

Violence, Video Games, and A Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment

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I. INTRODUCTION

“We are in the world of kids’ popular culture. But it is not lightly to be suppressed.”¹

So wrote Judge Richard A. Posner on behalf of a unanimous three-judge panel for the Seventh Circuit Court of Appeals in March 2001 in striking down, on First Amendment² grounds, an Indianapolis ordinance that blocked minors’ access to video games depicting violence. Judge Posner’s erudite opinion could not have come at a more important time—a time when the entertainment industries in the United States seemingly are under government siege³ and when the media blame game is peaking.⁴ The judge’s cogent reasoning and logic in *American*

1. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 462 (2001).

2. The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

3. For instance, the Federal Trade Commission issued two recent reports on the alleged marketing of violent media content to minors by the video game, music, and movie industries. Megan Garvey, *FTC Pans Music Labels for Lack of Self-Policing*, L.A. TIMES, Apr. 25, 2001, at A1 (describing the April 2001 report of the FTC). The text of the April 2001 report—a follow-up report to the FTC’s initial September 2000 report—can be downloaded online from the FTC’s home page. Federal Trade Commission, *Marketing Violent Entertainment to Children: A Six-Month Follow-up Review of Industry Practices in the Motion Picture, Music Recording and Electronic Game Industries: A Report to Congress* (April 2001), at <http://www.ftc.gov/opa/2001/04/youthviol.htm> (last visited Oct. 13, 2001).

In July 2001, the House Subcommittee on Telecommunications and the Internet held hearings in July 2001 regarding the entertainment industry’s marketing of products depicting violence. Bill Hillburg, *FTC Official Says Hooray for Hollywood Self-Regulation*, L.A. DAILY NEWS, July 21, 2001, at N1, 2001 WL 6062863. In addition, the United States Senate held hearings that same month regarding ratings systems for video games, music, and movies. Megan Garvey, *Rating System Gets the Once-Over*, L.A. TIMES, July 26, 2001, at A16. A writer for the *Los Angeles Times* predicted that the July 2001 House hearings might have only represented “the first in what may prove a long series of Hollywood-centric congressional hearings this year.” Megan Garvey, *Hollywood Back in D.C.’s Woodshed*, L.A. TIMES, July 21, 2001, at A15.

4. See generally Clay Calvert, *Media Bashing at the Turn of the Century: The Threat to Free Speech After Columbine High and Jenny Jones*, 2000 L. REV. MICH. ST. U.-DETROIT C.L. 151 (analyzing the current public climate hostile to the media).

*Amusement Machine Assoc. v. Kendrick*⁵ seem, unfortunately, to be drowned out today by what can only be considered a hysterical narrative. It is a narrative created, in large part, by the news media and politicians in which society's problems with youth violence are largely foisted onto the products that primarily comprise and influence kids' culture at the turn of the new century—music, video games, and movies.⁶ Such a climate provides an ideal hothouse in which both legislation⁷ and lawsuits targeting video games can germinate and flourish.⁸

Judge Posner's opinion, then, is laudable for several reasons. First, and most importantly, the opinion recognizes that the case is about more than just one local community's legislative efforts to regulate video games. It represents, instead, an important battle fought in the ongoing culture wars in the United States—wars led by adults that target the popular culture domain of children for destruction.⁹

Judge Posner's opinion thus emphasizes facts many adults today, including politicians, apparently seem either to have forgotten or to have intentionally suppressed—that “[c]hildren have First Amendment rights”¹⁰ and, concomitantly, that they “are unlikely to become well-

5. 244 F.3d 572 (7th Cir. 2001), cert. denied, 122 S. Ct. 462 (2001).

6. Ironically, on the same day that the Seventh Circuit Court of Appeals handed down its decision in *American Amusement Machine* declaring the Indianapolis video game ordinance unconstitutional, United States Attorney General John Ashcroft lamented what he called an “ethic of violence,” created, at least in part he claimed, by violent video games. Marsha Ginsburg, *An ‘Ethic of Violence’ Fostered, Ashcroft Says: Attorney General Urges the Media and Gamemakers to Curb Violence and Cultivate a ‘Culture of Responsibility,’* S.F. CHRON., Mar. 24, 2001, at A1, 2001 WL 3398755.

7. At the federal level, the proposed Media Marketing Accountability Act—legislation introduced by Senator Joseph Lieberman (D. Conn.) in April 2001—would give the Federal Trade Commission power to fine the makers of video games and other entertainment products for target marketing their goods to minors. Vanessa O’Connell, *Marketers to Attack Bills Restricting Ads*, WALL ST. J., July 25, 2001, at B5.

8. Linda Sanders, the wife of the late Dave Sanders, the teacher killed in the shooting at Columbine High School, filed a class-action lawsuit in April 2001 against the manufacturers and distributors of violent video games. Kevin Simpson, *Slain Teacher’s Family Sues to Limit Media Violence*, DENVER POST, Apr. 22, 2001, at B5. A similar lawsuit against video game manufacturers, tied to the school shooting near Paducah, Kentucky in 1997, failed in a federal district court. *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 819 (W.D. Ky. 2000).

9. The debate is, in fact, frequently framed as one over culture. For instance, United States Attorney General John Ashcroft suggested in a speech to the American Society of Newspaper Editors in April, 2001, that violent video games are examples of “the culture of violence” in the United States. *Ashcroft Says Violent Video Games Could Teach Children How to Shoot*, ST. LOUIS POST-DISPATCH, Apr. 5, 2001, at A5, 2001 WL 4453890.

10. *Am. Amusement Mach. Ass’n*, 244 F.3d at 576.

functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”¹¹ The speech rights of minors in school settings are already under attack today in the zero-tolerance world of Columbine High-like fears of violence,¹² and now those same minors’ right to receive speech—to listen to music, to play video games, to watch movies—is subject to a similar assault.

The *American Amusement Machine* decision is also important because it: (1) reminds those seeking to regulate images of violence that violence is far from a new part of our society and, instead, “has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low;”¹³ (2) stresses that the violent image cannot easily be lumped together with obscenity and child pornography as a category of speech falling outside the scope of First Amendment protection;¹⁴ (3) underscores the point that social science research, no matter how valid¹⁵ and reliable¹⁶ methodologically, can *never* tell us whether a particular instance of real-world violence was *caused* by a media product; and (4) strikes a blow on both common sense reasoning and compelling interest thinking as the guiding principles for the decision-making process to legislate media violence.

This Article critiques, analyzes, and praises these aspects of Judge Posner’s opinion in *American Amusement Machine* in Part I,¹⁷ and then reinforces and extends his reasoning in subsequent Parts. Part II describes and attacks the post-Columbine High School shooting¹⁸ media witch-hunt that has led to flawed legislative efforts like the one in

11. *Id.* at 577.

12. *See generally* Larry Atkins, *Free Speech Hurt in Shootings’ Wake*, BALT. SUN, Mar. 13, 2001, at 13A, 2001 WL 6153508. (lamenting that “[i]n addition to the tragic loss of lives caused by the recent spate of school shootings, another silent victim has emerged: the free speech rights of students”). Jon Furlow, an attorney with the American Civil Liberties Union in Wisconsin, recently observed that “the courts have misconstrued settled First Amendment precedent in the name of zero tolerance of school violence.” Dennis Chaptman, *Testing Limits of Kids’ Tough Talk*, MILWAUKEE J. SENTINEL, Oct. 1, 2000, at B1.

13. *Am. Amusement Mach. Ass’n*, 244 F.3d at 577.

14. *See* *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that the distribution of materials defined as child pornography under New York law is “without the protection of the First Amendment”); *Miller v. California*, 413 U.S. 15, 23 (1973) (observing that it “has been categorically settled by the Court, that obscene material is unprotected by the First Amendment”).

15. *See generally* RUSSELL K. SCHUTT, INVESTIGATING THE SOCIAL WORLD 19–24 (3d ed. 2001) (discussing the concept of validity in social science research).

16. *See id.* at 95–97 (discussing the concept of reliability in social science research).

17. *See infra* notes 28–120 and accompanying text.

