁶ *Id.* at 18.

³⁷ *Id.*

³⁸ *Id.* at 18-19.

³⁹ *Id.* at 23-24.

taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”⁴⁰ Whether a work appeals to the prurient interest is determined by the perception of an average person applying the standards of his community.⁴¹ The Court, in establishing the “*Miller* test,” set out three guidelines for the trier of fact to determine whether a work is obscenity and thus, not protected by the First Amendment:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴²

While it does conclude that a work no longer needs to meet the old test of being “utterly without redeeming social value,”⁴³ the *Miller* court does *not* conclude that state regulation of offensive material is entirely off-limits.

The Court does, however, make an important decision to limit the application of the obscenity test to sexual material. The Court stated, “We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct.”⁴⁴ The concern over regulating forms of expression seems to be matter of scope. While the Court certainly has valid concerns over the potentially broad scope of the obscenity rule, there is little reason as to why the sexual nature of a particular work should be a keystone consideration when deciding whether or not the content is obscene. This limitation to sexual content set out in *Miller* seems to be more a product of the specific case facts brought before the Court rather than anything legally or policy based.

Limiting the obscenity rule to sexual content is surprisingly contrary to the Court’s expression in one of its overlooked footnotes. Footnote two is critical to understanding the Court’s intent in *Miller* and its attitude towards

⁴⁰ *Id.* at 24.

⁴¹ *Miller*, 413 U.S. at 24.

⁴² *Id.*

⁴³ *Id.* at 18.

⁴⁴ *Id.* at 23-24.

obscenity in general. In it the Court states, “[t]his Court has defined ‘obscene material’ as ‘material which deals with sex in a manner appealing to prurient interest,’ . . . but the . . . definition does not reflect the precise meaning of “obscene” as traditionally used in the English language.”⁴⁵ The Court goes on to discuss the Webster’s Third New International Dictionary and Oxford English Dictionary definitions as standards for the meaning of the word “obscene.”⁴⁶ While the word “obscene” can have to do with “disgusting the senses,” “offensive or revolting as countering or violating some ideal or principle,” it does not mean “pornographic.”⁴⁷ As the Court explains,

Pornographic material which is obscene forms a sub-group of all “obscene” expression, but not the whole, at least as the word “obscene” is now used in our language. We note, therefore, that the words “obscene material,” as used in this case, have a specific judicial meaning which derives from the *Roth* case, *i e.*, obscene material “which deals with sex.”⁴⁸

The fact that the Court was careful to say the words “obscene material” had a specific judicial meaning in *Miller* is significant because it supports the notion that the sexual content limitation was, once again, driven by the facts in the case before them rather than legally or policy based. The Supreme Court has not yet addressed the issue of violence as obscenity and the effect of this neglect is seen in the cases that follow legislative attempts at limiting minors from accessing violent video games.

II. LEGISLATIVE ATTEMPTS

The main method of regulation adopted by most states and local governments who enact video game legislation is to ban the sale and distribution of violent games.⁴⁹ Most chose to focus the responsibility of enforcement on retailers exclusively, while others included provisions on parental education.⁵⁰ The bans vary in degree as do the sanctions, ranging

⁴⁵ *Id.* at n. 2.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Seth Schiesel, *Court Blocks Laws on Video Game Violence*, N.Y. TIMES, Aug. 21, 2007, at E1; see also Terry McSweeney, *CA May Ban Violent Video Game Sales*, ABC, Oct. 29, 2008, <http://abclocal.go.com/kgo/story?section=news/state&id=6476970>.

⁵⁰ See e.g. *NY Video Game Bill Is On Fast Track to Becoming Law*, May 22, 2007, available at <http://www.gamepolitics.com/2007/05/22/ny-senate-asses-video-game-bill> (reporting that a New York bill would establish a Parent-Teacher Anti-Violence Awareness Program along with regulating the sale of violent video games). See Schiesel, *supra* note 48, at E1 (noting state and local legislatures attempted

from fines to felony convictions.⁵¹ One commonality among all of the state and local attempts has been a reliance on scientific evidence connecting video game violence with violent behavior exhibited by children. Legislative histories generally mention studies without pointing to any one study in particular. Another commonality is that they all attempt to utilize the *Miller* Court's definition of obscenity. Legislators are very much aware of the potential constitutionality problem. They go as far as using the actual definitional language from court decisions with the hope that it will be enough to satisfy the free speech standard.

A. Local Laws

In 2000, the city of Indianapolis attempted to enforce an ordinance that would limit minors' access to violent video games.⁵² The ordinance forbade any operator of five or more video-game machines in one place to allow a minor to play games defined as "harmful to minors" without the supervision of a parent, guardian, or custodian.⁵³ It also required appropriate warning signs, that the machines for these games be separated by a partition from the other machines in the location, and that the viewing areas be concealed from persons who are on the other side of the partition.⁵⁴ Operators of fewer than five games in one location are subject to all but the partitioning restriction.⁵⁵ Monetary penalties, as well as suspension and revocation of the right to operate the machines, were specified as remedies for violations of the ordinance.⁵⁶ Executive Order No. 1, 2000, which ordered the creation of the ordinance, showed that the city was most concerned with children displaying "higher levels of hostility and anxiety" and the conditioning effect of repeated play, which caused children to "overcome built-in resistance to acting-out violently in response

to adapt the laws for pornography to proposed laws regulating violent video games).

⁵¹ See *infra* Parts IIA, B, & C. .

⁵² See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 573 (2001). (discussing that the ordinance attempted to regulate video games which contained either "graphic violence" or "strong sexual content"); see also Crystal D. Swann, *Indianapolis Mayor Leads Fight Against Video Game Violence*, July 31, 2000, http://usmayors.org/usmayornewspaper/documents/07_31_00/video_article.html (noting that the ordinance would have taken effect on September 1, 2000).

⁵³ See *Kendrick*, 244 F.3d at 573.

⁵⁴ See *Kendrick*, 244 F.3d at 573.

⁵⁵ *Id.*

⁵⁶ See *id.* (listing the penalties for violation of the ordinance); see also Ilana Lubin, Note, *Challenging Standard Conceptions of Tradition, Science and Technology in 2006*, 13 *CARDOZO J.L. & GENDER* 173, 179 (2006) (discussing the ordinance in the context of American Amusement Machine Association).

to these emotions.”⁵⁷ In addition, there was a fear that children will “script scenarios based on the violence depicted in the video games they play and use these scenarios when attempting to resolve conflicts” and “help children develop the precision motor skills required to carry out violent fantasies.”⁵⁸

In October 2000, the local government of St. Louis County in Missouri passed St. Louis County Ordinance No. 20193, which made it “unlawful for any person knowingly to sell, rent, or make available graphically violent video games to minors, or to ‘permit the free play of’ graphically violent video games by minors, without a parent or guardian’s consent.”⁵⁹ The preamble of this ordinance presented very similar concerns to the Indianapolis ordinance. It stated that it was created in response to school shootings and the common fact that the shooters were “avid fans of such games.”⁶⁰ It was also created in response to scientific studies that linked prolonged play of violent games to “violent, antisocial and otherwise harmful behavioral patterns,” causing children to “imitate violent behavior, glorify violent heroes, become desensitized to violence and learn that violence is rewarded.”⁶¹

B. State Laws

In 2003, Washington became the first state in the nation to ban the sale of certain violent video games to minors.⁶² Specifically, under the Washington statute, a violent video game was defined as “a video or computer game that contains realistic or photographic-like depictions of

⁵⁷ Prohibition of Video Games with Violent Content from City Rights-of-Way and Public Property, INDIANAPOLIS, IND, EXEC. ORDER NO. 1, 2000, available at http://www.indygov.org/eGov/City/CorpCounsel/Documents/EO_1_2000.pdf.

⁵⁸ *Id.*

⁵⁹ Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954, 56 (8th Cir. 2003) (explaining the provisions of the County ordinance); see Kevin W. Saunders, *Shielding Children from Violent Video Games Through Ratings Offender Lists*, 41 IND. L. REV. 55, 57 (2008) (discussing the county ordinance as the second in a string of attempts to ban violent video game availability to minors).

⁶⁰ ST. LOUIS COUNTY, MO., ORDINANCE 20193 (Oct. 26, 2000) (stating the purpose of the County ordinance); see Matthew D. Bunker & David K. Perry, *Standing at the Crossroads*, 9 COMM. L. & POL’Y, 1, 5 (2004) (explaining the motivation for the County ordinance).

