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## Mediated Images of Violence and The First Amendment: From Video Games to The Evening News

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# MEDIATED IMAGES OF VIOLENCE AND THE FIRST AMENDMENT: FROM VIDEO GAMES TO THE EVENING NEWS

*Clay Calvert & Robert D. Richards*

- I. INTRODUCTION
- II. PROTECTING CHILDREN THROUGH FUNDED RESEARCH: WILL CREDIBLE SOCIAL SCIENCE EVIDENCE EMERGE?
  - A. *CAMRA's Unsteady Focus*
  - B. *Video Games and Weird Social Science*
- III. THE LASNIK FACTORS: A CRITIQUE OF "KEY CONSIDERATIONS" FOR FUTURE LEGISLATION
  - A. *The First Key Consideration*
  - B. *The Second Key Consideration*
- IV. MISSING THE MARK ABOUT IMAGES OF VIOLENCE IN THE MEDIA: THE IRONY OF OUR OBSESSION WITH REGULATING FAKE IMAGES
- V. CONCLUSION

## MEDIATED IMAGES OF VIOLENCE AND THE FIRST AMENDMENT: FROM VIDEO GAMES TO THE EVENING NEWS

Clay Calvert\* & Robert D. Richards\*\*

### I. INTRODUCTION

In July 2004, a federal district court<sup>1</sup> struck down, on First Amendment<sup>2</sup> grounds, a Washington state law that restricted minors' access to video games containing "realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer."<sup>3</sup> The decision was anything but surprising. It followed in the footsteps of recent opinions issued by two federal appellate courts that held unconstitutional similar legislation regulating minors' access to fictional images of violence in video games.<sup>4</sup>

In striking down Washington's video game law, U.S. District Court Judge Robert S. Lasnik articulated a veritable laundry list of flaws that fatally plagued the statute. Judge Lasnik, applying the well-established judicial doctrines of both strict scrutiny<sup>5</sup> and vagueness,<sup>6</sup> found:

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1. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

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. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

3. WASH. REV. CODE § 9.91.180 (2004).

4. See *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (striking down, on First Amendment grounds, a St. Louis County, Missouri, ordinance that regulated minors' access to graphically violent video games) *petition for reh'g en banc denied*, 2003 U.S. App. LEXIS 13782 (8th Cir. July 9, 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (declaring unconstitutional an Indianapolis, Indiana, ordinance limiting minors' access to games deemed to be "harmful to minors" because of their "graphic violence").

5. See *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000) (writing that "a content-based speech restriction" is constitutional "only if it satisfies strict scrutiny," and defining this test to mean that a statute "must be narrowly tailored to promote a compelling Government interest").

6. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 910 (2d ed. 2002) (writing that "[a] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted").

- the current state of social science research seriously lacking and concluded that it fails to provide substantial evidence to support “the Legislature’s belief that video games cause violence.”<sup>7</sup> In particular, Judge Lasnik wrote that “neither causation nor an increase in real-life aggression is proven by these studies”;<sup>8</sup>

- the Washington law was “both over-inclusive and under-inclusive”<sup>9</sup> in its attempt to single out “just one type of violence”<sup>10</sup> for regulation, namely game-related aggression toward law enforcement officers. As Judge Lasnik reasoned, the law “sweeps too broadly in that it would restrict access to games that reflect heroic struggles against corrupt regimes”<sup>11</sup> or “involve accidental injuries to officers,”<sup>12</sup> while it simultaneously “is too narrow in that it will have no effect on the many other channels through which violent representations are presented to children”;<sup>13</sup>

- the law’s limitations on game-related violence “impact more constitutionally protected speech than is necessary to achieve the identified ends and are not the least restrictive alternative available.”<sup>14</sup> Judge Lasnik observed that the regulation was “not limited to the ultra-violent or the patently offensive and is far broader than what would be necessary to keep filth like *Grand Theft Auto III* and *Postal II* out of the hands of children”;<sup>15</sup> and

- the law was “unconstitutionally vague.”<sup>16</sup> Judge Lasnik pointed out that attorneys for Washington State were unable, during oral argument, to answer the seemingly simple question of whether a firefighter would be a “public law enforcement officer” as that term is used in the statute.<sup>17</sup>

On top of these problems, Judge Lasnik also refused to expand the legal definition of obscenity<sup>18</sup>—a form of sexually explicit speech that falls outside the

7. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1189 (W.D. Wash. 2004).

8. *Id.* at 1188.