18. *See generally* Mark Obmascik, *High School Massacre: Columbine Bloodbath Leaves up to 25 Dead*, DENVER POST, Apr. 21, 1999, at 1A (describing the worst school shooting in United States history at Columbine High School near Littleton, Colorado).

Indianapolis.¹⁹ Next, Part III provides a brief critique on the limitations of using social science research to provide foundational evidence to support regulations on media content.²⁰ Part III examines the paucity of current research on the influence and effects of video games on violent acts, and emphasizes the critical distinction seemingly overlooked by many legislators between correlation and causation.²¹ Violent behavior, in brief, is a complex phenomenon and its occurrence cannot be blamed squarely on any one variable.²² Part III also critiques the social science evidence specifically cited in *American Amusement Machine* as supporting Indianapolis's unconstitutional ordinance.

Part IV then suggests that legislative bodies concerned with youth violence should focus their efforts on factors other than media products when attempting to confront what has been portrayed falsely in the news media²³ as a rise in this category of activity.²⁴ Part IV looks at the growing media focus on so-called "bullying" behavior as a factor in school violence, but it also cautions that this variable raises First Amendment issues of free speech when schools and teachers try to stop the speech of students who are perceived as bullies.²⁵ Finally, the

19. See *infra* notes 121–42 and accompanying text.

20. See *infra* notes 143–58 and accompanying text.

21. See *infra* notes 143–52 and accompanying text.

22. See Paul Kettl, *Biological and Social Causes of School Violence*, in *SCHOOL VIOLENCE: ASSESSMENT, MANAGEMENT, PREVENTION* 53, 53 (Mohammad Shafii & Sharon Lee Shafii eds., 2001) (observing that "[v]iolence is a complex behavior, an interaction of psychological, biological, and social factors that can lead a human being to a violent act").

23. See James Forman, Jr., *Overkill on Schools: Zero-tolerance and Our Exaggerated Images of Violence*, WASH. POST, Apr. 23, 2001, at A15, 2001 WL 17622970 (blaming the news media, in part, for creating "the public's erroneous belief that school shooters lurk everywhere" when, in fact, "a student is more likely to be killed by lightning than in a school homicide"); LynNell Hancock, *The School Shootings: Why Context Counts*, COLUMBIA JOURNALISM REV., May–June 2001, at 76 (writing that "the numbers" support the view that "saturation media coverage" is "painting a distorted picture" that schools are becoming more violent).

24. See *infra* notes 159–78 and accompanying text.

25. For instance, an in-school, antiharassment policy adopted by the school district in the central Pennsylvania town of State College that prohibited offensive, denigrating, and belittling speech was declared unconstitutional on First Amendment grounds in 2001 by the Third Circuit Court of Appeals. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001). This decision suggests that there are serious First Amendment concerns that must be addressed by school districts adopting antibullying policies, no matter how well intended those policies may be. In particular, the appellate decision in *Saxe* "will likely force hundreds of school districts to reassess their own policies to ensure they comply with the ruling." Dan Lewerenz, *Court Overturns School Policy*, Feb. 15, 2001, 2001 WL 13673287; see also Kate Zernike, *Free-Speech Ruling Voids*

Article concludes that in the future, the judges who will undoubtedly review legislation similar to that adopted in Indianapolis—St. Louis County, Missouri already has adopted a comparable ordinance²⁶ and Chicago, Illinois is considering one²⁷—should accept and embrace Judge Posner’s voice of reason in *American Amusement Machine* so as not to unjustifiably and unnecessarily shred the First Amendment rights of children based on speculative fears.

II. WARNING—DO NOT PLAY THAT VIDEO GAME
BY YOURSELF: INDIANAPOLIS’S EFFORTS TO
PROTECT MINORS AND THE PUBLIC

A. *The Statute*

Bart Peterson, the newly elected Democratic mayor of Indianapolis in 1999,²⁸ “wanted to do something about the culture of violence children are subjected to almost from the day they are born.”²⁹ Believing that playing violent video games can lead to violent behavior, Peterson pushed the Indianapolis City Council in 2000 to adopt an ordinance limiting minors’ access to such games.³⁰

The turn-of-the-new-century ordinance eventually adopted by Indianapolis and the same one at issue in *American Amusement Machine*:

forbids any operator of five or more video-game machines in one place to allow a minor unaccompanied by a parent, guardian, or other custodian to use “an amusement machine that is *harmful to minors*,” requires appropriate warning signs, and requires that such machines be separated by a partition from the other machines in the location and that their viewing areas be concealed from persons who are on the other side of the partition.³¹

School District’s Harassment Policy, N.Y. TIMES, Feb. 16, 2001, at A10 (writing that the *Saxe* opinion has “potentially wide reverberations for school districts”).

26. Phil Sutin, *St. Louis County Ordinance that Targets Violent Video Games is in Peril*, ST. LOUIS POST-DISPATCH, Apr. 28, 2001, at 26, 2001 WL 4458388. St. Louis County modeled its legislation on the Indianapolis ordinance at issue in *American Amusement Machine*. Phil Sutin, *County Council Votes to Prohibit Children from Playing Violent Video Games*, ST. LOUIS POST-DISPATCH, Oct. 20, 2000, at C3, 2000 WL 3555037.

27. Fran Spielman, *Burke Targets Violent Arcade Games*, CHI. SUN-TIMES, Sept. 28, 2000, at 10. The proposed ordinance in Chicago is modeled after the one in Indianapolis. *Id.*

28. B. Drummond Ayres, Jr., *Democrats Gain Control of 2 Large Cities*, N.Y. TIMES, Nov. 3, 1999, at A22 (observing that Peterson, a developer, became Indianapolis’s first Democratic mayor in thirty years after beating Republican Sue Anne Gilroy in November 1999).

29. Art Golab, *Violent Video Games Under Fire*, CHI. SUN-TIMES, July 22, 2000, at 3.

30. *Id.*

31. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001)

The concept of “harmful to minors,” is defined as:

“an amusement machine that predominantly appeals to minors’ morbid interest in violence or minors’ prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under” that age, and contains either “graphic violence” or “strong sexual content.”³²

This language parallels, to a large extent, the United States Supreme Court’s definition of obscenity, as well as what are called variable obscenity statutes.³³ In *Miller v. California*,³⁴ the Court set forth a test to assist the trier of fact in making an obscenity determination that asks:

(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.³⁵

If all three prongs of this so-called *Miller* test are met, then any First Amendment protection for the work in question dissolves. As discussed later in this Article, Judge Posner in *American Amusement Machine* rejected Indianapolis’s attempt to lump the regulation of violent images in video games together with sexually explicit speech barred by *Miller*.³⁶

Finally, the Indianapolis ordinance defined graphic violence to be “an amusement machine’s visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration [disfigurement].”³⁷ As the next section reveals, it would not be long before the ordinance, replete with this definition of graphic violence, would face a stiff legal challenge in federal court.

(emphasis added).

32. *Id.*

33. See *Ginsberg v. New York*, 390 U.S. 629, 635 (1968) (adopting a variable obscenity standard for sexually explicit materials sold to minors); see also IND. CODE ANN. § 35-49-2-2 (Michie 1998) (setting forth Indiana’s criminal statute defining matters and performances that are harmful to minors).

34. 413 U.S. 15 (1973).

35. *Id.* at 24 (citations omitted).

36. See *infra* text accompanying notes 66–76.

37. *Am. Amusement Mach. Ass’n*, 244 F.3d at 573.