⁶¹ ST. LOUIS COUNTY, MO., ORDINANCE 20193 (giving scientific evidence for the need to implement the County ordinance); see Bunker & Perry, *supra* note 59, at 5 (quoting the ordinance preamble).

⁶² See Chris Morris, *Washington State Bans Sale of Violent Video Games to Minors*, CNN, May 21, 2003, <http://money.cnn.com/2003/05/20/technology/gaminglaw/index.htm> (describing Washington’s ban as the first state video game ban on anti-police game sales to minors); see Associated Press, *Washington Video-Game Law in Suspended Animation*, FIRST AMENDMENT CENTER, July 11, 2003, <http://www.firstamendmentcenter.org/news.aspx?id=11703> (calling Washington’s law “the first state statute of its kind in the country.”).

aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.”⁶³ Retailers were fined up to \$500 for violating the act.⁶⁴ It was fairly clear that Washington legislators had the Grand Theft Auto (hereinafter GTA) series of games in mind when drafting this legislation.⁶⁵ However, the act’s effort to be specific in its ban actually had the opposite effect and ended up including games that were not in either the M (mature) or AO (adult only) categories.⁶⁶

Later, in 2005, Illinois also banned the sale and rental of violent and sexually explicit video games to minors, but on a broader scale.⁶⁷ The act, called the Violent Video Games Law, defined “violent video games” as those that include “realistic depictions of human-on-human violence in which the player kills, seriously injures, or otherwise causes serious physical harm to another human, including, but not limited to, depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.”⁶⁸ Retailers would be fined \$500 for their first three failures to properly label or place proper signs and \$1000 for each subsequent violation.⁶⁹ In addition, retailers would face a petty offense and be fined \$100 for violating the ban on sales and rentals.⁷⁰ What seemed to prompt this legislation was the disgust over the interactive aspect

⁶³ WASH. REV. CODE § 9.91.180 (2003); see Morris, *supra* note 61 (explaining that the law forbids the sale of any video game depicting violence against law enforcement officials to minors).

⁶⁴ See Morris, *supra* note 61 (stating retailers who sell any video or computer game depicting violence against law enforcement to minors are subject to fines of up to \$500); see also Dan Richman, *Law limits some violent video games*, SEATTLE POST-INTELLIGENCER REP., May 21, 2003, available at <http://www.criminology.fsu.edu/book/Cybercriminology/Law%20limits%20some%20violent%20video%20games.htm> (explaining that the video games the law limits includes those in which the player kills or injures police officers and fire fighters).

⁶⁵ See Morris, *supra* note 61. “Grand Theft Auto 3” and “Grand Theft Auto: Vice City” are industry best sellers affected by this law. *Id.* See also *Grand Theft Auto Series*, Moby Games, available at <http://www.mobygames.com/game-group/grand-theft-auto-series>. In the GTA games, the player is a gangster who is given missions that involve various illegal activities i.e. smuggling drugs, killing rival gang members, stealing cars, robbing banks, etc. *Id.*

⁶⁶ See Morris, *supra* note 61. Games that featured police officers but did not contain graphic violence, like Atari’s *Enter the Matrix*, would also be banned. See also Richman, *supra* note 63. Opponents of the Washington law argue that the legislation is not narrowly tailored enough in its scope. The proper approach should entail educating parents about the ratings that video games voluntary carry and to encourage retailers to enforce these voluntary ratings. *Id.*

⁶⁷ Gov. Blagojevich Signs Law Making Illinois Only State In Nation To Protect Children From Violent, Sexually Explicit Video Games, *US FED NEWS*, July 25, 2005 (stating that Governor Rod R. Blagojevich signed the *Safe Games Illinois Act*, making Illinois the only state in the country to ban the sale and rental of violent video games to minors).

⁶⁸ 720 ILL. COMP. STAT. 5/12A-10 (2008)

⁶⁹ *Id.*

⁷⁰ *Id.* (“A person who sells, rents, or permits to be sold or rented, any violent video game to any minor, commits a petty offense for which a fine of \$1,000 may be imposed.”).

of video games in general and violent ones in particular:

Parents today are up against a multi-billion dollar industry that peddles violent and sexually explicit video games to children. And when a kid plays the video game, he's not a spectator - he's a participant. He's the one who uses the joystick and the keyboard. He's the one who takes crack cocaine and feels the video controller simulate what it's like to be on drugs. He's the one who engages in simulated sex. He cuts someone's head off and makes blood spurt from the neck. He's the killer who laughs at the victim and makes crude sexual comments after being with a prostitute. And, incidentally, he gets extra credit for doing it.⁷¹

Former Governor Rod Blagojevich's words expressed multiple fears linked to the impressionability of children playing excessively violent games. The main concern was that children would become desensitized towards violence and grow-up with a poor sense of morality. The other fear was that children are impressionable and could potentially imitate or mimic the behavior of the games' characters.

Following Illinois, Michigan passed its own video game legislation on September 14, 2005.⁷² Michigan's law was also motivated by the potential harm to minors caused by exposure to violent video games. MCL § 722.685 drew its authority from the states' power to police public health and general welfare.⁷³ Included in Michigan's law was the definition of "harmful to minors," a result of their reliance on scientific studies of aggression in minors.⁷⁴ However, Michigan's video game law differed from Illinois's law in two ways: Michigan used the term "ultra-violent" and imposed more severe fines than Illinois.⁷⁵ An ultra-violent video game

⁷¹ Press Release, Illinois Governor's Office, *Gov. Blagojevich signs law making Illinois the only state in the nation to protect children from violent and sexually explicit video games* (July 25, 2005), available at <http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=3&RecNum=4170>. In the Governor's press release, he articulates how violent video games affect children. *Id.*

⁷² *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006), *aff'd*, 469 F. 3d 641 (7th Cir. 2006) (noting in the facts of the case the date in which bill was signed); *Video Game Legislation Passed*, MICH. DAILY, Sept. 12, 2005, <http://www.michigandaily.com/content/video-game-legislation-passed> (reporting Gov. Jennifer Granholm's signing of the bills barring sales of ultra-violent video games).

⁷³ MCLS § 722.685 (2009) (citing to the Michigan state constitution as authority for passing legislation involving "public health and welfare of the people of the state," which are "declared to be matters of primary public concern.").

⁷⁴ MCL § 722.686 (2008) ("Harmful to minors" is defined as that which (i) considered as a whole, appeals to the morbid interest in asocial, aggressive behavior of minors as determined by contemporary local community standards, (ii) is patently offensive to contemporary local community standards of adults as to what is suitable for minors, and (iii) considered as a whole, lacks serious literary, artistic, political, educational, or scientific value for minors.)

⁷⁵ MCLS § 722.687 (2009). A person in violation of the statute may be ordered to pay a civil fine of not more than \$5,000.00. *Id.* Compare 720 ILCS 5/12A-15 (2009). Illinois statute is titled: Restricted

is defined in the Michigan statute as one that “continually and repetitively depicts extreme and loathsome violence.”⁷⁶ For a first offense, a person who “knowingly disseminates to a minor an ultra-violent explicit video game that is harmful to minors” would be fined up to \$5,000.⁷⁷ Second offenses carried a fine of up to \$15,000 while third and subsequent offenses lead to a fine of up to \$40,000.⁷⁸

California also passed legislation restricting the sale and rental of violent video games to minors.⁷⁹ On October 7, 2005, Governor Arnold Schwarzenegger announced that he would sign Assembly Bill 1179, which required that violent video games be clearly labeled, could not be sold to children under 18 years old, and imposed a fine on violators.⁸⁰ The Governor stated:

Now if you look at these products you can see the incredible talent behind them, all the creativity and the technical genius. And much of this is California-based talent pumping money into our economy and giving kids of all ages some great entertainment and fun. But of course, at the same time, we must always do what we can to protect the kids. Because that's what it's all about.⁸¹

In this act, California adopted a two-part definition for violent video games. A “violent video game” is one 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) a reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors, it is patently offensive to prevailing standards in the community as to what is suitable for minors, and it causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors or (B) enables the player to virtually inflict serious injury upon

Sale or Rental of Violent Video Games. *Id.*

⁷⁶ MCLS § 722.686 (2009).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Video Software Dealers Ass'n v. Schwarzenegger, No. C-05-04188 RMW, 2007 U.S. Dist. LEXIS 57472 (N.D. Cal., 2007) (holding for the plaintiff associations of companies in the video game industry and permanently enjoining the Act); California Civil Code §§ 1746 (2005).

⁸⁰ See Governor Schwarzenegger Takes Steps to Protect Children, (Oct. 7, 2005), <http://gov.ca.gov/index.php?/speech/1361/> (stating that he wants parents involved in determining which video games are appropriate for their children).

