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America's Newest Boogeyman for Deviant Teen Behavior: Violent Video Games and the First Amendment

Abstract

Are violent video games harming America's youth? Is it possible a series of interconnected circuit boards can influence children (or even adults) to become, themselves, violent? If so, how should our society-- and government-- respond?

To properly answer this last query, violent video games must be viewed through the lens of the First Amendment. Simply put: do games depicting grotesque acts of depravity so profound as to negatively influence the psyche warrant the full constitutional protections ordinarily guaranteed under the mantle of free speech and expression? Are these guarantees without limit? If not, how far may the government go in regulating the content or restricting the availability of these games?

This paper first examines the history of video game development and its economic significance. Next, similar "societal boogeymen" are examined, compared, and contrasted to video games. Their impact on society and law is also examined. What, if any, First Amendment protections this class of video games should receive as well as possible regulatory schemes and limitations are then examined. Finally, after weighing public policy interests, a new regulatory framework is proposed.

Keywords

Deviant, teen, behavior, violent, video, games, First, Amendment, violence, constitution, psychology, development, youth, public, policy

Background

Every generation has some form of societal boogeyman. Ordinarily, some new, norm-bending technology or artistic endeavor, is embraced by an incoming generation and feared by elders – often to the point of hysteria. These phenomena have the ability to create new societal norms and are, by their very nature, societally disruptive devices often powerful enough to effectuate permanent change. Generally centered around music and popular culture, often with racial or ethnic underpinnings, these “disrupters” frequently inspire fear and revulsion from the established generational power. Although some of this fear may be justified, it is the product of cultural and generational misunderstanding. In the 1950’s, black-influenced rock music was blamed for perceived societal ills. The raucous songs and flamboyant-dress of black showmen like Little Richard were seen as unnatural and feared by parents in newly created white suburbia. However, sanitized covers of such songs were readily accepted by those same white parents when performed by the white conservative Christian Pat Boone, known for declining to perform songs that might compromise his moral beliefs. Similarly, the parents and elder generations of the 1960’s were terrified by youth: long-haired hippies, anti-war peace protesters, risqué film and art. The out-generation of the 1960’s, often dubbed the “counterculture,” was that decade’s boogeyman, and one conservative leaders believed would certainly be the downfall of the sensible decorum of the age. Nixon’s “law and order” messaging in the 1970’s, predictably, cast the major cities as dens of evil and sin, polluted with peep-show theaters and sex clubs on every corner. The older generation took to the messaging and attributed lack of “law and order” as disruptive and destructive to the moral order. The 1980’s saw the vilification of homosexuals, viewed cutting edge art as pornography, and hard rock as the sign of the coming rapture. The heavy metal music of the 80’s, coupled with the overblown media coverage of the “crack epidemic” quickly turned into fear of Rap-music-

inspired-violence in the 1990's. Starting in the 2000's, a new cultural wave, spawned in the 1980's as a nerdy pastime, festered and then exploded with the advent of widespread internet usage: video games.

Once confined to benign and fanciful adventures and amateurish sci-fi scenarios, the rise of the multi-player online video gaming culture, built around extraordinarily violent storylines began to assert itself on the forefront of youth culture. These games, often involving hundreds or even thousands of players globally, and forming intricate and incredibly detailed "communities" inspire fevered, often fanatical followings, sometimes leading to full-blown addiction and mental health concerns. Of what then, do these video games really consist, and from where did they come?

I. Blips on a Screen: The Rise of Video Games as Entertainment

a. The History of Gaming

In technical terms, "for a product to be a video game, there must be a video signal transmitted to a cathode ray tube (CRT) that creates a rasterized image on a screen."¹ Game-like simulations were created by early computer scientists at M.I.T. as far back as the 1950's, as well as the first patent for a "cathode-ray tube amusement device."² In 1971, Ralph Baer, an electrical engineer working for a defense contractor, devised the Magnavox Odyssey- a system that could be connected to a standard television console. It sold with simple games consisting of a few lines and a moving dot, such as a table tennis game, with limited success. In 1972, electrical engineers Nolan Bushnell and Ted Dabney, who worked on the Magnavox system

¹ MARK WOLF, *THE VIDEO GAME EXPLOSION 4* (Greenwood Press, 2007).

² *Id.* at 218.

decided to hang their own shingle and established a system named Atari.³ The Atari partnership released *Pong*, an improved table-tennis game that ignited a craze which helped sales top 73,000 units in its first year of production.⁴ The video game industry had officially been launched.