B. The Challenge

The Indianapolis ordinance soon caught the eye of the American Amusement Machine Association (AAMA). Headquartered in Elk Grove Village, Illinois, the AAMA bills itself on its World Wide Web home page as “an international non-profit trade organization representing the manufacturers, distributors and suppliers of the coin-operated amusement industry.”³⁸

The AAMA, along with several manufacturers and distributors of video games, filed a lawsuit in federal court in the Southern District of Indiana, contending, among other things, that the Indianapolis ordinance’s “restrictions on games with ‘graphic violence’ are content-based restrictions on speech that violate the First Amendment and that the Ordinance is unconstitutionally vague.”³⁹ The AAMA further alleged that Indianapolis’ efforts to expand and extend restrictions on minors’ access to sexually explicit materials permitted by the United States Supreme Court in *Ginsberg v. New York*⁴⁰ to the different content realm of graphic violence violated the First Amendment.⁴¹ Put more bluntly, the AAMA contended that Indianapolis could not get away with restricting minors’ access to video games depicting graphic violence by treating violence as if it were a form of pornography.⁴² Based on these arguments, the AAMA sought a preliminary injunction to stop enforcement of the ordinance.⁴³

Unfortunately for the AAMA, Judge David F. Hamilton turned back each of the trade organization’s allegations. He opined that Indianapolis’s ordinance “reflects a careful, reasonable, and limited extension of the principles applied in *Ginsberg* to protect children from pornography. The court also finds that plaintiffs are unlikely to prevail on their vagueness challenge to the Ordinance.”⁴⁴ He added that he was “not persuaded there is any principled constitutional difference between sexually explicit material and graphic violence, at least when it comes to providing such material to children.”⁴⁵

Judge Hamilton caustically wrote that “[i]t would be an odd conception of the First Amendment and ‘variable obscenity’ that would

38. AAMA, *American Amusement Machine Association*, at <http://www.coin-op.org> (last visited July 2, 2001).

39. *Am. Amusement Mach. Ass’n v. Kendrick*, 115 F. Supp. 2d 943, 946 (S.D. Ind. 2000), *rev’d*, 244 F.3d 572 (7th Cir. 2001).

40. 390 U.S. 629 (1968).

41. *Am. Amusement Mach. Ass’n*, 115 F. Supp. 2d at 967–68.

42. *Id.*

43. *Id.* at 946.

44. *Id.*

45. *Id.*

allow a state to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses, as in *Ginsberg*, but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission."⁴⁶ With such hyperbole and rhetoric handed down at the district court level, it would be left to the United States Court of Appeals for the Seventh Circuit to resurrect and resuscitate the AAMA's arguments.

C. *The Seventh Circuit's Decision*

On March 23, 2001, Judge Posner, joined by Circuit Judges Diane P. Wood and Ann Claire Williams, reversed the district court's decision and entered the preliminary injunction sought by the AAMA.⁴⁷ This section breaks down the appellate court's decision into four crucial components, and then moves beyond the court's own language to search for and to explore other supporting authorities that buttress its decision.

1. *Media Violence Is Nothing New*

Although Indianapolis was concerned with regulating violent imagery, the Seventh Circuit Court of Appeals emphasized that violence—as portrayed in the media, specifically, and as consumed in our culture, generally—has a long and appealing history.⁴⁸ Video games, in brief, simply provide a new medium for portraying old themes of violence.

Judge Posner's effort to contextualize violent video games within the broader framework of fictional violence adds necessary perspective to the current frenzy to stifle images of violence in the media. He wrote in *American Amusement Machine*:

Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Anderson, and Perrault is aware.⁴⁹

To illustrate his point about the prevalence of violent media products predating video games, Posner cited graphic descriptions of violence in

46. *Id.* at 981.

47. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001).

48. For background on why violence is appealing, see Glenn G. Sparks & Cheri W. Sparks, *Violence, Mayhem, and Horror*, in *MEDIA ENTERTAINMENT: THE PSYCHOLOGY OF ITS APPEAL* 73 (Dolf Zillmann & Peter Vorderer eds., 2000).

49. *Am. Amusement Mach. Ass'n*, 244 F.3d at 577.

classic works such as *Odyssey*, *The Divine Comedy*, and *War and Peace*.⁵⁰ Posner pondered whether Indianapolis, as its next step, would “ban the stories of Edgar Allen Poe, or the famous horror movies made from the classic novels of Mary Wollstonecraft Shelley (*Frankenstein*) and Bram Stoker (*Dracula*).”⁵¹ These examples pounded home Posner’s argument that “[c]lassic literature and art, and not merely today’s popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial.”⁵²

For Posner, then, video games “with their cartoon characters and stylized mayhem are continuous with an age-old children’s literature on violent themes.”⁵³ He even wrote that the themes of many violent video games, such as self-defense, protection of others, and fighting against the odds “are all age-old themes of literature, and ones particularly appealing to the young.”⁵⁴

Importantly, the Seventh Circuit Court of Appeals and Judge Posner are far from alone in such observations. Indeed, a number of scholars bolster and buttress their sentiments. For instance, Professor Torben Grodal of the University of Copenhagen, Denmark recently wrote:

The themes and actions of most video games are updated versions of fairy tales and Homer’s *Odyssey*, enhanced by modern audiovisual salience and interactive capabilities. Central themes are the fights with dragons and evil monsters in combination with quests through dangerous and exotic scenarios. It is furthermore important for many games that the hero rescues damsels in distress. That there are only a few basic narrative patterns in video games is not surprising because there are not many basic narrative patterns in fiction.⁵⁵

Grodal’s comments are seconded by other scholars. Marjorie Heins, writing in 2000 in the *Media Studies Journal*, emphasizes that:

Historically, violence is an eternal theme in literature, art, popular entertainment and even games invented by children at play. From the gory wartime atrocities in Homer’s *Iliad* and *Odyssey* to the fantasy action in *Mortal Kombat* and *Teenage Mutant Ninja Turtles*, human culture has displayed, reflected and documented aggression and violence.⁵⁶

Joan Bertin, executive director of the National Coalition Against Censorship, agrees with Heins’s assessment. In testimony before the

50. *Id.*

51. *Id.*

52. *Id.* at 575.

53. *Id.* at 578.

54. *Id.* at 577–78.

55. Torben Grodal, *Video Games and the Pleasures of Control*, in MEDIA ENTERTAINMENT: THE PSYCHOLOGY OF ITS APPEAL, 197, 211 (Dolf Zillmann & Peter Vorderer eds., 2000).

56. Marjorie Heins, *Blaming the Media: Would Regulation of Expression Prevent Another Columbine?*, 14 MEDIA STUD. J. 14, 15 (2000).

New York State Task Force on Youth Violence and the Entertainment Industry in October 1999, Bertin reminded the group that:

graphic depictions of violence can be found in the Bible, *The Odyssey*, *Agamemnon*, Faulkner's *Light in August*, and James Dickey's *Deliverance*; in films such as *Paths of Glory*, and *The Seventh Seal*, and *The Godfather*; in Picasso's *Guernica* and almost all religious art depicting the Crucifixion and religious martyrdom; and in theater including much of Shakespeare (*Macbeth*, *Henry V*, *Titus Andronicus*).⁵⁷

The fact that violence has such a long history as a form of entertainment fare suggests that our current obsession to restrict video games might be based largely on a fear that such games are somehow different from and more dangerous than other media. Such fears may, however, be in the minds of an older generation not as familiar with the technology in question, a technology dominated by, and the province of, teens and twenty-somethings. This would not be surprising. Why? As new communications technologies emerge, society often experiences apprehension about them.⁵⁸ Video games may be no different.

On the other hand, there may, indeed, be a qualitative difference between the violence in video games as compared to that portrayed on television or depicted in the movies or described in books. In particular, the difference may relate to both the quality of presentation and to the participatory, interactive nature of video games. Philosopher and ethicist Sissela Bok, for example, observes that "participatory computer games" have become "increasingly graphic in presenting elaborate death sequences in highly realistic detail."⁵⁹ She adds that this interactive nature rewards participants "for shooting, eviscerating, and strangling victims."⁶⁰

Interactive violent video games thus become, as Dave Grossman testified in May 1999 before the House of Representatives Judiciary Committee on Youth Culture and Violence, "firearms trainers" and

57. Joan E. Bertin, *The Problem of Media Violence Does Not Justify Censorship*, in *VIOLENCE IN THE MEDIA* 37, 40 (James D. Torr ed., 2001). For a new book providing further background on violence in the movies, see *VIOLENCE AND AMERICAN CINEMA* (J. David Slocum ed., 2001). In addition, for a new book regarding violence in today's literature, see JAMES R. GILES, *VIOLENCE IN THE CONTEMPORARY AMERICAN NOVEL: AN END TO INNOCENCE* (2000).

58. Robert D. Richards & Clay Calvert, *The "True Threat" to Cyberspace: Shredding the First Amendment for Faceless Fears*, 7 *COMMLAW CONSPECTUS* 291, 295 (1999).