⁸¹ *Id.*

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.⁸²

Oklahoma took a more holistic approach to video game regulation in 2006 and amended its existing legislation for crimes against public indecency and morality to address the issue.⁸³ Existing legislation prescribed criminal penalties for any person who knowingly displays, sells, furnishes, distributes, or otherwise disseminates to minors any material considered “harmful to minors.”⁸⁴ Material covered by this act included “any description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse” when the material or performance, taken as a whole, had the following characteristics:

(1) the average person 18 years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors, and (2) the average person 18 years of age or older applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors, and (3) the material or performance lacks serious literary, scientific, medical, artistic, or political value for minors.⁸⁵

The amendment sought to include violent video games in the definition of harmful material.⁸⁶ Violators of the act were to be fined no more than \$500 for their first or second offense.⁸⁷ Their third and subsequent offenses would lead to a fine of \$1000 per violation.⁸⁸

While most of states placed the responsibility on retailers and parents,

⁸² CAL. CIV. CODE § 1746 (West 2005)

⁸³ Entm't Merchs. Ass'n v. Henry, No. CIV-06-675-C2007, U.S. Dist. LEXIS 69139, at *2 (W.D. Okla., Sept. 17, 2007).

⁸⁴ *Id.*

⁸⁵ OKLA. STAT. TIT. 21 § 1040.75 (2007).

⁸⁶ *Id.* (noting the inclusion and definition of “inappropriate violence”)

⁸⁷ OKLA. STAT. TIT. 21 § 1040.77 (2007).

⁸⁸ *Id.*

Minnesota focused on the culpability of the individual obtaining the restricted material. The Minnesota Restricted Video Games Act provided, in relevant part, that “[a] person under the age of 17 may not knowingly rent or purchase [a] video game rated AO or M by the Entertainment Software Rating Board]. A person who violates this subdivision is subject to a civil penalty of not more than \$25.”⁸⁹ Retailers must also post a sign notifying its customers of this restriction.⁹⁰ State Senator Sandra Pappas, in a response to an editorial opposing this act, stated:

Your opposition shows a lack of understanding of our civic history and our traditional duty to protect children from exposure to harmful effects. . . [N]umerous studies have proven a correlation between violent media and violent behavior. . . Any parent can attest to the fact that children mimic and learn from adult behavior. . . The videos that my legislation addresses are not literary works which examine social questions of race or gender preference; rather they are inter-active “games” that reward violent criminal behavior.⁹¹

Like Governor Blagojevich in Illinois, Senator Pappas’s response suggested that the violence in some of today’s video games can be harmful to children, who have a tendency to mimic what they see adults, do. The fear is that virtual violence will translate into real violence.

New York has also jumped on the bandwagon of video game regulation. In May 2007, New York State legislators introduced and passed two different bills dealing with violent video game distribution.⁹² The bill from the Assembly would do three things: (1) make dissemination of violent and indecent video games to minors a class E felony, (2) create an advisory council on interactive media and youth violence, and (3) require that all video game consoles be equipped with a device or control that would permit the owner to prevent the display of violent or indecent games.⁹³ In

⁸⁹ Entm’t Software Ass’n v. Hatch, 443 F. Supp. 2d 1065, 1067 (Minn. 2006).

⁹⁰ *Id.*

⁹¹ Press Release, Office of State Senator Sandra L. Pappas, *Senator Pappas Responds to Editorial About Violent Video Game Legislation* (July 12, 2006), http://www.senate.leg.state.mn.us/members/member_pr_display.php?ls=27&id=415 (responding to an editorial opposing legislation to restrict children’s access to violent video games).

⁹² See Brendan Sinclair, *NY Assembly Passes Game Bill*, GAMESPOT, May 31, 2007, <http://www.gamespot.com/news/6171789.html?tag=result;title;0> (discussing the New York State Assembly bill A8696 dealing with violent video games); Brendan Sinclair, *New York Senate Passes Game Bill*, GAMESPOT, May 22, 2007, <http://www.gamespot.com/news/6171292.html> (discussing the introduction of the New York State Senate bill that would “crackdown” on violent video games).

⁹³ See Press Release, Assembly Speaker Sheldon Silver, *Silver, Lentol, Pheffer Announce Assembly Passage Of Bill Banning The Sale Of Violent Video Games To Minors* (May 30, 2007), <http://assembly.state.ny.us/Press/20070530b/> (highlighting the provisions of the video game bill passed by the New

contrast, the Senate bill does not include the first provision and focuses more on labeling and parental awareness.⁹⁴ It would, however, create an advisory council like that found in the Assembly bill.⁹⁵ Former New York Governor, Eliot Spitzer, had also expressed that he would be introducing legislation targeting violent video games, calling for sanctions on retailers who disregard ratings when selling to minors.⁹⁶

C. Federal Laws

Currently, there is no federal law regulating the sale of violent video games; the ESRB ratings were created as a compromise that preempted federal legislation in 1994.⁹⁷ Politicians are recognizing, however, that the current ratings system is not enough to keep minors from obtaining violent

York State Assembly).

⁹⁴ See Press Release, New York State Senate, *Senate Passes Legislation To Crack Down On Video Game Violence* (May 21, 2007), <http://www.senate.state.ny.us/pressreleases.nsf/2e0e86fa9105ed5a85256ec30061c0be/4ac2f0825cfeddb28852572e2007b18f3?OpenDocument>

[The] Advisory Council on Interactive Media and Youth Violence . . . would review and make recommendations on the effectiveness of the current [ESRB] ratings system. The panel . . . will also develop policies relating to public education and advocacy against youth violence, examine efforts being undertaken in other states, and develop recommendations for additional ways of regulating the exposure of youth to these games. [The] Rating System Labeling Requirement . . . would have every video game sold in New York by a retailer or over the Internet to have a clearly displayed rating indication on the game cover or elsewhere . . . Individuals who violate these provisions will face fines and penalties. The Parent-Teacher Anti-Violence Awareness Program . . . will empower parents and teachers to work with students and children on issues related to violence in video games. The program will also seek to increase awareness of the ratings system on games and the importance of appropriate parental supervision. The Anti-Violence Program would be funded through fines on retailers who violate the new labeling law.

Id. See also Nick Mokey, *New York State Cracks Down on Game Violence*, DIGITAL TRENDS, May 23, 2007, <http://news.digitaltrends.com/news-article/13063/new-york-state-cracks-down-on-game-violence>. The substantive provisions of the New York State Senate bill include increased inclusions of warning labels and parental controls. *Id.*

⁹⁵ See *Breaking: New York Governor Signs Video Game Bill Into Law*, GAMEPOLITICS, July 22, 2008, <http://www.gamepolitics.com/2008/07/22/breaking-new-york-governor-signs-video-game-bill-law> (discussing Governor Paterson's signing the Senate and Assembly bills into law); Mokey, *supra* note 93 (discussing the creation of an advisory council as one of the Senate bill's provisions).

⁹⁶ See *NY Gov Targets Violent Video Games*, ABCMONEY, Apr. 17, 2007, <http://www.abcmoney.co.uk/news/18200757892.htm> (stating that Governor Elliot Spitzer will provide a bill to restrict access to violent video games by children as part of his legislative agenda). See also Danny Hakim, *Spitzer Puts Limits on Political Contributions at the Top of His Wish List*, N.Y. TIMES, Apr. 18, 2007, <http://www.nytimes.com/2007/04/18/nyregion/18spitzer.html?n=Top%2FReference%2FTimes%20Topics%2FPeople%2FH%2FHakim%2C%20Danny> (noting that limiting children's access to violent video games was part of Governor Spitzer's political agenda).

⁹⁷ See Leonard Herman, et al., *The History of Video Games: The 32-bit Era Begins*, GAMESPOT, http://www.gamespot.com/gamespot/features/video/hov/p8_01.html (discussing the establishment of the Entertainment Software Review Board to rate the content of video games). See also John Sterman, et al., *Sony's Battle for Video Game Supremacy*, MIT SLOAN TEACHING INNOVATION RESOURCES, Sept. 17, 2008, <https://mitsloan.mit.edu/MSTIR/IndustryEvolution/SonysBattle/Documents/07-046-Sonys-Battle.pdf> (noting that the Entertainment Software Ratings Board, which assigns rating to inform customers of the content in video games, was created to preempt federal regulation).

video games.⁹⁸ As a result, there have been many bills introduced in Congress since 1994, when Senators Joseph Lieberman and Herb Kohl first initiated an investigation into violent video games and the gaming industry.⁹⁹ The most notable ones, other than Senator Lieberman's 1994 Video Game Rating Act,¹⁰⁰ have been the Protect Children from Video Game Sex and Violence Act of 2003, the Family Entertainment Prevention Act, and the Children and Media Research Advancement Act (hereinafter CAMRA).