Today, PC and console based multi-player games dominate the industry. These games are played real-time and online and can incorporate hundreds of players at once remotely. Games such as *World of Warcraft*, *Halo*, and *Runescape* were also fantastically profitable. *World of Warcraft* alone boasted 100 million registered accounts and grossed over nine billion dollars in revenue by 2017.⁵ In 2019, the global gaming community numbers around 2.5 billion, and global gaming revenues are set to exceed 152 billion dollars.⁶

b. Societal Impact of Video Games: The Good and the Bad

Some argue that video games serve as a positive educational model. Of note, “video games have clear, meaningful goals, multiple goal structures, scoring system, adjustable difficulty levels, random element of surprise, and an appealing fantasy metaphor, all things a good education system should have.”⁷ This positive sentiment has been echoed in the medical community, with several

³ Pescovitz, David (June 12, 1999). "The adventures of King Pong". Salon. Archived from the original on March 7,

2008.

⁴ Leonard Herman, *The Untold Atari Story* 94-99 (Edge, Vol. 200 2009).

⁵ GUINNESS WORLD RECORDS GAMER'S EDITION (Guinness World Records Limited, 2008).

⁶ Tom Wijman, *The Global Games Market Will Generate \$152.1 Billion in 2019 as the U.S. Overtakes China as the Biggest Market*, NEWZOO (June 18, 2019), <https://newzoo.com/insights/articles/the-global-games-market-will-generate-152-1-billion-in-2019-as-the-u-s-overtakes-china-as-the-biggest-market/>.

⁷ Susan Sacirbey, Video games and their effect on modern society, HUFFINGTON POST (May 10, 2016), https://www.huffpost.com/entry/video-games-and-their-eff_ .

studies focusing on the positive effects of gaming on the brain. Hannah Nichols, writing for *Medical News Today*, reports that scientists have determined that video games can “not only affect how our brains perform, but also their structure.”⁸ For example, videogame playing has been shown to increase both sustained and selective attention.⁹ Moreover, “the regions of the brain that play a role in attention are more efficient in gamers compared with non-gamers, and they require less activation to stay focused on demanding tasks,” as well as marked improvements to visuo-spatial skills and reasoning.¹⁰

Conversely, much press is devoted to the possible negative effects of hyper realistic violence that is portrayed in some games. For instance, many popular first person “shooter” games allow players to engage in “sniper mode” to portray gory headshots, complete with exploding brain and blood. Other games allow players to simulate realistic slashing and dismemberment wounds using edged weapons such as knives, swords, or axes. Games are becoming even more visually realistic and nearly indistinguishable from live action film. These player-directed sport killings take on an ominous tone in an era of marked spikes in hate crimes and school shootings.

Worse, some games, such as the wildly popular *Grand Theft Auto (GTA)* series allow players to assume online criminal personas, with the goal of outdoing each other with outrageous simulated criminal activities. *GTA and others may also* allow players to alter its base code, or “mod” to allow players seemingly unlimited powers. This can allow a player to take control of another players “avatar,” or character, against its players will and simulate a “rape” of that player’s

⁸ Hannah Nichols, *How Video Games Affect the Brain*, MEDICAL NEWS TODAY (May 10, 2017), <https://www.medicalnewstoday.com/articles/318345.php>.

⁹ *Id.*

¹⁰ *Id.*

character. Once initiated, the victimized player is helpless and must submit until the attacker is finished. Because these online multiplayer games are often accompanied by microphone assisted communication, these attacks are often accompanied by real time verbal abuse. Game creators are aware of these mods and even take steps to attempt to segregate or limit these mods, by “levelling the playing field, often by placing all players using the same mod onto a single server so they only play against one another.”¹¹ However, many game creators simply choose to ignore these mods and allow gamers to do as they wish. These in-game attacks and brutalizations are frequently recorded and uploaded online. As gamers frequently utilize their online personas across multiple social media and gaming platforms, the real identity of a victim is easily ascertainable, allowing other players to mock or intimidate them. The above, in concert, can create real feelings of victimization, trauma, social embarrassment and hurt which can manifest as diagnosable mental afflictions.¹²

Video games, like many “vices” can become addictive, a recognized diagnosis known as “internet gaming disorder.”¹³ Like most addictions, “there are functional and structural alterations in the neural reward system - a group of structures associated with feeling pleasure, learning, and motivation. Exposing video game addicts to game-related cues that cause cravings, and monitoring their brain responses, highlighted these changes - changes that are also seen in other addictive disorders.”¹⁴

¹¹ Rob Brooks *Virtual Rape in Grand Theft Auto 5: Learning the Limits of the Game*, THE CONVERSATION (August 18, 2014), <http://theconversation.com/virtual-rape-in-grand-theft-auto-5-learning-the-limits-of-the-game-30520>.