59. SISSELA BOK, *MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT* 37 (1998).

60. *Id.* at 4.

“killing simulators.”⁶¹ Surely this experience *is* different from reading a book or watching a movie.

Despite the appeal of such arguments, Judge Posner and the Seventh Circuit squarely rejected them in *American Amusement Machine*. Interactivity, for Posner, is part and parcel of nearly all entertainment fare. He wrote:

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. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.⁶²

Judge Posner, providing perhaps some relief and guidance to Indianapolis and other cities hoping to go back to the drawing board to craft video game legislation, suggested that not all violent video games may carry the necessary literary value to place them within the scope of First Amendment protection.⁶³ He wrote that a more narrowly drafted ordinance targeting only those games that “lacked any story line and were merely animated shooting galleries” might pass constitutional muster.⁶⁴ The games to which Posner apparently was referring are sometimes called “shoot-and-splatter” games.⁶⁵ But since these games were not the ones solely at issue in *American Amusement Machine* and because the Indianapolis ordinance applied to more than this narrow class of video games, Posner was not forced to address the specific question of their regulation.

2. *Violence Is Not Obscenity*

As noted earlier in this Article, speech that is obscene falls outside the scope of First Amendment protection.⁶⁶ Indianapolis hoped to take advantage of this principle by attempting, as Judge Posner put it, to fit its regulation of video game violence into the “familiar legal pigeonhole” of obscenity.⁶⁷

Indianapolis was not the first community, it should be noted, to try this approach, and not the first community to watch it fail before a

61. Dave Grossman, *Violent Video Games Teach Children to Enjoy Killing*, in *VIOLENCE IN THE MEDIA* 67, 70 (James D. Torr ed., 2001).

62. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

63. *Id.* at 579–80.

64. *Id.* at 579.

65. Steven Levy, *Loitering on the Dark Side*, *NEWSWEEK*, May 3, 1999, at 39.

66. See cases cited *supra* note 14.

67. *Am. Amusement Mach. Ass'n*, 244 F.3d at 574.

federal appellate court. In 1997, the Second Circuit Court of Appeals rejected Nassau County, New York's efforts to borrow from the *Miller* obscenity standard to regulate trading cards depicting heinous crimes.⁶⁸ In that case, the Second Circuit admonished Nassau County that "the standards that apply to obscenity are different from those that apply to violence. Obscenity is not protected speech."⁶⁹ The Second Circuit refused to place violent depictions in the same unprotected class as obscenity.⁷⁰

The Seventh Circuit in *American Amusement Machine* echoed this sentiment, concluding that "[v]iolence and obscenity are distinct categories of objectionable depiction."⁷¹ In particular, the appellate court examined the underlying rationale for placing obscenity outside the ambit of First Amendment protection and then compared it with Indianapolis's asserted interests for attempting to place violent depictions in video games into the same category. This comparison revealed different rationales.

For Judge Posner, the primary rationale for regulating obscenity is "that it is offensive."⁷² In particular, the concern is that an obscene work "violates community norms regarding the permissible scope of depictions of sexual or sex-related activity."⁷³ In contrast, the two concerns providing the foundation for Indianapolis's regulation of violent video games related not to offense but to harm—harm to players of the video games and harm to those who might come into contact with or encounter players of the video games.⁷⁴ As Posner wrote, the basis of the city's ordinance "is a belief that violent video games cause temporal harm by engendering aggressive attitudes and behavior, which might lead to violence."⁷⁵

Judge Posner thus declined to expand the category of unprotected obscene speech to encompass and sweep up violent imagery. By failing to enlarge this category of unprotected expression, Judge Posner assured that laws regulating violent content would continue to constitute content-based laws subject to the demanding strict scrutiny standard of judicial review.⁷⁶ This standard is analyzed later in Part II.C.4.⁷⁷

68. *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 64 (2nd Cir. 1997).

69. *Id.* at 67.

70. *Id.* at 66.

71. *Am. Amusement Mach. Ass'n*, 244 F.3d at 574.

72. *Id.*

73. *Id.*

74. *Id.* at 575–76.

75. *Id.* at 575.

76. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (holding

3. *Letting Kids Be Kids and the Dangers of Overprotection*

Video games are an important part of the cultural experience of children today in the United States. Author and media expert Joseph R. Dominick of the University of Georgia writes that the “games are typically played by a relatively powerless segment of society—younger teenagers. Nonetheless, these players can find meaning in the games that lets them resist, for a rather short time, forms of social control, allowing them to form their own cultural identity.”⁷⁸

Judge Posner’s opinion in *American Amusement Machine* seems to appreciate such sentiment, providing at one point that video games are simply one part “in the cultural menu of Indianapolis youth”⁷⁹ and then, at another point, that they involve “a children’s world of violent adventures.”⁸⁰ It is the First Amendment that protects children’s ability to receive such speech, to have access to it,⁸¹ and to partake in this cultural experience unless the strict scrutiny standard of review noted above can be satisfied by the government.⁸² Thus it was that Posner wrote: “We are in the world of kids’ popular culture. But it is not lightly to be suppressed.”⁸³

Posner expounded upon the danger of shielding children from violent images, observing that to do so “would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”⁸⁴ He likened the danger of Indianapolis’s attempt to guard minors from such expression to the situation in World War II Germany, contending that “[t]he murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion.”⁸⁵

What is remarkable, beyond the reference to the Hitler Youth of Nazi Germany in the 1940s as a rhetorical device to attack a local video game ordinance in the midwestern United States in 2001, is that Judge Posner

that content-based laws are constitutional only if they satisfy a strict scrutiny standard of review in which the law “must be narrowly tailored to promote a compelling Government interest”).

77. See *infra* text accompanying notes 96–97.

78. JOSEPH R. DOMINICK, *THE DYNAMICS OF MASS COMMUNICATION: MEDIA IN THE DIGITAL AGE* 52–53 (7th ed. 2002).

79. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d at 579.

80. *Id.*

81. The First Amendment rights of free speech and press have been held to include an unenumerated but qualified right to receive speech. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (discussing the right of access to information).

82. See *infra* text accompanying notes 96–97.

83. *Am. Amusement Mach. Ass’n*, 244 F.3d at 578.

84. *Id.* at 577.

85. *Id.*

and the Seventh Circuit reject what seems to be a reflexive belief among many adults—children are fragile individuals who will always be negatively influenced by media messages that adults believe are harmful. This tendency dates back in the United States at least to early concerns with the influence of motion pictures on youth, which sparked the Payne Fund studies more than seventy years ago in 1929,⁸⁶ and to the Estes Kefauver-led hearings on juvenile delinquency and comic books in the 1950s.⁸⁷ Judge Posner and his colleagues give more credit to children today than most adults seem willing to extend.

One possible explanation for this deference to children is that Posner may be attempting not to conflate or to confuse the so-called “culture of violence”⁸⁸ in the United States with the culture of children. The two are not concomitant. Not all of children’s culture is violent, although violent imagery certainly is a component of that culture. If we really do live in a culture of violence, then shielding children from violent imagery until they reach adulthood or requiring them to be accompanied by an adult when they view it will, as Judge Posner suggests, stunt their intellectual development and leave them unprepared to handle the real world.⁸⁹ Children, in brief, have at least a limited or qualified First Amendment right to receive speech, even if it is violent speech and even if adults fear it will harm them.

In addition, because the speech in question—video games located in video arcades—is not received in the special pedagogical setting of a public school, the same concerns that justify increased restrictions on the speech rights of minors at school did not apply in *American Amusement Machine*.⁹⁰ Parsed differently and more bluntly, a video arcade simply is not a public school. They serve different purposes. There is no special educational mission in a video arcade, unlike in a middle school or high school.

86. See SHEARON A. LOWERY & MELVIN L. DEFLEUR, MILESTONES IN MASS COMMUNICATION RESEARCH 21–43 (3d ed. 1995) (describing the impetus for and the results of the Payne Fund studies).

87. See JAMES R. WILSON & STAN LE ROY WILSON, MASS MEDIA/MASS CULTURE: AN INTRODUCTION 438–39 (5th ed. 2001) (discussing the Payne Fund studies and the Kefauver Commission hearings).