In 2003, Representative Joe Baca introduced The Protect Children from Video Game Sex and Violence Act in the House of Representatives.¹⁰¹ The Act referred to the research of six public health group studies that found a link between aggressive behavior in children and violent video games.¹⁰² Similarities between this Act and some state laws include the definition of key terms like "content harmful to minors" and its focus on punishing retailers.¹⁰³ The similarity in the definitions is significant because it suggests a continued effort by both levels of government to draft language that conforms to the obscenity standard. This law has since become a model for other violent video game laws like the Family Entertainment Protection Act.¹⁰⁴

CAMRA differs from both of these bills because it does not prohibit the sale or rental of violent video games. Rather, this 2006 act seeks to establish "a centralized research program within the Federal Government to examine the impact of electronic media on children and adolescents."¹⁰⁵

⁹⁸ See Jessica Williams, Note, *Faulting San Andreas: The Call to Arms for Sensible Regulation of Violent Video Games*, 29 *Hastings Comm. & Ent. L.J.* 121, 123-24 (2006) (highlighting efforts by various states to regulate violent video games); see also Seth Schiesel, *supra* note 48, at E1 (discussing attempts by governors to regulate video games).

⁹⁹ See Herman, *supra* note 96 (noting development of a rating system by ESRB); see *Ratings for Video Games*, N.Y. TIMES, Jan. 4, 1994, at D11 (mentioning industry attempts to develop a rating system for video games.)

¹⁰⁰ Video Game Rating Act of 1994, S. 1823, 103d Cong. (1994); see also Video Game Rating Act of 1994, H.R. 3785, 103d Cong. (1994) (introducing a similar bill in the House).

¹⁰¹ HR 669, 108th Cong. (2003)

¹⁰² *Id.*

¹⁰³ *Id.* ("Harmful to minors" is defined as "video game content that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and lacks serious literary, artistic, political, or scientific value for minors, and contains (A) graphic violence; (B) sexual violence; or (C) strong sexual content." Fines range from \$1000 for first violations to \$5000 for second and subsequent violations.)

¹⁰⁴ See Byrd, *supra* note 17 at 409 (mentioning Congressman Baca's proposed Violent Video Game Act); see also Family Entertainment Protection Act, S. 2126, 109th Cong. (2005) (noting managers or agents of managers are fined \$1000 or 100 hours of community service for first offenses and \$5000 or 500 hours of community service for each subsequent violation.)

¹⁰⁵ S. REP. NO. 109-323, at 1 (2006).

The program would be conducted by the Center for Disease Control and Prevention (hereinafter CDC). CAMRA also differs from other violent video game legislation because it encompasses all types of media in the study.¹⁰⁶ Sponsors for CAMRA included Senators Hilary Clinton, Rick Santorum, Joe Lieberman, and Sam Brownback.¹⁰⁷ Being less contentious than a proposition to restrict sales, CAMRA has actually passed in the Senate.¹⁰⁸ The bill recognizes that there are positive and negative effects of media on children but there is not enough known about these effects to draw conclusions, particularly because of the constant development of new technologies.¹⁰⁹

Bills introduced during the 110th Congress include the Video Game Decency Act of 2007, the Children Protection from Video Game Violence and Sexual Content Act, the Truth in Video Game Rating Act, and the Parents' Empowerment Act.¹¹⁰ Two of these bills address the problem of

¹⁰⁶ See S. REP. NO. 109-323, at 1 (noting that, under the CAMRA Act, various research grants are to be awarded to examine electronic media such as "television, movies, DVDs, video games, cell phones, digital music, and the Internet"); Clay V. Calvert & Robert D. Richards, *Violence and Video Games 2006: Legislation and Litigation*, 8 TEX. REV. ENT. & SPORTS L. 49, 55 (2007) ("These research priorities will encompass a broad array of electronic media . . .").

¹⁰⁷ Tor Thorsen, *Senate OKs CAMRA*, GAME SPOT, Sept. 19, 2006, <http://www.gamespot.com/news/6157904.html> (discussing co-sponsorship of the CAMRA Act by Senators Santorum, Lieberman, Brownback and Clinton); see Clay Calvert & Robert D. Richards, *Mediated Images of Violence and the First Amendment: From Video Games to the Evening News*, 57 ME. L. REV. 91, 95 (2005) (suggesting that Republican Senator Santorum's alliance with Senators Clinton and Brownback regarding the CAMRA Act is unusual due to differing political objectives among the Senators).

¹⁰⁸ See Thorsen, *supra* note 106 (explaining that the CAMRA Act had been approved by the Senate). See generally Susan Minamizono, Comment, *Japanese Prefectural Scapegoats in the Constitutional Landscape: Protecting Children from Violent Video Games in the Name of "Public Welfare"*, 9 SAN DIEGO INT'L L.J. 135, 138 (2007) (indicating that the Senate passed the CAMRA Act due to "the lack of substantial studies proving the direct effect of violence in video games on children").

¹⁰⁹ See S. REP. NO. 109-323, at 3 ("[M]edia can have positive and negative effects on children's health, behavior and development, but there is insufficient knowledge of the nature of these effects. We have . . . limited knowledge of the effects of children's exposure to established media, and even less is known about the effects of new, electronically based media."); Lorraine M. Buerger, Comment, *The Safe Games Illinois Act: Can Curbs on Violent Video Games Survive Constitutional Challenges?*, 37 LOY. U. CHI. L.J. 617, 627-28 (2006) (discussing various authorities and researchers that have yet to establish any casual link between violence in media and violent behavior, and the need to develop longitudinal studies dealing with the effects of media violence).

¹¹⁰ Video Game Decency Act of 2007, H.R. 1531, 110th Cong. (2007) (stating that the purpose of the Bill is "[t]o prohibit deceptive acts and practices in te content rating and labeling of video games"); Children Protection from Video Game Violence and Sexual Content Act, H.R. 2958, 110th Cong. (2007) (noting that the Bill is "[t]o direct the Federal Trade Commission to review the video game ratings of the Entertainment Software Ratings Board and to direct the Government Accountability Office to study the impact of video games on children and young adults"); Truth in Video Game Rating Act, S. 568, 110th Cong. (2007) (describing the Bill as intending to "prohibit deceptive conduct in the rating of video and computer games, and for other purposes"); Parents' Empowerment Act, H.R. 3899, 110th Cong. (2007) (explaining that the Bill is "[t]o provide a civil action for a minor injured by exposure to an entertainment product containing material that is harmful to minors, and for other purposes").

inaccurate ratings, an issue brought to light by the *Grand Theft Auto: San Andreas* "Hot Coffee" mod debacle from 2005. A hidden mini-game featuring interactive virtual sex was found in *GTA: San Andreas*.¹¹¹ The game could be accessed on all versions (PC and console) using either an easily obtainable file download from the internet or cheat codes. Upon discovery of the mini-game, the ESRB changed the game's rating from M to AO.

The Video Game Decency Act of 2007 and the Truth in Video Game Rating Act, proposed by Senator Brownback, state that distributors were deemed to have engaged in "unfair or deceptive practices" and subject to section 18(a) of the Federal Trade Commission Act if a game was rated lower than it actually should have been.¹¹² The remaining bills address different angles of the violent video game problem. The Children Protection From Video Game Violence and Sexual Content Act, introduced once again by Representative Baca, puts pressure on ESRB's rating system by having the FTC evaluate it and report its findings.¹¹³ Also, the Act calls for a study on the impact of video games on the mental health of children, but unlike in CAMRA, the Comptroller General of the Government Accountability Office is given this task.¹¹⁴ The Parents' Empowerment Act, unlike any other violent video game legislation, establishes a civil action for a minor injured by exposure to a violent video game.¹¹⁵ Should it gain political momentum, it will likely become extremely controversial, allowing for both compensatory and punitive damages.¹¹⁶

¹¹¹ See Tor Thorsen, *Confirmed: Sex Minigame in PS2 San Andreas*, GAMESPOT, July 15, 2005, http://www.gamespot.com/news/2005/07/15/news_6129301.html ("The Hot Coffee mod first surfaced . . . when the PC version of *San Andreas* was released. The mod, which is available on numerous Web sites, adds a bonus sex minigame as a reward for the numerous 'girlfriend' missions in *San Andreas*."). See generally Byrd, *supra* note 17, at 408 (portraying the sexual acts involved in the mod as "crude" and "resulting in severe backlash from politicians, watchdog groups, and video-game insiders").