¹² *Id.*

¹³ Sacirbey, *Supra*.

¹⁴ *Id.*

c. Can Video Games Negatively Impact Human Behavior?

The short answer is *probably*. When testing questions involving human behavior, experiments and studies often prove *both sides* of a hypothesis. On one hand, in a recent large-scale survey of Norwegian youth, researchers examined the effects of multi-player online “role playing” or “fantasy persona” games, whereby the player assumes a detailed and realistic virtual identity.¹⁵ The study found that “the higher the level of realism in violent video games, the higher the aggressive behavior the players will get” which can be attributed to the “quality of the graphics in violent video games, the quality of the description of violent acts and the blood scenes increases.”¹⁶ Perhaps most damning, another study showed “that neurons in the human body deal with the effects that happen when playing video games just as the same dealing with the effects in the real world .”¹⁷

Conversely, other studies show that violent video games do not negatively impact human behavior. In one study, researchers compared extreme graphic violent imagery with non-graphic imagery and concluded that there was little effect on behavior.¹⁸ Another study found no

¹⁵ C. Barlett, et. al., The Effect of Advances in Video Game Technology and Content on Aggressive Cognitions, Hostility, and Heart Rate 540-565 (Media Psychol., Vol. 11, no. 4, Dec. 2008).

¹⁶ Muhammed Quwaider, *The Impact of Video Games on Player Behavior*, Jordan University of Science and Technology, (2019), www.sciencedirect.com.

¹⁷ F. BAYRAKTAR AND H. AMCA, INTERRELATIONS BETWEEN VIRTUAL-WORLD AND REAL-WORLD ACTIVITIES: COMPARISON OF GENDERS, AGE GROUPS, AND PATHOLOGICAL AND NONPATHOLOGICAL INTERNET USERS 263-269 (Cyberpsychology Behav. Soc. Netw., vol. 15, no. 5, May 2012).

¹⁸ K. CHENG AND P. A. CAIRNS, BEHAVIOUR, REALISM AND IMMERSION IN GAMES, IN CHI '05 EXTENDED ABSTRACTS ON HUMAN FACTORS IN COMPUTING SYSTEMS 1272-1275 (2005).

correlation to time playing violent video games with increases in “mental health, emotional, Attention-Deficit or Hyperactivity Disorder” or other neural diagnosis.¹⁹

II. America’s Favorite Teen Behavioral Boogeymen

The American public has always been obsessed with teen behavioral triggers. Generationally, focus has befallen numerous fringe or underground teen cultural phenomena as an explanation for deviant behavior trends, outrageous events, or perceived moral failures. Partly driven by new trends in technology and entertainment, and partly a generational gap in understanding of what “the damn kids” are up to these days has long been a boogeyman of sorts for each defined American generation. Some of these phenomena have been fleeting, and some have changed American culture forever.

a. The 1950’s and 60’s: Rock and Roll and Risky Behavior

Concerned with American youth being influenced by a dark skinned under culture, parents in the 1950’s and 60’s blamed much of society’s ills on rock and roll music. Birthed by negro driven blues from the south, rock and roll was seen as a deviant influence leading to promiscuity, rebellion, and “loose morals.” It was no coincidence that the rise of black influenced rock and roll coincided with the rise of the civil rights movement in America. Egged on by the government, traditional recording artists eschewed or even vilified rock and roll and dismissed it as an artform, as evidenced by a profanity laden missive by recording great Frank Sinatra, who said:

“Rock in' roll smells phony and false. It is sung, played, and written for the most part by cretinous goons and by means of its almost imbecilic retardation and sly,

¹⁹ V. KOVESH-MASFETY ET. AL., IS TIME SPENT PLAYING VIDEO GAMES ASSOCIATED WITH MENTAL HEALTH, COGNITIVE AND SOCIAL SKILLS IN YOUNG CHILDREN? 349-357 (Soc. Psychiatry Psychiatric. Epidemiol., Vol. 51, no. 3, Mar. 2016).