9. *Id.* at 1189.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The under-inclusiveness rationale articulated by Judge Lasnik tracks Judge Richard Posner’s observation three years earlier in *American Amusement Machine Ass’n v. Kendrick* that the City of Indianapolis:

doesn’t even argue that the *addition* of violent video games to violent movies and television in the cultural menu of Indianapolis youth significantly increases whatever dangers media depictions of violence pose to healthy character formation or peaceable, law-abiding behavior. Violent video games played in public places are a tiny fraction of the media violence to which modern American children are exposed. Tiny—and judging from the record of this case, not very violent compared to what is available to children on television and in movie theaters today.

244 F.3d 572, 579 (7th Cir. 2001).

14. *Video Software Dealers Ass’n v. Maleng* 325 F. Supp. 2d at 1189.

15. *Id.* at 1190.

16. *Id.* at 1191.

17. *Id.* at 1190.

18. The United States Supreme Court applies a three-part test to determine if speech about sexual conduct is obscene 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.

*Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted).

ambit of First Amendment protection<sup>19</sup>—to include graphic portrayals of violence.<sup>20</sup> Although there are a number of well-established categories of speech that are not safeguarded by the First Amendment,<sup>21</sup> violence is not one of those unprotected categories. As Lasnik wrote, depictions of violence “have been used in literature, art and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation.”<sup>22</sup>

One might believe then, in light of this stinging 2004 judicial rebuke and the fact that “no such regulation has passed constitutional measure”<sup>23</sup> in the past, that the issue of regulating minors’ access to video games that depict violence will soon be relegated to the graveyard of failed legislative trends and initiatives. What’s more, external situations and real-world events make such an end-of-the-line-for-legislation belief seem quite logical. In particular, one would reasonably think that legislators today would be far more concerned about the effects of viewing a steady stream of real-life images of graphic violence, from photographs of torture in an Iraqi prison<sup>24</sup> to videotapes of beheadings of United States’ citizens in foreign countries,<sup>25</sup> than they would be about the effects of viewing fictional images in a game. Put differently and more bluntly, at a time when the country is fighting an open-ended war on terrorism involving real-life death and violence and, concomitantly, consuming those real-life images as they are published in newspapers,<sup>26</sup> aired on television sets, and posted on the Internet,<sup>27</sup> one might conclude that

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19. *E.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (“The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, *obscenity*, and pornography produced with real children.”) (emphasis added).

20. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d at 1185.

21. As the United States Court of Appeals for the Ninth Circuit recently observed: “The categories of unprotected speech include child pornography; imminent incitement; true threats; obscenity; libel; and fighting words.” *Roe v. City of San Diego*, 356 F.3d 1108, 1113 (9th Cir. 2004) (citations omitted).

22. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d at 1185.

23. *Id.* at 1183.

24. *See generally* Julie Hirschfeld Davis, *New Photos Show Abuse of Iraqi Prisoners*, BALT. SUN, May 10, 2004, at 4A (describing photographic evidence “graphically depicting U.S. soldiers abusing Iraqi detainees at Abu Ghraib prison”).

25. *See generally* Mary Curtius & Greg Miller, *U.S. Businessman Beheaded in Iraq as Militants’ Videotape Rolls*, L.A. TIMES, May 12, 2004, at A1 (describing how “[a]n American businessman who had been missing in Iraq since last month was beheaded by five masked Islamic militants, who posted a video of the killing on the Internet on Tuesday and called it revenge for the abuse of Iraqi prisoners in the U.S.-run Abu Ghraib prison”).

26. *See, e.g.*, Brad Smith & Walt Belcher, *Violent Images Spur Debate on Coverage, Effect on Politics*, TAMPA TRIB., Apr. 1, 2004, at 4 (describing publication in the Tampa Tribune of “a front-page photo of a jeering crowd in the foreground and two burned, mutilated bodies hanging from a bridge in the background” after four United States citizens were killed in Fallujah, Iraq). The *Tampa Tribune* was not alone in printing a grisly photograph of violence from that particular incident. The *Philadelphia Inquirer*, for instance, also “published a front-page photo of two charred bodies hanging behind a crowd of cheering Iraqis.” Paul Nussbaum, *Reaction to Graphic Images Somewhat Subdued*, PITTSBURGH POST-GAZETTE (Pa.), Apr. 2, 2004, at A-6.

27. *See, e.g.*, Megan K. Stack & Josh Meyer, *Radicals Kill American in Saudi Arabia*, L.A. TIMES, June 19, 2004, at A1 (describing how “Islamic radicals killed an American engineer” named Paul M. Johnson, Jr., and then “posted photographs of the man’s severed head and bloodied corpse on a website”).

legislators would have more important things to worry about than the effects of viewing computer-generated, entertainment-based images of violence in a video game. The latter, after all, is just that—a game. The former—war—is anything but a game.

Despite all of this, one would be wrong, the authors of this article contend, to believe that access-prevention video game legislation will fade away any time soon. In fact, there are multiple indicators—at least a half-dozen—that such failed legislation will continue to be drafted and passed in the near future and that the obsession with controlling fictional images of violence will wax rather than wane. What are the indicators that more legislative efforts directed at video games will crop up soon?