¹¹² See H.R. 1531, 110th Cong. § 1-3 (2007) (indicating that it is unfair or deceptive to rate games with inappropriate leniency); S. 568, 110th Cong. § 3-4 (2007) (prohibiting deceptive rating of video games).

¹¹³ H.R. 2958, 110th Cong. § 1-2 (2007) (setting forth a video game study that requires report by the FTC).

¹¹⁴ H.R. 2958, 110th Cong. § 3 (2007) (conducting a study on video game impact on mental growth of young people); see notes 104-108 and accompanying text (noting that CAMRA is conducted by the CDC).

¹¹⁵ H.R. 3899, 110th Cong. § 1-2 (2007) (explaining a minor's right to civil action for harm by exposure to entertainment products).

¹¹⁶ H.R. 3899, 110th Cong. § 2 (2007) (listing the relief options for a minor who brings a civil action by exposure to entertainment products).

III. CASES

Each of the state and local laws discussed above has been found unconstitutional by various courts around the country. Courts have refused to apply the *Miller* obscenity test in these cases, and have instead applied the standard strict scrutiny test, which provides that a law is constitutional only if it is narrowly tailored to achieve a compelling state interest.¹¹⁷ A law cannot survive strict scrutiny if a less restrictive means of achieving the state interest exists.¹¹⁸ The courts' rationale in their refusal is that *Miller* indicates that only sexual content can be defined as obscene. Essentially, they endorse the use of the ESRB ratings system as the least restrictive means of regulating violent video games. They have dismissed the idea that video games are unlike any other form of media and that they require additional regulation.

Beginning with St. Louis County Ordinance No. 20193, the Eighth Circuit Appellate Court in *Interactive Digital Software Association v. St. Louis County* established that video games were protected forms of speech.¹¹⁹ Their finding is extremely important to advancing First Amendment rights for new technologies. However, it demonstrates that the court is not entirely comfortable with this new protected genre by comparing it to older forms of entertainment. The court, in comparing the level of interaction in violent games to violence in movies and Choose-Your-Own adventure books, erroneously drew an analogy which is repeated in subsequent cases.¹²⁰ This comparison greatly underestimates the multi-sensual experience of video games that cannot be had with movies or books. Predictably, the court also denies that violence can be obscene.¹²¹ Referring to the sexual content limitation of the *Miller* test, it stated flippantly, "Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults."¹²²

The idea that violence can be "obscenity" is more thoroughly discussed

¹¹⁷ See *Sable Commc'ns of Cal., Inc. v. Fed. Commc'n Comm'n*, 492 U.S. 115, 126 (1989) (recognizing government's ability to regulate constitutionally protected speech because states have compelling interest to protect minors); see also *Ashcroft v. ACLU*, 542 U.S. 656, 677 (U.S. 2004) (Breyer, J., dissenting) (describing the requirements for meeting the strict scrutiny standard).

¹¹⁸ *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1186 (W.D. Wash. 2004) (setting forth the requirements of the strict scrutiny rule); see also *Sable Commc'ns*, 492 U.S. at 126 (detailing elements of the strict scrutiny rule).

¹¹⁹ 329 F.3d 954, (8th Cir. 2003).

¹²⁰ *Id.* at 957-58.

¹²¹ See *Id.* at 958 (holding that only material that contains violence is obscene but not depictions of sexual conduct).

¹²² *Id.*

in *American Amusement Machine Association v. Kendrick*.¹²³ In 2001, Judge Richard Posner wrote the majority opinion, enjoining Indianapolis from implementing its ordinance.¹²⁴ The U.S. Court of Appeals for the Seventh Circuit also dismissed the claim that violent video games could fall into the obscenity category of unprotected speech. However, the court in this case did not reject the likening of violence to obscenity as quickly as the court in *Interactive Digital Software Association* did. Rather, it began its discussion by recognizing a distinction between violence and obscenity: “[v]iolence and obscenity are distinct categories of objectionable depiction, and so the fact that obscenity is excluded from the protection of the principle that government may not regulate the content of expressive activity . . . neither compels nor forecloses a like exclusion of violent imagery.”¹²⁵ To be classified as obscene, a work does not need to cause harm but must be offensive: disgusting, embarrassing, degrading, or disturbing.¹²⁶ Ultimately, the court found that none of the games offered as examples were so offensive that they would “turn anyone’s stomach” and therefore, could not be considered obscene.

The *Kendrick* court also rejected the idea that video games are a unique form of interactive entertainment. Judge Posner explained, “Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive.”¹²⁷ While it may have been suitable to include video games in the category of “all literature” in 2001, it is not a view that deserves continued support. The games presented in *Kendrick* no longer accurately represent potentially offensive video game violence.¹²⁸

Video Software Dealers Association v. Maleng, decided in 2004 by the United States District Court for the Western District of Washington, Seattle Division, showed that, even at the state level, courts were uncomfortable

¹²³ 244 F.3d 572 (7th Cir. 2001).

¹²⁴ *Id.* at 580 (granting a preliminary injunction against the city’s violent game ordinance because the law was not narrowly drawn).

¹²⁵ *Id.* at 574.

¹²⁶ *Id.*

¹²⁷ *Id.* at 577.

¹²⁸ See *The House of the Dead*, GAME SPOT, <http://www.gamespot.com/arcade/action/houseofthedeadthe/index.html?tag=result;title;5> (last visited May 15, 2010); *Ultimate Mortal Kombat 3 for ARC*, GAME SPOT, <http://www.gamespot.com/arcade/action/ultimatemortalkombat3/index.html?tag=result;title;2> (last visited May 15, 2009) (noting “The House of the Dead” and “Ultimate Mortal Combat 3” were released for arcade in 1997 and 1995 respectively, almost a decade ago).

with the application of the obscenity doctrine to violence.¹²⁹ The court began its analysis in a similar fashion to the court in *Interactive Digital Software Association* by finding that video games are “expressive and qualify as speech for purposes of the *First Amendment*.”¹³⁰ Also, it reverted to the “sexual content” limitation, finding that the obscenity doctrine did not apply to violent content. The court stated, “No court has accepted such an argument, probably because existing case law does not support it.”¹³¹ In considering the historical justifications for the regulation of sexually-explicit material, the court found that “the prevention and punishment of lewd speech has very little, if any, impact on the free expression of ideas and government regulation of the sexually obscene has never been thought to raise constitutional problems.”¹³² Referring to violent speech, the court continued, “such depictions have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the *First Amendment* or subject to government regulation.”¹³³ It ultimately concluded that, unlike sexual obscenity, limiting violent speech was detrimental to *First Amendment* protections.¹³⁴ Overall, the *Maleng* court did not want to expand the definition of obscenity for the inclusion of explicit violence and enjoined the enforcement of Washington’s *RCW 9.91.180.*, the first state law to regulate access to violent video games.¹³⁵

In 2005 and 2006, the Entertainment Software Association sought injunctions for three different state laws. The first case, *Entertainment Software Association v. Granholm*¹³⁶, involved Michigan’s video game legislation.¹³⁷ United States District Court for the Eastern District of Michigan, Southern Division did not merely issue an injunction but also found that part of 2005 Mich. Public Act 108 was unconstitutional.¹³⁸ Without too much discussion, the court held that the First Amendment, in general, protected video games because they “contain original artwork,

¹²⁹ *Maleng*, 325 F. Supp. 2d at 1180.

¹³⁰ *Id.* at 1184-85.

¹³¹ *Id.* at 1185.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *See id.* at 1184-85 (calling video games “expressive” and therefore within the purview of the First Amendment).

¹³⁵ *Id.* at 1191.

¹³⁶ 426 F. Supp. 2d 646 (2006).

¹³⁷ *See id.* at 648 (citing the 2005 Mich. Public Act 108 signed by Governor Granholm on September 14, 2005).