lewd in plain fact dirty lyrics.... it manages to be the martial music of every side-burned delinquent on the face of the earth."²⁰

Outrage bordering hysteria erupted - the latter in in young white women and their outraged parents, as a young Elvis Presley's sexually charged gyrations beamed directly into mid-century living rooms by the new medium of television when he performed on *The Milton Berle Show* in 1956.²¹ Such behavior, and the music it represented, was a direct clash with established societal norms of the time, and thus was the object of ridicule and blame.

b. The 1970's and 80's: The Scourge of Porn and Heavy Metal

i. The Scourge of Pornography

In 1988, infamous "pornographer" Larry Flynt prevailed over "Moral Majority" leader Rev. Jerry Falwell in the United States Supreme Court, vacating Falwell's state court damage award of \$150K for intentional infliction of emotional distress (IIED).²² It was no easy road, however. The Flynt-published *Hustler Magazine* pushed (and arguably exceeded) the boundaries of obscenity law. As the first adult magazine to publish graphic photos of female genitalia and lewd sexual acts, *Hustler* drew enormous backlash and protest.²³ The response was instantaneous and fierce, culminating in an assassination attempt in 1976 while outside a Georgia court fighting an obscenity charge. The bullets fired by the alleged gunman -outraged by depictions of interracial

²⁰ Vaillancourt, Eric, *"Rock 'n' Roll in the 1950s: Rockin' for Civil Rights"* (2011). Education and Human Development Master's Theses. 119, quoting Glenn C. Altschuler, *"All Shook Up: How Rock 'N' Roll Changed America,"* 6. (2004).

²¹ *Id.* at 12.

²² *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

²³ Larry Flynt & Kenneth Ross, *An Unseemly Man: My Life As a Pornographer, Pundit and Social Outcast*, 91 (2008).

sex- left Flynt a paraplegic.²⁴ However, being shot was the least of Flynt's troubles. Conservative pundits and lawmakers alike clamored for Flynt's head throughout their crusade to stamp out obscenity, which they believed to be sinful. The chief protagonist was evangelical televangelist Jerry Falwell, founder of the faith-based and politically powerful *Moral Majority*. Pornography, as Falwell saw it, was a public scourge "preying on innocent, impressionable children to feed the lust of depraved adults."²⁵ To Falwell, Flynt was the lowest of the low: a pimp, a blasphemer, the devil incarnate. However, Flynt believed Falwell to be a sanctimonious, pompous stuffed shirt who deserved to be "knocked down a peg." Falwell's bombastic and constant attacks induced Flynt to retaliate in his own clever and biting way by publishing a parody of a popular Campari (an Italian liquor) advertisement in *Hustler*. The ad parody relayed the fictitious account of Falwell's first sexual encounter and "portrayed [Falwell] as having engaged in a drunken incestuous rendezvous with his mother in an outhouse."²⁶ The *Hustler* parody "portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk."²⁷ Enraged, the godhead of the Moral Majority sued Flynt for libel, invasion of privacy, and intentional infliction of emotional distress seeking forty-five million dollars in damages.

The lawsuit climaxed at the Supreme Court where the Justices found satire and parody, indeed, to be protected under the First Amendment. In a unanimous opinion vindicating Flynt, the

²⁴ Green, Josh (March 4, 2013) "*Flashback: Larry Flynt shot in Lawrenceville.*" <https://www.atlantamagazine.com/history/larry-flynt-shot-in-lawrenceville-ga-1978/> (*Last accessed October 26, 2019*).

²⁵Douglass O. Linder, *The Jerry Falwell v Larry Flynt Trial: An Account*, <https://famous-trials.com/falwell/1779-account> (last visited October 26, 2019)..

²⁶ 485 U.S at 46.