88. See *Introduction*, in *VIOLENCE IN THE MEDIA* 13, 15 (James D. Torr ed., 2001) (using the phrase “culture of violence”).

89. *Am. Amusement Mach. Ass’n*, 244 F.3d at 577.

90. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682–83 (1986) (holding that the special concerns relating to the missions and purposes of public schools justify restricting the First Amendment speech rights of minors in such educational settings).

That Judge Posner and the Seventh Circuit recognized the First Amendment rights of children were at stake in *American Amusement Machine* is laudable because children were not the plaintiffs in the case. The plaintiffs, instead, were entities involved in the manufacturing and distributing of video games; their own First Amendment rights, the right to create video games with story lines and the right to profit from those games, were at stake.

Posner acknowledged that two distinct classes of groups, the video game industry *and* the children who play video games, have First Amendment interests that would be jeopardized by the Indianapolis ordinance. By framing⁹¹ the case as one as much about the First Amendment rights of children as it was about the First Amendment rights of corporations and trade associations, Judge Posner clearly bolstered support for the appellate court's ruling. The case thus moved from one solely about apparent avarice and greed, the rights of video game industry corporations to make money and to profit from their speech-related activities by preying on innocent children, to one about human beings' rights of access to speech and expression in which they have an interest. That children would be interested in having access to such expression, to cartoon characters, animated drawings and fantasy mayhem packaged up in video game format, is not necessarily tantamount to a "morbid interest in violence,"⁹² as that phrase is used in the Indianapolis statute, Judge Posner wrote.⁹³

Adults' fear of children's culture may simply represent, as Professor Todd Gitlin of New York University views it, "adults' denial that the culture of their own generation could become passe. Every culture passes sooner or later, but we don't want to believe that what we like is just provisional."⁹⁴ Or it simply may be, as Francis G. Couvares, a social historian and dean of freshmen at Amherst College puts it, that "[e]very generation believes that the one coming up behind it is being corrupted by popular culture."⁹⁵

91. Framing is used here to refer to the rhetorical strategies, including such things as choice of words and what facts to include and exclude, that are used in describing an event that make salient some issues surrounding the event while suppressing others, which, in turn, impacts how we think about, understand and process the event in question. See generally JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* 38–48 (1997) (discussing the concept of framing within the field of journalism).

92. See *supra* text accompanying note 32 (setting forth the relevant portion of the video game ordinance).

93. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

94. David E. Rosenbaum, *Raw Rap and Film May Stir a Fuss, but Hist'ry Shows 'Twas Ever Thus*, N.Y. TIMES, Sept. 21, 2000, at E1.

95. *Id.*

Fortunately, Judge Posner and the Seventh Circuit seemed to implicitly recognize such human tendencies as embraced by the City of Indianapolis in its ordinance. Their decision preserves children's culture, low brow though it may be, from this destructive pattern, a pattern that threatens the First Amendment freedom of speech.

4. *Compelling Interests and Proof of Harm*

Because the Indianapolis ordinance was content-based, the City needed to prove that it had a compelling interest to justify it.⁹⁶ As Judge Posner wrote: "The grounds must be compelling and not merely plausible."⁹⁷ The twin grounds or interests, as noted earlier, asserted by Indianapolis to justify its ordinance were protecting both the children who play violent video games and so-called third persons who might come into contact with those players.⁹⁸

In an effort to show that these interests were compelling, Indianapolis offered into the record social science research.⁹⁹ That evidence consisted primarily of a single peer-reviewed publication in the *Journal of Personality and Social Psychology* reporting the results of two studies.¹⁰⁰ The published article is nineteen pages long and cannot be completely or adequately described here, and readers of this law journal are strongly encouraged to review it for themselves. With that caveat in mind, a very brief overview of the studies is helpful.

In particular, one study consisted of college students completing a questionnaire regarding their own long-term use of violent video games.¹⁰¹ Each student's violent video game usage was then compared with that same student's self-reported, paper-and-pencil measures of things such as irritability, trait aggression, and delinquency.¹⁰² The study's authors concluded from their data "that real-life violent video game play was positively related to aggressive behavior and delinquency."¹⁰³

96. See *supra* note 76 and accompanying text.

97. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001).

98. See *supra* text accompanying note 74.

99. *Am. Amusement Mach. Ass'n*, 244 F.3d at 578–79.

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

101. *Id.* at 776–78.

102. *Id.* at 777.

103. *Id.* at 772.

The second study was a laboratory experiment in which aggressive behavior of college students was measured after playing a video game.¹⁰⁴ In particular, after playing either a violent or a nonviolent video game, each participant in this experiment took part in a “competitive reaction time task” on a computer. Participants were led to believe they were competing in this task against another person hidden in another cubicle.¹⁰⁵ This other person, in fact, was a computer.¹⁰⁶ When participants “won” the task in question—the game was rigged such that all participants won thirteen of the twenty-five time tasks—they were allowed to administer a noise blast to their opponent whom, once again, they thought was a real person. Aggressive behavior, in turn, was “operationally defined as the intensity and duration of noise blasts the participant [chose] to deliver to the opponent.”¹⁰⁷ The researchers found that “college students who played a violent video game behaved more aggressively toward an opponent than did students who had played a nonviolent video game.”¹⁰⁸

Judge Posner and the Seventh Circuit, however, gave these two studies short shrift. In a clear blow to the use of social evidence to support video game legislation, Posner wrote:

There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the *interactive* character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings.¹⁰⁹

Unpacking this statement reveals several important points. First, research about the effects of video games generally has no relevance to the law unless it relates to the specific games that are targeted for regulation. One cannot simply extrapolate findings for one video game and conclude that they hold true for another. What is more, generalized aggregated data about the influence of one game on one group of people taking part in one experiment or survey tells us nothing about the critical question of whether that same game influenced a specific individual who actually committed a specific violent act.

104. *Id.* at 783–84.

105. *Id.* at 784.

106. *Id.*

107. *Id.*

108. *Id.* at 787.

109. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578–79 (7th Cir. 2001). For background on Judge Posner’s thoughts regarding the limitations of controlled laboratory experiments, see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 65 (1990).

Second, Judge Posner's statement hones in on the critical issue of causation, correctly pointing out that the studies cannot show causation of any actual act of violence. Social science research like that cited in *American Amusement Machine* can, at best, demonstrate *correlation* or association between two variables—video games and aggression, for instance—but not *causation*. Indeed, one of the four biggest fallacies about the media-violence connection, according to Karen Sternheimer of the Sociology Department at the University of Southern California and a research consultant to the Center for Media Literacy, is that correlation indicates causation.¹¹⁰ Thus, while there may be, in the opinion of some, “plenty of evidence” showing a correlation between anti-social behavior and some forms of media content,¹¹¹ correlation only “tells us about associations, not cause and effect.”¹¹²

The data from the first study offered in *American Amusement Machine*, it will be recalled, was merely correlational. That study's authors concluded from their questionnaire-gathered data “that real-life violent video game play was positively related to aggressive behavior and delinquency.”¹¹³ This does not mean, however, that playing real-life violent video games *causes* aggressive behavior and delinquency. It only means that these variables were *associated* with one another in this particular study. It may be, in fact, that individuals who rate high on measures of aggression and delinquency would act that way regardless of whether they ever played a violent video game. They may simply seek out such games because those games already appeal to their predisposed aggressive tendencies.