¹³⁸ *Id.* at 656.

graphics, music, storylines, and characters similar to movies and television shows.”¹³⁹ Even so, they adopted Judge Posner’s view in *Kendrick* that video games were no different from “all literature.”¹⁴⁰ The Granholm court, unlike Judge Posner in *Kendrick*, did not take up the issue of obscenity in great detail. It instead evaluates the Michigan statute under the three-prong strict scrutiny test found in *Brandenberg v. Ohio*¹⁴¹ and found that it failed all three prongs.¹⁴² The court does, however, acknowledge that another test may be applicable, namely the obscenity test in *Ginsburg v. New York*.¹⁴³ It failed to seize upon the opportunity when presented the example of *Postal II*, a video game that allowed players the “ability to shoot schoolgirls in the knees, set them on fire, and urinate on their corpses.”¹⁴⁴ The court responded rather disappointingly, “Despite the fact that *some* of these games are likely to be considered ‘disgusting or degrading’ by certain people, neither the Supreme Court nor Sixth Circuit has ever applied the *Ginsberg* test in cases that don’t involve sexually explicit material.”¹⁴⁵ As long as the sexual content qualification in *Miller* stands, the courts will continue to allow violent video games to hide behind it like as it did here.

Minnesota’s video game statute also did not fair well constitutionally. The United States District Court for the District of Minnesota held in *Entertainment Software Association v. Hatch* that the statute was unconstitutional and issued a permanent injunction against its enforcement.¹⁴⁶ Unlike the previous cases, obscenity was not even mentioned. Rather than attempting to convince the court that violent video games fall under the obscenity exception, the court focused on trying to meet the same strict scrutiny test presented in *Granholm*.¹⁴⁷ This case showed how difficult it was to regulate video games at all under this higher standard of review. Not only did the State have to articulate a purportedly

¹³⁹ *Id.* at 651.

¹⁴⁰ *Id.*

¹⁴¹ See *Brandenberg v. Ohio*, 395 U.S. 444 (1969).

¹⁴² *Entm’t Software Ass’n*, 426 F. Supp. 2d 646, 652 (2006) (“Under the first prong of the Brandenburg test, free speech may be restricted if it ‘is directed to inciting or producing the imminent lawless action and is likely to incite or produce such action.’ [B]ecause the video game producers do not intend for the consumers to commit violent actions, the Act fails this first prong. The second prong requires that the danger of violence must be imminent. The research conducted by the State has failed to prove that video games have ever caused anyone to commit a violent act, let alone present a danger of imminent violence. Finally . . . the State’s research fails to prove that ultra-violent video games are “likely” to produce violent behavior in children.”)

¹⁴³ *Id.* (“In order for free speech to be restricted under the *Ginsberg* test, the material must be shown to be “disgusting or degrading.”)

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Granholm*, 443 F. Supp. 2d at 1067.

¹⁴⁷ *Id.* at 1068-69.

compelling interest, show that the harms it sought to prevent “are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way,” but also the court required the State to present actual “empirical support for its belief that ‘violent’ video games cause psychological harm to minors.”¹⁴⁸ Correlation studies were not adequate to satisfy this standard; the State had to show actual causation.

The United States Court of Appeals for the Seventh Circuit similarly decided the fate of Illinois’s legislation on November 27, 2006 in the last of the three Entertainment Software Association cases.¹⁴⁹ In *Entertainment Software Association v. Blagojevich*,¹⁵⁰ the court agreed that Illinois had a compelling state interest in “shielding children from indecent sexual material and in assisting parents in protecting their children from that material.”¹⁵¹ It did not however agree that this particular piece of legislation was narrowly tailored. Finding first that “[c]hildren have *First Amendment* Rights” the court went on to state, “[t]he implication of this observation is that our narrow tailoring inquiry must be broader than the question of whether adults will be affected by the challenged legislation. The Constitution also requires us to ask whether legislation unduly burdens the *First Amendment* rights of minors.”¹⁵² The court went on to find that:

[B]ecause of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. Thus, the State may regulate sexual material that is “indecent” with respect to minors, even if such material is not “obscene” under the Court’s formulation for adults, if the State can demonstrate that the regulation in question is narrowly tailored to serve a compelling government interest.¹⁵³

This interest, however, was not enough to allow Illinois to regulate violent video games because of the second prong in the *Miller* test; the state must be regulating sexual content.¹⁵⁴ Codification of the rest of the *Miller* test is not enough to make an act constitutional even if it uses the exact language from the case.¹⁵⁵

¹⁴⁸ *Id.* at 1069 (noting that this is a higher standard for the State to meet).

¹⁴⁹ *See Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006).

¹⁵⁰ *See id.*

¹⁵¹ *Id.* at 646.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 647 (quoting *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 (1968)).

¹⁵⁵ *See Entm’t Software*, 469 F.3d at 649; *see also Ashcroft v. ACLU*, 54 U.S. 656, 678 (2004)

Oklahoma's amendment to include video games as "harmful material" led to *Entertainment Merchants Association v. Henry*.¹⁵⁶ In this case, the court granted summary judgment in favor of the Entertainment Merchants Association, stating that "[v]iolent video games are a type of artistic expression and contain "stories, imagery, 'age-old themes of literature,' and messages, 'even an "ideology," just as books and movies do."¹⁵⁷ The court once again disregarded the state's argument distinguishing video games from other forms of entertainment because of their uniquely interactive property. Citing a previous decision, the court found that "[a]ll literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive."¹⁵⁸ From this quite erroneous comparison, the court set a very low bar for the gaming industry to meet. As long as there is some storyline, the game is protected by the First Amendment.¹⁵⁹ The court's biggest mistake in *Entertainment Merchant* is that it disregarded one of the prongs of the *Miller* test. It claimed, "[W]hether the Court 'believe[s] the advent of violent video games adds anything of value to society is irrelevant,' because they are just as entitled to First Amendment protection as is the finest literature."¹⁶⁰ The value of a creative piece certainly has a place in the discussion of whether it is unprotected obscene content.

In addition, the court again created a nearly impossible standard for the state to meet using the *Brandenburg* test, requiring that the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁶¹ A state would have to show that a video game had some immediate, direct impact upon first exposure of a child for it to have a legitimate state interest in curbing behavior. Similarly, a state would have to show hard, scientific facts that video games *caused* violent behavior and aggression to have a state interest in protecting the well-being of minors.¹⁶² The court concluded with arguments regarding lack of narrow

(using a textualist approach in comparing the statute at issue to the statute in the *Miller* case).

¹⁵⁶ *Henry*, 2007 U.S. Dist. LEXIS 69139, at *7 (noting the amendment to Okla. Stat. tit. 21 § 1040.75 added a new category of material that is "harmful to minors" and penalizes any person who knowingly displays, sells, furnishes, distributes such material to minors).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 8 (noting that the games defendants have provided for review by the court have storylines and are more than simply "depictions of death scenes").

¹⁶⁰ *Id.* at 9.

¹⁶¹ *Id.* at 15.

¹⁶² *Id.* at 17-18 (explaining that the "government may not limit minors" exposure to creative works based on a general belief that they may be psychologically harmful, absent substantial evidence").

tailoring and vagueness, both problems of drafting.

The most recently decided case was that of *Video Software Dealers Association v. Schwarzenegger* in 2007.¹⁶³ Seeing the success of previous injunctions, the Video Software Dealers Association and the Entertainment Software Association sought to enjoin California from enforcing its labeling statute as well. By this point, the previously discussed cases had already set the stage for the United States District Court for the Northern District of California.¹⁶⁴ However, an important shift was evident from the court's reasoning. In its discussion of obscenity, the court recognized that, "[t]he Supreme Court has never expressly considered whether obscenity is a unique category of expression and therefore the only subject matter that justifies limitation of the *First Amendment* rights of minors, or whether—as California seeks to do here—*Ginsberg* may serve as a template for other limitations on minors' access to other categories of expression, such as violent videos."¹⁶⁵ It did not interpret the absence of a Supreme Court decision on the matter as exclusivity; the door was still open on the issue of violence as obscenity.

The court went on to cite a media violence case, *Winters v. New York*, in which the Supreme Court struck down a New York Court of Appeals decision reasoning that "violence can be 'indecent or obscene' in much the same way as sexual material can."¹⁶⁶ However, the court in *Schwarzenegger* made it a point to note that the Supreme Court "was holding neither that a state 'may not punish circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment nor that states are 'prevented by the requirements of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise.'"¹⁶⁷ *Winters* did not rule out the possibility of states regulating violent content. Even though the court was discouraged from applying the obscenity standard to this case, it seemed to be more receptive to the state interest of shielding minors from violent video games.

¹⁶³ No. C-05-04188 RMW, 2007 U.S. Dist. LEXIS 57472 (N.D. Cal. Aug. 6, 2007).

¹⁶⁴ *Id.* at *6 (discussing video game legislation decisions from the Seventh, Eighth, and Ninth Circuit courts).

¹⁶⁵ *Id.* at *15.

¹⁶⁶ *Id.* at *15–16 (noting the NY Court of Appeals' decision upheld "the defendant's conviction under a statute that prohibited distribution of publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime.").