²⁷ *Id.*

High Court held that “the First and Fourteenth Amendments prohibit public figures from recovering damages for the tort of intentional infliction of emotional distress (IIED), if the emotional distress was caused by a caricature, parody, or satire of the public figure that a reasonable person would not have interpreted as factual.”²⁸

ii. **The Rise of Heavy Metal and the Satanic Panic**

Another popular boogeyman was heavy metal rock music. The 1980’s typified excess and outrageousness- heavy metal was the musical embodiment of both those characteristics. Popular metal bands such as Iron Maiden, Black Sabbath, Motley Crüe, and others rode the tsunami unleashed by MTV’s brilliant coupling of music and video in 1982. A visual as well as auditory experience, heavy metal artists raced to outdo each other with outrageous displays of gore, frightening makeup, and pagan or satanic looking accouterments. Naturally, this caused parents and the conservative elements of society to lose their collective minds and start blaming heavy metal for a variety of questionable behavior, culminating in a decade of “Satanic Panic” and general fear of the occult. The Satanic Panic resulted in myriad criminal trials at which individuals, entire families, and even whole secular organizations were accused of ritualized rapes and murders and often ended with convictions. It is now known that these grisly stories of ritual killing were, at best, mere fabrication and, at worst, outright manufactured. The overzealous media trumpeted these falsehoods which lent credibility to these claims.

Fear of raunchy or violent lyrics drove parent’s groups, led by Tipper Gore’s hysterical *Parent’s Music Resource Center* which maintained a list of vulgar music and led to the creation of the nation’s first music lyric rating system. This culminated in the rise of

²⁸ *Id.* at 57.

the dreaded “parental advisory” sticker that was required to be affixed to certain albums.²⁹

It wasn’t long before lawmakers got into the act, with Senate hearings attended by rock luminaries such as Frank Zappa as witnesses.

This hysteria led to several high profile lawsuits against rockers accused of influencing or even commanding listeners to commit violence or suicide with overt or subliminal lyrics and messages.³⁰ So reviled and vilified was heavy metal music that parents and special interest groups were willing to entertain the utterly insane proposition that a musician or band, just for kicks, chose to implant subliminal commands to self-harm into their records. Some even went so far as to allege that heavy metal bands recorded subliminal messages to “praise Satan” and “kill yourself,” but that those messages could only be heard by playing an album or song backwards.³¹ A boogeyman indeed! Most famous was the trial of the band, *Judas Priest* in 1990. In that case, the band was accused of planting subliminal messages encouraging suicide that led to two young men taking their lives after a night fueled by alcohol, drugs – and Judas Priest on the record player.³² The

²⁹ Kim Kelly, *Revisiting America's Satanic Panic: When Heavy Metal and the Devil Himself Stalked the Earth.*, (Jul. 3, 2015, 12:05 PM), https://www.vice.com/en_au/article/r3za83/satanic-panic-interviews.

³⁰ *Waller v. Osbourne*, 763 F. Supp 1144, 1148 (M.D. Ga. 1991); *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920 (Nev. Dist. Ct. Aug. 24, 1990) (Both courts held that subliminal messages are unprotected speech because they influence people without their conscious awareness and circumvent assumptions underlying the —marketplace of ideas.); See *Waller*, 763 F. Supp. at 1148 (subliminal messages are akin to false and misleading speech and —worthy of little, if any, [F]irst [A]mendment constitutional protection.); *Judas Priest*, 1990 WL 130920 at *25 (subliminal suicide commands are unprotected speech because they operate beyond conscious awareness and do not enter the marketplace of ideas).

³¹ Scot Silverglate, *Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?*, 44 U. Miami L. Rev. 1243 (1990).

³² Kory Grow, *Judas Priest's Subliminal Message Trial: Rob Halford Looks Back*, (Aug. 24, 2015, 4:45 PM), <https://www.rollingstone.com/music/music-features/judas-priests-subliminal-message-trial-rob-halford-looks-back-57552/>.

band was found not guilty, but the stigma – and collective belief that heavy metal music was satanic or lead to violence, continued, albeit reduced to a simmer. Efforts to legislate limitations went nowhere, but the parental advisory rating system remained.

c. The 1990's: The Rise of "Gangsta" Rap Music

*I'm a cop killer, better you than me
Cop killer, fuck police brutality!
Cop killer, I know your family's grieven' (fuck 'em!)
Cop killer, but tonight we get even haha!*³³

Few cultural fears in the 1990's came close to the collective terror Americans had for South-Central Los Angeles gang violence. This fear permeated the 1990's and was (overly) portrayed in movies, videos, fashion and, of course, music. Rap music started on the East coast in the early 1970's. But, by the late 1980's, gang-inspired rap was pouring out of L.A.'s notoriously gang-infested areas such as Compton and Watts. Chief among these was the group *Niggaz Wit Attitudes* (N.W.A. for short) famous for in-your-face ghetto anthems such as "Fuck tha Police." Born during a time of violent social upheaval, corrupt police departments, race riots, and capped off by the brutal public beating of Rodney King leading to vicious riots nationwide, "gangsta rap" became a way for young, disenfranchised black men to air their grievances on a national stage.