Finally, Posner's comment is important because it recognizes a distinction between aggressive feelings and actual aggression. There is a difference, in other words, between attitudes and action. The late communication scholar Steve Chaffee and co-author Connie Roser observed that “[a]t most . . . knowledge-attitude-behavior consistency is variable and moderate, not constant and high.”¹¹⁴ Research suggests “that attitude-behavior relations can range from zero to the very

110. Karen Sternheimer, *Blaming Television and Movies Is Easy and Wrong*, L.A. TIMES, Feb. 4, 2001, at M5.

111. James Sullivan & Jesse Hamlin, *A Raging Debate*, S.F. CHRON., Apr. 29, 2001, at Datebook 59.

112. Sternheimer, *supra* note 110, at M5.

113. Anderson & Dill, *supra* note 100, at 772.

114. Steven H. Chaffee & Connie Roser, *Involvement and the Consistency of Knowledge, Attitudes, and Behaviors*, 13 COMM. RES. 373, 375 (1986).

strong.”¹¹⁵ Other scholars also have observed “considerable variability in attitude-behavior consistency.”¹¹⁶

Thus, the Seventh Circuit Court of Appeals was unmoved, for multiple reasons, by the social science evidence offered by the City of Indianapolis. It concluded that:

Common sense says that the City’s claim of harm to its citizens from these games is implausible, at best wildly speculative. Common sense is sometimes another word for prejudice, and the common sense reaction to the Indianapolis ordinance could be overcome by social scientific evidence, but has not been. The ordinance curtails freedom of expression significantly and, on this record, without any offsetting justification, “compelling” or otherwise.¹¹⁷

This suggests, of course, that while social science evidence is not unimportant in legal cases examining questions of alleged media effects, the social science evidence in *American Amusement Machine* was, essentially, irrelevant. Without such relevant evidence, Posner concluded that benefits of the ordinance were of an “entirely conjectural nature.”¹¹⁸ He refused to speculate “on what evidence might be offered” to provide the compelling justification necessary to sustain it.¹¹⁹

5. Summary

Part I has highlighted the rationale and reasoning behind the Seventh Circuit’s decision in *American Amusement Machine* and, in the process, explained why it is an important victory for the First Amendment rights of both children who play video games and for the individuals and corporations that produce and distribute them. The Seventh Circuit’s systematic approach to the case described above, it should be noted, meant that it never even needed to reach the question raised by the AAMA of whether the ordinance was unconstitutionally vague.¹²⁰ Clearly defining the concept of violence is a difficult task and worthy of legal challenge in the future, even if it was not essential to the appellate court’s holding in *American Amusement Machine*. Part II examines

115. Russell H. Fazio, *Multiple Processes by Which Attitudes Guide Behavior: The Mode Model as an Integrative Framework*, in 23 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 75, 76 (Mark P. Zanna ed., 1990).

116. Paul M. Herr & Russell H. Fazio, *The Attitude-to-Behavior Process: Implications for Consumer Behavior*, in *ADVERTISING EXPOSURE, MEMORY, AND CHOICE* 119, 121 (Andrew A. Mitchell ed., 1993).

117. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

118. *Id.* at 580.

119. *Id.* at 579.

120. See *supra* text accompanying note 39. “A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted.” ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 763 (1997).

some of the forces that lead to flawed legislation like that in *American Amusement Machine*.

III. FINGER POINTING AFTER PADUCAH AND LITTLETON: THE DRIVING FORCE BEHIND VIDEO GAME LEGISLATION?

Fourteen-year-old Michael Carneal killed three students and wounded five others assembled in a hallway prayer group at Heath High School in West Paducah, Kentucky in December 1997.¹²¹ Less than two years later, Eric Harris and Dylan Klebold went even farther, committing the worst school shooting in United States history at Columbine High School near the Denver, Colorado suburb of Littleton.¹²²

Besides the bullets and the bloodshed, something else linked this pair of school tragedies. It was video games: a part of youth culture since the early 1970s commencing with the advent of a primitive and slow-moving electronic table tennis game called Pong.¹²³

As psychologists Corinne Frantz and Rosemarie Scolaro Moser recently observed, the perpetrators of the violence in Paducah and Littleton “shared in common a particular affinity for playing video splatter games, such as *Doom*, *Quake*, or *Mortal Combat*.”¹²⁴ They emphasize, regarding the shootings at Columbine High School, that “Eric Harris and Dylan Klebold apparently became obsessed with playing *Doom* and, at one point, Harris customized *Doom* into a scenario that resembled the actual massacre.”¹²⁵ Likewise, Ginger Casey observed recently in the *American Journalism Review* that, after the shooting at Columbine,

121. Stephen Braun & Judy Pasternak, *Student Opens Fire on Prayer Group, Kills 3*, L.A. TIMES, Dec. 2, 1997, at A1.

122. James Brooke, *2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES, Apr. 21, 1999, at A1 (describing “the deadliest school massacre in the nation’s history” in which two gun-toting students wearing ski masks, Eric Harris and Dylan Klebold, fired semiautomatic weapons at fellow students and hurled explosives).

123. See John Colwell & Jo Payne, *Negative Correlates of Computer Game Play in Adolescents*, 91 BRIT. J. PSYCHOL. 295, 295 (2000) (observing that “[t]he era of computer games began in 1972 with Pong, a computerized table tennis game”).

124. Corinne E. Frantz & Rosemarie Scolaro Moser, *Youth Violence and Victimization: An Introduction*, in SHOCKING VIOLENCE: YOUTH PERPETRATORS AND VICTIMS—A MULTIDISCIPLINARY PERSPECTIVE 3, 6 (Rosemarie Scolaro Moser & Corinne E. Frantz eds., 2000).

125. *Id.*

“Marilyn Manson¹²⁶ and video games are blamed for setting off troubled teens.”¹²⁷ Mark Boal, writing in *Brill’s Content*, concurs with Casey’s observation and asserts that after Columbine:

[V]ideogames—in particular, violent ones known as “first person shooters”—became the subject of lengthy, soul-searching articles and the target of political saber-rattling. The press, scrambling to impose a narrative line on a senseless crime, found its villain in Doom, a game favored by the gunmen, Dylan Klebold and Eric Harris.¹²⁸

Newsweek, for instance, reported that the two Columbine shooters “became ‘obsessed’ with the violent video game Doom—an interactive game in which the players try to rack up the most kills.”¹²⁹

In Paducah, Michael Carneal also apparently had a fondness for violent video games. The very manner in which Carneal unleashed his violence, in fact, suggested he was playing a real-life version of a video game. As Dave Grossman wrote recently, in the book *Shocking Violence*, describing that moment of tragedy:

The witness statements state that Michael Carneal stood, never moving his feet, holding the gun in two hands, never firing far to the left or right, never far up or down, with a blank look on his face. He was playing a video game. Simply shooting everything that popped up on this screen. Just like he had done countless times before.¹³⁰

Media claims that video games may contribute to youth violence¹³¹ enhance and foster an ideal climate for the creation of legislation like that in Indianapolis. Such claims pander to a public impulse to blame otherwise seemingly unexplainable and irrational phenomena on media products. As Marjorie Heins recently observed in the *Media Studies Journal*, “many politicians and media pundits focused on violent entertainment” in the wake of Columbine.¹³² There was, she noted, “a

126. “Marilyn Manson is the stage name of ‘goth’ rock performer Brian Warner, and also the name of the band in which he is the lead singer.” *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 466 (6th Cir. 2000).

127. Ginger Casey, *Beyond Total Immersion*, AM. JOURNALISM REV., July–Aug. 1999, at 30, 31.

128. Mark Boal, *Winning the Blame Game*, BRILL’S CONTENT, Dec. 2000–Jan. 2001, at 138, 138.

129. Daniel Glick et al., *Anatomy of a Massacre*, NEWSWEEK, May 3, 1999, at 25, 26.

130. Dave Grossman, *Teaching Kids to Kill*, in SHOCKING VIOLENCE: YOUTH PERPETRATORS AND VICTIMS—A MULTIDISCIPLINARY PERSPECTIVE 17, 17–18 (Rosemarie Scolaro Moser & Corinne E. Frantz eds., 2000).

131. See Mary E. Ballard & Robert Lineberger, *Video Game Violence and Confederate Gender: Effects on Reward and Punishment Given by College Males*, 41 SEX ROLES 541, 542 (1999) (citing several instances of “recent media claims that video games may be one of the factors that contribute to youth violence”).

132. Heins, *supra* note 56, at 14.

frenzied search for explanations.”¹³³ Such frenzied searches, of course, lead to flawed legislation like the video game statute struck down by the Seventh Circuit in *American Amusement Machine*.