¹⁶⁷ *Id.*, at *16.

IV. APPLYING THE OBSCENITY DOCTRINE

As mentioned above, *Miller* set the standard for determining whether or not something should be considered obscenity.¹⁶⁸ The three-prong test is easily applicable to violent material. The first prong asks whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest.¹⁶⁹ The Oxford English Dictionary defines “prurient” as “exhibiting or characterized by excessive or inappropriate desire or interest; overly curious.”¹⁷⁰ Excessive or inappropriate desire or interest in violence is as much prevalent in today’s society as sexual content. Violence in movies is a prime example of how this prurient interest is exploited to sell. A review for “No Country for Old Men,” 2008’s Oscar winner for Best Picture, warned, “Calling the violence graphic is almost an understatement.”¹⁷¹ Others, describing the violent scenes for a parents’ guide, reported countless men being shot in graphic ways (through the throat, in the limbs, etc.) and dead bodies strewn about.¹⁷² Another example of prurient interest in violent content is the urban legend surrounding “snuff films.” A snuff film is one that depicts the killing of another human being without the aid of special effects or other trickery for entertainment value.¹⁷³ While a real snuff film has yet to be discovered, it is apparent that interest exists as these rumors continue to circulate.¹⁷⁴

¹⁶⁸ See discussion *supra* Part I. (explaining the obscenity test that the Supreme Court established in *Miller*); Seiden, *supra* note 165, at 591 (referencing *Miller*’s emphasis on community standards as a reason why “community mores, are best able to provide appropriate legislation for protecting children, provided that the localities have rational reasons for limiting minors’ speech rights”).

¹⁶⁹ *Miller*, 413 U.S. at 24 (laying out the test that courts must apply when determining whether material is unprotected obscene speech or protected, but offense speech).

¹⁷⁰ OXFORD ENGLISH DICTIONARY ONLINE (April 6, 2009), available at <http://www.oed.com/> (noting that it has overtones of secondary definition – “Lascivious, lewd; exhibiting or characterized by an excessive or inappropriate concern with sexual matters; encouraging such a concern.”).

¹⁷¹ See A.O. Scott, “*He Found a Bundle of Money, and Now There’s Hell to Pay*” *Movie Review for No Country for Old Men* (2007) N.Y. TIMES, Nov. 9, 2007, <http://movie.nytimes.com/2007/11/09/movies/09coun.html> (stating the film has “[a] lot of killing” and children under 17 years of age must be accompanied by an adult or guardian).

¹⁷² See *No Country for Old Men* (2007) (April 6, 2009) – *Parents Guide*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0477348/parentalguide> (describing each instance of violence in detail from movie); *No Country for Old Men*, ALLMOVIE.COM, available at <http://www.allmovie.com/work/no-country-for-old-men-348834/review> (highlighting the movie is flagged for graphic violence, adult situations, and profanity).

¹⁷³ See Barbara Mikkelson & David Mikkelson, *A Pinch of Snuff*, SNOPE.COM, Oct. 31, 2006, <http://www.snopes.com/horror/madmen/snuff.asp> (dispelling myth of snuff films existence and offering alternate explanations); see also Stephen Schaefer, *Movies, Subculture Club, ‘8 Millimeter’ Enters Dark World of Snuff Films*, BOSTON HERALD, Mar. 1, 1999 at 37 (explaining that snuff films are defined by the Federal Bureau of Investigation as films in which a person is killed on camera unbeknownst to them).

¹⁷⁴ See Mikkelson & Mikkelson, *supra* note 171, at 37 (listing factors that contribute to the belief

The second prong contemplates whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.¹⁷⁵ The sexual content limitation, as discussed throughout this note, is an arbitrary one. The Supreme Court in *Miller* never once explained fully as to why they chose sexual content as a limiting factor. Subsequent cases citing *Miller* also do not elaborate on this limitation, blindly utilizing it whenever possible to avoid the issue of whether violence could be evaluated under the same obscenity test. In doing so, courts have overlooked the *Miller* Court's understanding of obscenity and intent present in Footnote 2.¹⁷⁶ Violent content would be just as suitable of a limitation under this lack of a standard. The definition for violent content in each of the above statutes has been basically adapted from the *Miller* Court's ruling.¹⁷⁷ Lastly, the third prong asks whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The courts, as shown in the cases above, have set a very low standard for "value." The mere presence of a storyline is enough to satisfy the requirement, making the limit established by this prong illusory.¹⁷⁸

Critics of applying the obscenity doctrine to violence seem to have three main concerns: (1) definition, (2) a chilling effect on speech, and (3) institutional stress.¹⁷⁹ Justice Douglas's dissent in *Miller* expressed a disappointment with the development of obscenity law that is still present today.¹⁸⁰ His comments showed doubt in the role of courts addressing the issue because of their inability to reach a consensus over applicability.¹⁸¹ He also expressed concerns of vagueness and interpretation. However, these concerns are mostly addressed by the *Miller* majority.

Beginning with the definitional concern, it is apparent that the *Miller*

that snuff films still exist); see also Mark Caro, *Legend Lives on, Despite No Proof Snuff Films Exist*, CHI. TRIB., Feb. 26, 1999 at 1 (explaining that although the FBI has not known of any snuff films to be discovered in Chicago, many people believe they still exist).

¹⁷⁵ See 413 U.S. at 25 ("The basic guidelines must be . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law").

¹⁷⁶ See discussion *supra* Part I.

¹⁷⁷ See discussion *supra* Part II.

¹⁷⁸ See 244 F.3d at 577 (providing examples of books with violent themes that are still regarded as great literature), see also Wallace Baine, *UCSC Play Explore Dark and Violent Themes*, SANTA CRUZ SENTINEL, Oct. 31, 2008 (describing a school play that uses violence to explore the human condition).

¹⁷⁹ See Dean *supra* note 22, at 151 (discussing Justice Brennan's dissent in *Paris Adult Theater v. Slaton*, in which he explained application of the obscenity doctrine was obstructed by (1) definitional concerns (2) the chilling effect and (3) institutional stress); see also *Paris Adult Theater v. Slaton*, 413 U.S. 49, 101 (1972) (Douglas, J., dissenting) (explaining Justice Douglas's opinion that the definition of obscenity is not clear enough to provide fair notice, avoid chilling protected expression, and lessen institutional stress).

¹⁸⁰ *Miller*, 413 U.S. at 37 (stating that the court has failed in its attempt to define obscenity).

¹⁸¹ *Id.* at 39 (Douglas, J., dissenting).

Court intended to allow the standard to evolve as community standards changed. It took into account the possibility of different standards depending on multiple factors such as region, culture, etc. The Court states:

People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity . . . the primary concern with requiring a jury to apply the standard of “the average person, applying contemporary community standards” is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. Without such flexibility, there could be no exclusion of obscene material from First Amendment protection.¹⁸²

Definitional concerns about due process and vagueness may not be as detrimental as critics may claim. Quoting from Justice Brennan’s decision in *Roth v. United States*, the *Miller* Court stated, “This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process . . . The Constitution does not require impossible standards”; all that is required is that the language ‘conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.’¹⁸³ Unlike in situations involving sexual content, the fact that there is a ratings system in place provides an adequate guide for retailers to distinguish what would be obscene material for minors. Hence, within the video game industry there is a sense of what sort of entertainment is appropriate for minors and what is not.

The second concern of a chilling effect on speech has been empirically disproved. The argument is that an overly broad and poorly defined obscenity doctrine would cause citizens to shy away from gray areas of legitimate and illegitimate expression.¹⁸⁴ However, objectionable media in all forms, like pornography, violent movies, and games, continue to be produced daily. Because of the way the obscenity rule operates on community standards, works can only be judged as obscene *after* they are

¹⁸² *Id.* at 33.

¹⁸³ *Id.* at 28 (quoting *U.S. v. Petrillo* 332 U.S. 1, 7–8 (1947)).

¹⁸⁴ See Dean, *supra* note 22, at 153 (summarizing Justice Brennan’s argument in *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 89– 88 (1973) (Brennan, J., dissenting)); Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of “Political Correctness”: First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789, 809 (1995) (noting that laws imposing overly broad restrictions create a “chilling effect,” curtailing the availability of non-obscene expression).

produced. Even then, the three-prong test from *Miller*, specifically the third prong regarding the value of the work, makes it difficult for it to be considered obscene.¹⁸⁵ The bar is still set particularly high for determining that something is not worthy of First Amendment protection. Most noteworthy is the fact that no one is willing to shut the door entirely on government regulation of obscenity. As stated before in *Schwarzenegger*, absence does not equate to exclusion.¹⁸⁶

The third concern of institutional stress is fairly weak because it is a concern that cannot be avoided. Citing from Justice Brennan's opinion in *Jacobellis v. Ohio*, the majority in *Miller* stated:

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the *First Amendment*—because it will lighten our burdens. "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees."¹⁸⁷

Obscenity cases are extremely fact sensitive, as are all First Amendment challenges. However, difficulty has seldom been enough to deter a court from adopting rules that require the devotion of more resources.