Almost immediately, lawmakers and the public responded, especially to the 1990 release of *Cop Killer* by the band *Body Count*, a side project of Crenshaw rap legend Ice-T. "Cop Killer was 'intended to speak from the viewpoint of a criminal getting revenge on racist, brutal cops.'"³⁴

³³ Body Count, *Cop Killer*, (Ernkneesea Music, Rhyme Syndicate Music 1990).

³⁴ Thomas, Stephen, "Ice-T". AllMusic. All Media Network. (1992).

Ice-T's song infuriated government officials, the National Rifle Association and various police advocacy groups.³⁵

Public outcry reached the White House quickly as President George Bush and other politicians publicly denounced the song and forced its retraction by the band. Despite its popularity -or perhaps because of it- public boycotts organized by Tipper Gore's PMRC and police organizations and unions shone a spotlight on violent rap... and thrust it to the top of the parental concern list.³⁶

Unlike the music described above, there is overwhelming evidence that violent rap music depicting graphic murder, abuse of women, and drug use does in fact negatively impact behavior. In 2003, the *Journal of Personality and Social Psychology* published a study that linked violent song lyrics with thoughts of aggression and negative emotions.³⁷ This finding was echoed in a 2006 study by researchers from Western Connecticut State University, who found that "listening to violent music and watching aggressive and violent music videos and one getting into more fights, using inappropriate language, inappropriate gestures, and a tendency to think less of women."³⁸

³⁵ Chuck Phillips, *COVER STORY: 'Arnold Schwarzenegger blew away dozens of cops as the Terminator. But I don't hear anybody complaining.': A Q & A with Ice-T about rock, race and the 'Cop Killer' furor.* L.A. Times. (Jul. 19, 1992, 12 AM), <https://www.latimes.com/archives/la-xpm-1992-07-19-ca-4406-story.html>.

³⁶ Tim Scott, *25 years of killing cops with Ice-T.*, (Jun. 2, 2017, 10:30 AM), https://www.vice.com/en_us/article/paye7y/talking-cop-killer-with-body-counts-ice-t.

³⁷ Anderson, C. A., Carnagey, N. L., & Eubanks, J., *Exposure to violent media: The effects of songs with violent lyrics on aggressive thoughts and feelings*, *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY*, at 960-971 (2003).

³⁸ Elaine Tropeano, *Does Rap or Rock Music Provoke Violent Behavior?*, *JOURNAL OF UNDERGRADUATE PSYCHOLOGICAL RESEARCH*, Vol. 1 (2006).

However, when put to the test in the courts, such evidence failed. This was illustrated by a multi-million dollar civil suit filed against rap artist Tupac Shakur and Interscope records in 1995 alleging that his lyrics incite “imminent lawless action” and were the cause of the 1992 murder of a Texas State Trooper by a man listening to Tupac’s “*2Pacalypse Now*” album, which glorifies shooting cops.³⁹ Tupac and Interscope prevailed as federal judge John D. Rainey concluded:

2Pacalypse Now is both disgusting and offensive. That the album has sold hundreds of thousands of copies is an indication of society's aesthetic and moral decay. However, the First Amendment became part of the Constitution because the Crown sought to suppress the Farmers' own rebellious, sometimes violent views. Thus, although the Court cannot recommend *2Pacalypse Now* to anyone, it will not strip Shakur's free speech rights based on the evidence presented by the Davidsons.⁴⁰

Clearly, this ruling shows that violent music lyrics depicting the murder of police and the abuse of women are protected speech under the First Amendment, regardless of scientific studies showing a correlation between them and violent behavior. Does the wisdom of judge Rainey in 1997 apply to violent video games in today? Does the fact that, unlike music, the first-person, virtual reality of video games put users in a position *to do*, rather than simply *to listen*?

III. Video Games, Restrictions, and the First Amendment.

Congress shall make no law ... abridging the freedom of speech, or of the press ...
U.S. Const. amend. I, §3.

³⁹ Chuck Phillips, *Testing the Limits : The fatal shooting of a Texas trooper during a routine traffic stop sets up a conflict over the words in a rap song that may wind up . . . : Testing the Limits*, L.A. TIMES (Oct. 13, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-10-13-ca-225-story.html>.