At this point, it is important to understand the concept of agenda setting. The agenda-setting function of the news media in communications research “refers to the media’s capability, through repeated news coverage, of raising the importance of an issue in the public’s mind.”¹³⁴ Coverage of Columbine arguably raised the importance in the public’s mind of not simply the issue of school violence, but, more troubling for First Amendment advocates, the alleged contribution to that violence by video games. That the media influence and mold the public’s perception about crime, including school violence, is clear. In fact, more than seventy-five percent of Americans form their opinions about crime based on what they see on television or read in newspapers and magazines.¹³⁵

The media also seem to feed what Gary Chapman, director of the 21st Century Project at the University of Texas at Austin, calls an “American tendency to blame possible but speculative influences on the perpetrators of horrendous crimes.”¹³⁶ In turn, the media-created “spike in public attention and concern reaches a point where politicians feel they must do something.”¹³⁷ This has been the case after Columbine with violent video games, but Chapman stresses something that goes underplayed in the frenzy—“that most boys and men are not violent, even those who play violent video games or who own guns or who enjoy violent action movies.”¹³⁸

The reality, despite media attention on games like *Doom*, may also be that the vast majority of video games are nonviolent, indicating that federal, state and local regulations restricting video games may represent, at best, legislative overkill and, at worst, politicians pandering to public opinion. The president of the Interactive Digital Software

133. *Id.*

134. WERNER J. SEVERIN & JAMES W. TANKARD JR., *COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN THE MASS MEDIA* 249, 249 (4th ed. 1997).

135. Jane Twomey, *Media Fuels Fear About Youth Crime Perception: If Juvenile Crime Is at Its Lowest Level in Decades, Why Do So Many Americans Believe Otherwise?*, BALT. SUN, May 13, 2001, at 1C, 2001 WL 6159661.

136. Gary Chapman, *The Effects of Violent Video Games on Children are Exaggerated*, in *VIOLENCE IN THE MEDIA* 79, 79 (James D. Torr ed., 2001).

137. *Id.* at 79–80.

138. *Id.* at 80.

Association testified before the House Subcommittee on Telecommunications and the Internet in July 2001 that the number of mature-rated video games has been exaggerated by industry critics.¹³⁹ He told the subcommittee “that only 117 of the 1,600 game titles sold last year were rated mature and that only 2 of the current 20 best-sellers are in that category.”¹⁴⁰

On the other hand, a study conducted by researchers from the Harvard School of Public Health recently found that sixty-four percent of video games rated as suitable for everyone contained intentional violence, while sixty percent rewarded players for hurting or killing other characters.¹⁴¹ The definitional problems inherent in the vague concept of violence, however, led those same researchers to conclude that the venerable video game *Ms. Pac Man* was violent because it involves “eating” animated ghosts.¹⁴²

In summary, high profile journalistic coverage of the tragedies at Paducah and Littleton produced, at least in part, what were arguably false public perceptions of reality and media culpability. There was, in particular, a false perception that school violence was rapidly escalating due to violent media content, that set the stage for the legislative responses like Indianapolis’s targeting video games.

IV. BLINDED BY SOCIAL SCIENCE: PROBLEMS WITH LEGISLATIVE RELIANCE ON SOCIAL SCIENCE EVIDENCE

It will be recalled from Part I that the City of Indianapolis relied, in part, on two social scientific studies to support its argument that playing violent video games may contribute to real-life violence.¹⁴³ Yet even the authors of those studies cited in *American Amusement Machine* specifically caution that the “empirical literature on the effects of exposure to video game violence is sparse . . . in part because of its relatively recent emergence in modern U.S. society”¹⁴⁴ and that “[t]he research to date on video game effects is sparse and weak in a number of ways.”¹⁴⁵ Another researcher independently concurs, observing that “[t]he question of whether video games promote aggressiveness cannot be conclusively answered at present because the available literature is relatively sparse and conflicting, and there are many different types of

139. Hillburg, *supra* note 3, at 2001 WL 6062863.

140. *Id.*

141. Alex Pham, *Survey Disputes Ratings on Games*, L.A. TIMES, Aug. 1, 2001, at C3.

142. *Id.*

143. *See supra* text accompanying notes 96–100.

144. Anderson & Dill, *supra* note 100, at 772.

145. *Id.*

video games which probably have very different effects.”¹⁴⁶ And still another pair of researchers wrote in 1999 that “there is inconsistent evidence regarding the impact of violent video game play on feelings of hostility, and aggressive behavior.”¹⁴⁷ Thus, while there may be a critical mass of research and literature on media violence in general,¹⁴⁸ it is clear that this is not yet the case with the specific subject of video game violence.

In addition, there are limitations on social science research in proving actual causation between variables, as described earlier in this Article.¹⁴⁹ The authors of a major book on communication research explain the difference between association and covariance and causation and causality.¹⁵⁰ They write: “Covariance means that a change in one variable is *associated* with a change in the other variable; causality requires that change in one variable *creates* the change in the other. In other words, *covariance alone does not imply causality*.”¹⁵¹ Causality means “that a change which occurs in one variable (the cause) brings about a change in another variable (the effect).”¹⁵²

Beyond this, there is the most basic problem of how the term violence is defined by the various social scientists investigating it. Depending on how the term is explicated, a video game like *Ms. Pac Man* that does not depict any human or human-like figures and that does not entail the use of point-and-shoot artificial guns may be defined as violent.¹⁵³ What is more, often the social science evidence in question does not measure real world “violence” at all, but rather uses paper-and-pencil questionnaires that ostensibly tap into the aggressive attitudes of individuals.

Consider the two studies on which the City of Indianapolis primarily relied to support its ordinance. In one case, aggressive behavior was measured by a series of noise blasts that participants administered to

146. Mark D. Griffiths, *Video Game Violence and Aggression: Comments on ‘Video Game Playing and Its Relations with Aggressive and Prosocial Behaviour’ by O. Wiegman and E. G. M. van Schie*, 39 BRIT. J. SOC. PSYCH. 147, 148 (2000).

147. Ballard & Lineberger, *supra* note 131, at 542.

148. See BOK, *supra* note 59, at 57 (writing that “the vast majority of the studies now concur that media violence can have both short-term and long-term debilitating effects”).

149. See *supra* text accompanying notes 111–13.

150. JAMES H. WATT & SJEF A. VAN DEN BERG, RESEARCH METHODS FOR COMMUNICATION SCIENCE 37 (1995).

151. *Id.*

152. *Id.*

153. See *supra* text accompanying note 142.

what they thought was an opponent on a time task.¹⁵⁴ Administering a noise blast in a controlled laboratory setting, however, is a far cry from administering a round of real-life ammunition—deadly bullets—into real people at a real school. One must engage in a lengthy leap of faith to believe that administering a sound blast in a safe laboratory venue is predictive of actual violent behavior in a school classroom.

From a social science perspective, this problem relates to what is called the “external validity” of an experiment. This refers to the “ability to generalize from the results of a research study to the real world.”¹⁵⁵ Put differently, the issue becomes whether the results found in a laboratory setting can “be generalized to groups, subjects, and conditions other than those under which the research observations were made.”¹⁵⁶

The other study, dubbed Study 1 by the researchers, is also problematic. It was purely correlative in nature. Thus, when the researchers concluded that violent video games were “shown to be a superior predictor” of delinquency,¹⁵⁷ they did not mean that violent video games cause delinquency. It may be that individuals who are prone to delinquency seek out and play violent video games. Likewise, people who have aggressive personalities may seek out violent video games. It need not be that violent video games *cause* individuals to have aggressive personalities. The authors of this study, in fact, acknowledge this problem, much to their credit. They write, “the correlational nature of Study 1 means that causal statements are risky at best. It could be that the obtained video game violence links to aggressive and nonaggressive delinquency are wholly due to the fact that highly aggressive individuals are especially attracted to violent video games.”¹⁵⁸

In summary, social science evidence offered to support regulations on video games must be carefully reviewed before the law accepts its conclusions as facts upon which legislation may be grounded. Part IV of this Article moves beyond video games and social science research regarding their effects to suggest that there are other factors that may be responsible for youth violence on which the law should focus.