In actuality, this concern of institutional stress is irrelevant because no one is challenging the actual creation of violent video games. Even though the gaming industry has shown that it can be innovative and revolutionary without relying on the shock value of ultra-violent games, under each state law, those kinds of explicit games can still be produced.¹⁸⁸ A part of this concern has to do with the contextual element to obscene material. When used in the right context, such as a sophisticated military training simulator, violent video games can be quite useful and constitutional.¹⁸⁹ However, these are not the types of video games in question. One cannot compare a

¹⁸⁵ See *Miller*, 413 U.S. at 33 (acknowledging that tastes and attitudes toward depictions of conduct vary by locale).

¹⁸⁶ See *Schwarzenegger*, 2007 U.S. Dist. LEXIS 57472, at *16 (citing *Winters v. New York*, 333 U.S. 507, 510, 520 (1948)) (stating that the Supreme Court has left open the possibility of a valid state statute that punishes circulation of objectionable printed matter).

¹⁸⁷ *Miller*, 413 U.S. at 29 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 187–188 (1964)).

¹⁸⁸ See Byrd, *supra* note 17, at 409–10 (noting that despite state laws regulating the sale of violent games, there are still many games of explicit nature that are being created and distributed); Seth Schiesel, *supra* note 48, at E1 (discussing the efforts of politicians to outlaw the sale of violent games to children in the face of the growing surge in the popularity of video games).

¹⁸⁹ See Dean, *supra* note 22 at 155 (giving example of military simulation "game" to argue contextual nature of obscenity is problematic); see also Daniel Sieberg, *War Games: Military Training Goes High-Tech*, CNN.COM, Nov. 23, 2001, <http://archives.cnn.com/2001/TECH/ptech/11/22/war.games/index.html> (discussing the use of elaborate high-tech simulators in the military).

training simulator with a very specific purpose and intended audience to a product made purely for the entertainment of the general public. Once again, the legislation that has been proposed addresses this concern because each limited its applicability to retailers and minors.

CONCLUSION

In 2005, standing with Richmond County District Attorney Daniel Donovan, Rose Nemorin, widow of Detective James Nemorin, who was shot and killed while on duty in 2003, Patrick Lynch, President of the Patrolman's Benevolent Association, and Michael Palladino, President of the Detective's Endowment Association, Senator Charles E. Schumer expressed a shared outrage over *25 To Life*, a new video game that glorified criminal activity and cop killing.¹⁹⁰ The Senator's words shed light on why people find violent video games to be so offensive: "This is not a game to the men and women in our police services, but is a dangerous reality to those who put their lives on the line each day combating gang members and the guns and drugs that they peddle. As long as there is a profit to be made, these games will continue to be targeted to our communities."¹⁹¹ Sensitivity is often an afterthought when sales in January 2008 alone top \$1 billion¹⁹² but the example here is a fair illustration of obscenity as viewed by an average person applying community standards.

The highly anticipated release of the final GTA game on April 29, 2008 raised the issue of video game violence once again in the minds of politicians and the general public.¹⁹³ New York City Mayor Michael Bloomberg and New York Police Commissioner Raymond Kelly voiced

¹⁹⁰ See Schumer: New "Cop-Killer" Video Game Is All Time Low; Urges New York Retailers, Distributors Not To Stock, Sell In Stores, http://schumer.senate.gov/new_website/record.cfm?id=260958& (last visited May 15, 2010) (explaining that Senator Schumer called on New York retailers and distributors to opt out of stocking and selling the game); see also Charles Herold, *Game Theory: From the Maker of Grand Theft Auto to Table Tennis?*, N.Y. TIMES, June 15, 2006, available at <http://www.query.nytimes.com/gst/fullpage.html?res=9B05E5DD1031F936A25755C0A9609C8B63> (noting Senator Schumer's denunciation of *25 to Life*).

¹⁹¹ Schumer: New "Cop-Killer" Video Game, *supra* note 188.

¹⁹² See Chris Faylor, *January Video Game Sales Top \$1B; COD4, Rock Band, GH3, Burnout Paradise Among Best Sellers*, SHACKNEWS.COM, Feb. 14, 2008, <http://www.shacknews.com/one/article.x/51336> (noting that the North American console market pulled in \$1.18 billion in January 2008); see also posting of Alex Mebane to FiringSquad.com, <http://www.firingsquad.com/news/news/article.asp?searchid=19593> (Feb. 14, 2008, 17:08 EST) (pointing out that the total video games sales for the month of January 2008 in the United States were recorded as being \$1.18 billion).

¹⁹³ See *Grand Theft Auto IV*, GAME SPOT, <http://www.gamespot.com/ps3/action/grandtheftauto4/index.html?tag=result;title;0> (showing release date of April 29, 2008); see also *Grand Theft Auto 4 Set for Record Sales*, CNNMONEY.COM, Apr. 29, 2008, http://money.cnn.com/2008/04/29/technology/grand_theft_auto/index.htm?postversion=2008042905 (explaining that the controversial fourth installment of the video game was expected to break sales records).

their disgust for the similarities between the game's Liberty City setting and New York City.¹⁹⁴ The Chicago Transit Authority expressed outrage for the game and planned to pull an advertising campaign, removing ads from platforms and buses. The decision followed a report by Fox News, suggesting that the ads were inflammatory after Chicago had suffered an especially violent weekend.¹⁹⁵ It is clear that for many, GTA has become synonymous with obscenity through its unapologetic violence and adult storylines. After the last GTA sparked so much controversy, more criticism was expected.

Perhaps society as a whole is more tolerant of violence than sexual content; however, from a legal standpoint, there is little difference between the two. As much as the right to free speech is revered, the Court has recognized that there are situations in which censorship is not only allowed, but is necessary. *Miller* has shown that certain sexual content can be so repulsive that it does not warrant protection as an expression of free speech. What exactly turns our stomachs is indefinite but we know it when we see it. This feeling is not limited to sexual material because violence can be equally offensive. In those situations when we cannot look or are horrified as adults by what we see, it seems that limiting access to such material is the only way to protect young, impressionable minds from the potential damage that may be caused. Because of the variety of obscene materials that now exists, access to them is no longer limited to the restricted backroom of a video store. These materials are now readily obtainable at home with the simple click of a mouse or push of a button. Parents cannot be expected to be able to police their children without some reciprocal duty imposed upon game developers, retailers, and distributors.

Video games should not be overlooked as a powerful medium of entertainment. They have been made for every age group and are available for a multitude of systems. Not only have they become more available, but they have also become more graphic, gory, and gruesome. The

¹⁹⁴ See Tim Surette, *GTAIV Trailer Irks NYC Mayor*, GAMESPOT, Apr. 1, 2007, <http://www.gamespot.com/news/6168413.html> (quoting Bloomberg, "[t]he mayor does not support any video game where you earn points for injury or killing police officers" and quoting Kelly, "[i]t's despicable to glamorize violence in games like these, regardless of how far-fetched the setting may be"); see also *New York Officials Irks* (sic) by *GTA IV Trailer*, DITII.COM, Apr. 2, 2007 (noting the same quotes by Bloomberg and Kelly).

¹⁹⁵ See posting of Polybren to Sidebar: The GameSpot News Blog, http://www.gamespot.com/pages/news/show_blog_entry.php?topic_id=26355342&om_act=convert&om_clk=newlyadded&tag=newlyadded&title;1 (Apr. 21, 2008, 16:38 EST) (explaining the Chicago Transit Authority's plans to pull GTA advertising from buses and platforms after an especially violent weekend in the city); see also posting of Jim Sterling to Destructoid.com, <http://www.destructoid.com/chicago-authority-pulls-gta-iv-ads-from-buses-with-a-little-help-from-fox-82613.phtml> (Apr. 21, 2008, 15:49 EST) (discussing the CTA decision to pull the ads).

technological advances employed to offer gamers a more realistic and interactive experience cannot be overlooked by the courts and lawmakers. The standards used to limit access must continue to evolve alongside developments in technology that force society to face the reality of the virtual world it has created.