⁴⁰ *Davidson v. Time Warner*, 1997 WL 405907, 22 (S.D. Texas, March 31, 1997).

It is clear that video games, regardless of content, are protected forms of speech and expression under the First Amendment to the United States Constitution. In 2009, the state of California passed a law that forbade the sale of violent video games to minors.⁴¹ The statute also required packaging to clearly label the games as restricted to those 18 years of age and over. The Entertainment Merchants Association, or EMA, an industry group representing videogame and software makers, sued for injunctive relief against the governor of California, then Arnold Schwarzenegger.⁴² The District Court ruled against the State, finding that “the law violated the First Amendment, and that there was an insufficient showing of proof that either video games differed from other media or that there was established causality between violent video games and violent behavior.”⁴³

The State of California appealed the grant of a permanent injunction and summary judgment to the Ninth Circuit Court of Appeals in February of 2008. One year later, the Ninth Circuit affirmed the District Court's Summary Judgment for the VSDA by holding:

1. The Act is a presumptively invalid content-based restriction on speech, so it is subject to strict scrutiny and not the "variable obscenity" standard from *Ginsberg v. New York*.
2. The Act violates rights protected by the First Amendment because the state has not demonstrated a compelling interest, has not tailored the restriction to its alleged compelling interest, and there exists a less-restrictive means that would further the State's expressed interest.⁴⁴

⁴¹ CAL. CIV. CODE § 1746-1746.5 (West 2009).

⁴² *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011).

⁴³ *Video Software Dealers Ass'n. v. Schwarzenegger*, 2007 U.S. Dist. LEXIS 57472 (N.D. Cal. 2007) *aff'd sub nom. Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011).

⁴⁴ *Video Software Dealers Ass'n*, 556 F.3d 950 (2009).

On certiorari to the U.S. Supreme Court, it was found that video games were protected speech and that:

Like the protected books, plays, and movies that preceded them, video games communicate ideas--and even social messages--through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world).⁴⁵

This wasn't always the case though. Perhaps legal opinion and jurisprudence evolves along with common mass perception and cultural zeitgeist sentiment of a particular time. However, the *Brown* court's decision was a marked deviation from earlier precedent. In the early years, video games were denied constitutional protection. In *America's Best Family Showcase v. City of New York*, video games were categorized with simple recreational sports and mechanical gaming devices such as pinball. (It is noteworthy that this holding contemplated only early coin operated video arcade games.)⁴⁶ In *America's Best*, the plaintiff, a New York City restaurateur, challenged a city ordinance prohibiting more than four coin operated gaming devices, claiming it would endanger its plans to install forty coin operated arcade games converted into dining tables.⁴⁷ The plaintiff describes videogaming as "visual and aural presentations on a screen involving a fantasy experience in which the player participates."⁴⁸ These he compared to motion pictures, which have long been determined protected speech. The *America's Best* court, however, disagreed, instead opining that unless there is "some element of information or some idea being

⁴⁵ *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 786 (2011).

⁴⁶ *America's Best Family Showplace v. City of New York*, 536 F. Supp. 170 (E.D.N.Y. 1982).

⁴⁷ *America's Best Family Showplace*, 536 F. Supp. at 171.

⁴⁸ *Id.* at 173. (Quoting plaintiff's memorandum of law).

communicated,” no constitutional protection under the First Amendment could be applied.⁴⁹

More recently, in *American Amusement Machine Association v. Kendrick*, Judge Richard Posner “declined to carve out a constitutional exception for violence, such as that for obscenity.”⁵⁰ The *Brown* Court sided with Posner, holding that “[c]rudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than the Divine Comedy” and that because strict scrutiny must be applied, the vulgar deserves the same “protection of free speech as the best of literature.”⁵¹ Strict scrutiny, the highest standard of constitutional review is the mechanism whereby a governmental limitation of speech must be “justified by a compelling government interest and is narrowly drawn to serve that interest.”⁵²

The Court’s rationale rested upon vagueness, overbreadth, overinclusion and at the same time, underinclusion. The California statute was determined to be overinclusive because it affected all children, regardless of whether their parents cared if they were exposed to video games containing violence. Underinclusive because it does not include non-violent video games nor “permits a parental or avuncular veto.”⁵³

⁴⁹ *Id.* at 171.

⁵⁰ Patrick M. Gary, *Video Games*, The First Amendment Encyclopedia, <https://www.mtsu.edu/first-amendment/article/1152/video-games> (last updated Sept. 2017).