154. See *supra* text accompanying notes 104–08.

155. WATT & VAN DEN BERG, *supra* note 150, at 59.

156. *Id.*

157. Anderson & Dill, *supra* note 100, at 782.

158. *Id.*

V. LOOKING PAST MEDIA CONTENT: OTHER FACTORS AFFECTING YOUTH VIOLENCE DESERVE LEGISLATIVE ATTENTION

What causes violence among today's youth? The answer is far from simple. As Dr. Paul Kettl recently observed in the book *School Violence: Assessment, Management and Prevention*, "we are a long way from a full understanding of the causes of violence."¹⁵⁹ He emphasizes that "[v]iolence is a complex behavior, an interaction of psychological, biological, and social factors that can lead a human being to a violent act that we may then witness on our televisions."¹⁶⁰

Kettl's point that multiple factors contribute to violent conduct is seconded by L. Rowell Huesmann and his colleagues in their recent chapter of the *Handbook of Antisocial Behavior*.¹⁶¹ They write:

The existing research suggests that childhood aggression is most often a product of a number of interacting factors: genetic, perinatal, physiological, familial, and learning. In fact, it seems most likely that severe antisocial aggressive behavior occurs only when there is a convergence of several of these factors. . . . What is important for the investigation of the role of media violence is that no one should expect the learning of aggression from exposure to media violence to explain more than a small percentage of the individual variation in aggressive behavior.¹⁶²

If, then, there are multiple variables that influence aggressive behavior among children, then simplistic approaches to a perceived problem of increasing youth violence will not rectify the situation. More simply put, limiting access to video games that portray graphic violence will not solve the problem. Surely there are other contributing factors that can be addressed which do not raise the same or similar First Amendment concerns as those at issue in *American Amusement Machine*. Karen Sternheimer of the University of Southern California, for instance, emphasizes that "more likely contributors" to violence than the media are "alcohol abuse, the deterioration of public education and the lack of economic opportunity in impoverished areas."¹⁶³

Another possible variable in the youth violence equation that recently has received increased attention in the popular news media is so-called

159. Kettl, *supra* note 22, at 53.

160. *Id.*

161. L. Rowell Huesmann et al., *The Effects of Media Violence on the Development of Antisocial Behavior*, in HANDBOOK OF ANTISOCIAL BEHAVIOR 181 (David M. Stoff et al. eds., 1997).

162. *Id.* at 183.

163. Sternheimer, *supra* note 110, at M5.

“bullying” behavior. For instance, an April 2001 article in *The New York Times* linked the issue of bullying to the school shootings in both Littleton, Colorado in 1999 and Santee, California in March 2001.¹⁶⁴ An editorial in *The Columbus Dispatch* in May 2001 argued that “bullying can play a part” in placing a student “on a path toward a killing spree.”¹⁶⁵ And the executive director of the Colorado School Mediation Project wrote in a guest column in *The Denver Post* in June 2001 that “[t]he evidence is amassing to show that bullying and teasing are powerful forces behind episodes of violence in our schools.”¹⁶⁶

The authors of one recent study write that “bullying, a subset of aggression, has been identified as a significant problem that can affect the physical and psychosocial health of those who are frequently bullied.”¹⁶⁷ A Secret Service report indicated that more than two-thirds of the forty-one school shooters studied “felt persecuted, bullied, threatened or injured by others before resorting to violent measures.”¹⁶⁸ Adding his comments to such studies, United States Attorney General John Ashcroft has complained about what he called an “onerous culture of bullying.”¹⁶⁹

States such as Washington now are considering legislation, so-called antibullying bills, that would limit harassing speech and conduct because of the fear that harassment incidents “could lead to school violence.”¹⁷⁰ California, Georgia, New Jersey, and Colorado were considering similar bills in May 2001.¹⁷¹

By now, of course, all of this should sound very familiar based on the argument set forth in Part II of this Article.¹⁷² Media attention shines a spotlight on a possible cause of school violence.¹⁷³ Legislation sprouts

164. Erica Goode, *School Bullying Is Common, Mostly by Boys, Study Finds*, N.Y. TIMES, Apr. 25, 2001, at A17.

165. Editorial, *Bully Fight*, COLUMBUS DISPATCH, May 3, 2001, at 8A.

166. Randy Compton, *Culture of Belonging, Not Bullying, Needed*, DENVER POST, June 24, 2001, at D-3.

167. Dorothy L. Espelage et al., *Examining the Social Context of Bullying Behaviors in Early Adolescence*, 78 J. COUNSELING & DEV. 326, 326 (2000).

168. Keiko Morris, *Anti-Bully Laws Are Only First Step, Child Expert Says*, SEATTLE TIMES, May 24, 2001, at B1, 2001 WL 3510024.

169. Editorial, *No More Bullies' Dirty Looks?*, PITT. POST-GAZETTE, June 17, 2001, at E-1, LEXIS, New Group File, All.

170. Tan Vinh, *Anti-Bully Bill Announced: Legislation Aims to Curb School Violence*, SEATTLE TIMES, Jan. 26, 2001, at B2, 2001 WL 3498222.

171. *Bullying: Fright Club*, NEWSWEEK, May 7, 2001, at 8.

172. See *supra* notes 121–42 and accompanying text.

173. The word “possible” is critical here because “no studies have examined the relationship between bullying/being bullied and the risk of involvement in more serious violence, such as in school shootings or other fatal episodes.” Howard Spivak & Deborah Prothrow-Stith, *The Need to Address Bullying—An Important Component of Violence Prevention*, JAMA, Apr. 25, 2001, at 2131.

up in the wake of such attention. The only difference is that this time that potential trigger is bullying rather than video games.

Yet bullying itself, like video games, raises important First Amendment concerns, at least to the extent that bullying is defined in terms of expressive activities. And bullying, indeed, typically does include name calling, teasing, and other hurtful statements.¹⁷⁴

The Third Circuit Court of Appeals' 2001 decision in *Saxe v. State College Area School District*¹⁷⁵ should make legislative bodies take caution when they draft antiharassment or antibullying policies for schools. In *Saxe*, the Third Circuit declared unconstitutional on First Amendment grounds a school district's policy designed to keep students from harassing each other on the basis of "one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics."¹⁷⁶

To further describe the type of conduct prohibited under the policy, the school district enumerated specific examples:

Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, *bullying*, extorting or the display or circulation of written material or pictures.¹⁷⁷

The *Saxe* opinion should be read by school district attorneys everywhere who may be jumping on the antibullying policy bandwagon, just as the Seventh Circuit Court of Appeals' opinion, *American Amusement Machine*, should be required reading for legislators considering regulations on access to video games. Before we blindly move from one target to another in our efforts to reduce youth violence and school shootings, we must take caution to be sure that First Amendment interests are not unnecessarily sacrificed. This Part of the Article has suggested that the regulation of both video games and bullying raise such concerns and that the federal appellate courts have been wise to acknowledge and to protect those interests. There are

174. Andrew V. Beale & Paula C. Scott, "Bullybusters": Using Drama to Empower Students to Take a Stand Against Bullying Behavior, 4 PROF. SCH. COUNSELING 300, 300 (2001).

175. 240 F.3d 200 (3d Cir. 2001).

176. *Id.* at 202.

177. *Id.* at 202-03 (emphasis added).

multiple factors that may influence violent behavior¹⁷⁸ and, as a society, we should attempt to focus on those factors that do not raise constitutional concerns.

VI. CONCLUSION

Richard Posner's opinion in *American Amusement Machine* reads as if it were written as much by a cultural scholar as it were by a federal appellate judge. But that, as this Article has tried to point out, is a very good thing in this era of media bashing.

Beneath the legal issues of strict scrutiny and whether violence should be lumped together with obscenity lies the heart of the *American Amusement Machine* case—one generation's efforts to control both the culture and the cultural artifacts of another generation. The Seventh Circuit's decision protects this culture and the First Amendment rights of children to consume and to enjoy it.

We clearly are not through with legislative efforts to regulate media products like video games in this country. The *American Amusement Machine* opinion certainly will not put an end to that. But when those efforts become law and when they are later challenged, judges would be wise to take the contextualized approach employed by the Seventh Circuit in *American Amusement Machine*. Those laws will be about more than just preventing violence. They will be about restricting culture and the First Amendment interests of children. And those interests, as Judge Posner's quotation at the start of this Article reminds us, are not lightly to be suppressed.¹⁷⁹

178. See *supra* text accompanying notes 160–63.

179. See *supra* text accompanying note 1.