⁵¹ *Brown*, 564 U.S. at 786.

⁵² *Id.*

⁵³ *Id.*

IV. Rating Systems and Public Policy Arguments

If violent and sexualized video games are protected expressions of speech what, if anything, can be done to limit their societal effects? What, if anything, *should* be done? To answer these questions, we turn to what *has been done*.

a. Videogame Rating Systems

As discussed above, rap music spawned parental guidance stickers on albums deemed obscene in the 1990's. Rating motion pictures goes back farther, to 1968, when the Motion Picture Association, or MPAA replaced the *Hays Code* with the modern rating system.⁵⁴ Prior to that, the *Hays Code* authorized a movie for distribution based on whether it was deemed 'moral' according to an exhaustive list of rules.⁵⁵ These rules grew out of backlash as the film industry of the roaring 20's and into the 30's devolved into depravity including such high profile events as "[s]ilent-film comic Fatty Arbuckle charged with manslaughter in the death of an actress; a bisexual director found murdered; movie stars dying of drug overdoses."⁵⁶ Modern film ratings are divided into age appropriate classifications such as (G) for *general audiences*, (PG) for *parental guidance*, (R) for *under 18 admitted only with parent*. The rating (PG-13) was added in 1984 and (NC-17) prohibiting *any admittance of viewers under age 18* in 1990, replacing the (X) rating.

Video games, on the other hand, are rated by the *Entertainment Software Rating Board*, or ESRB. The ESRB ratings are softer, such as (E) for *everyone*, (E10) for *ten and older*, (T) for *teen*,

⁵⁴ The Classification & Rating Admin., *History of Ratings*, FilmRatings.com, <https://www.filmratings.com/History> (last visited Oct. 26, 2019).

⁵⁵ *Id.*

⁵⁶ Bob Mondello, *Remembering Hollywood's Hays Code, 40 Years On*, NPR, <https://www.npr.org/templates/story/story.php?storyId=93301189> (Aug. 8, 2008).

and (M17) for *mature players over 17*. This rating is reserved for “intense violence, blood and gore, sexual content and/or strong language.”⁵⁷ There are no marketing or sales restriction other than these labeling requirements. The question is: does this rating go far enough?

b. Public Policy and a Proposed Restrictive System

The law is clear: video games are protected speech and cannot be banned, but can they be restricted in other ways? Federal and state police powers give broad authority to regulate for the health and safety of citizens. Because scientific study has determined that exposure to first-person, outrageously violent and sexually charged games may create a behavioral impact, government must balance First Amendment concerns with the common good. Government ought to create a restrictive content and marketing scheme to personify this balance. We propose one here.

It is well settled that speech may not be restricted by government for content or viewpoint. However, we think it probable that it can restrict aesthetic content. For example, toy guns under federal law must have blaze orange tips to distinguish from real firearms.⁵⁸ Likewise, it should be constitutionally permissible to impose similar regulations on video game makers such as requiring weaponry be portrayed in less-realistic styles and colors than found on the street (although some already so voluntarily). Such regulation comports with studies showing that hyperrealism was partly responsible for behavioral impact.⁵⁹ This restriction should also be applicable to hyper-realistic depictions of gore, murder, rape, and maiming scenes. Moreover, coloring “blood” green or replacing gore with some other representative effect may short-circuit the behavioral imprinting described in numerous studies. As such, a new regulatory rubric could

⁵⁷ Entertainment Software Rating Board, *Ratings Guide*, <https://www.esrb.org/ratings-guide/>.

⁵⁸ 15 C.F.R. Part 272 (2013).

⁵⁹ See Quwaider, *supra* note 17.

be used to arrest the encoding of violence and aggression through science, not censorship. Additionally, strengthening marketing restrictions by formulating a new rating label (akin to film's NC-17) that forbids violent video game sales to minors, and coupling those restrictions with state and municipal statutes and ordinances which impose fines or authorize criminal charges for negligent or criminal creators, manufacturers, and proprietors would go a long way to curbing underage possession of restricted content- akin to those policies adopted for alcohol and tobacco products.

Conclusion

Video games, even fantastically violent ones, are protected speech. They are also likely harmful to minors and have a negative impact on behavior. While being mindful of First Amendment bounds, perhaps it's time to apply restrictions to the culprits ferreted out by these studies: hyper realistic depictions of violence and gore and short-circuit the negative impacts these depictions imprint on developing psyches.