First and, perhaps, most importantly, a new bill called the “Children and Media Research Advancement Act” (CAMRA Act) was introduced in the United States Senate on May 19, 2004 by Hillary Rodham Clinton (D-N.Y.) and Sam Brownback (R-Kan.).<sup>28</sup> The bill would authorize \$90 million to be spent from the fiscal year 2005 through 2009 to enable the National Institute of Child Health and Human Development to examine the role and impact of electronic media, including interactive video games, on the cognitive, physical, and socio-behavioral development of children.<sup>29</sup> The data generated by such studies would be reported back to Congress and, in turn, likely provide fodder to support future legislative measures at both the federal and state levels targeting video games. Why else call for expensive research if it is not directed or intended to support legislative action? The bill seems destined to become law, as it already has attracted one of “the most unexpected alliances”<sup>30</sup>—joining with Senator Rodham Clinton is Rick Santorum (R-Pa.), who is “known for crusading against same-sex marriage and for prayer in public schools.”<sup>31</sup>

Second, the hope that such future-generated social science evidence from measures like the CAMRA Act might someday (and somehow) support and justify anti-access video game legislation was fueled by Judge Lasnik. In fact, Judge Lasnik wrote that he, “along with virtually every entity that has considered this issue, hopes that more research is done to determine the long-term effects of playing violent video games on children and adolescents.”<sup>32</sup> Such judicial sentiment provides precisely the kind of hope that excites both social scientists and academics<sup>33</sup> looking for grant money to study media effects in the confines of their artificial “laboratory” settings,<sup>34</sup> as well as legislators eager to please parents and to foist blame and responsibility for the actions of individuals onto the corporations

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28. S. 2447, 108th Cong. (2004).

29. *Id.*

30. Linda Campbell, *Media Influence On Kids Needs Study*, *NEWSDAY*, June 30, 2004, at A41.

31. *Id.*

32. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004).

33. There is an entire new academic discipline known as “video game scholarship” that has sprung up at places such as the University of Southern California, which today boasts “probably the largest and most diverse collection of professors and students studying the vast yet mysterious world of video games.” Mary McNamara, *A PhD in Mortal Kombat*, *L.A. TIMES*, June 6, 2004, at E1.

34. For instance, in the College of Communications at Pennsylvania State University there is a “Media Effects Research Laboratory” that is dedicated to conducting empirical research on the psychological effects of media content, form, and technology. *See* Media Effects Research Laboratory website at <http://www.psu.edu/dept/medialab> (last visited Oct. 19, 2004).

that profit from the sale of video games. Beyond the academics and legislators, there are some plaintiffs' attorneys, such as Florida's Jack Thompson, who are on an "obsessive crusade"<sup>35</sup> and "just can't stop hammering video game manufacturers,"<sup>36</sup> who undoubtedly would love to see such studies commissioned in order to support their own lawsuits against the industry<sup>37</sup> as well as further legislation.

What's more, Judge Lasnik, unlike the federal appellate courts that struck down access-prevention video game legislation in *American Amusement Machine Ass'n v. Kendrick*<sup>38</sup> and *Interactive Digital Software Ass'n v. St. Louis County*,<sup>39</sup> provided legislators with a virtual roadmap for fine-tuning and re-drafting their video game laws. That roadmap provides a distinct ray of hope for government officials in Washington state and elsewhere to go back to the legislative drawing board rather than give up the fight. As Jim Pharris, a senior assistant attorney general for the state of Washington, told a reporter in July 2004, Judge Lasnik "didn't slam the door to the possibility that the Legislature could pass a law that would meet the necessary standards."<sup>40</sup>

In particular, Judge Lasnik wrote that it is "maybe"<sup>41</sup> possible for a state to someday impose a constitutional ban on video games, provided those games "contain violent images, such as torture or bondage, that appeal to the prurient interest of minors."<sup>42</sup> And while Judge Lasnik wrote that he "cannot give advisory opinions," he nonetheless articulated three "key considerations" for legislators to take into account in the future.<sup>43</sup> Those considerations, which pave the way for further legislative maneuvering, are spelled out, analyzed, and critiqued later in Part III of this article.

A third indicator that the United States has yet to see the end of video game legislation is that new legislation already is in the pipeline. As the Associated Press reported in July 2004, "[l]awmakers in at least seven states proposed bills during the most recent legislative session that would restrict the sale of games, part of a wave that began when the 1999 Columbine High School shootings sparked an outcry over games and violence."<sup>44</sup> For instance, in mid-2004 a bill was alive and well in the California Assembly that provided that "[a] person shall not, with knowl-

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35. Jane Musgrave, *Game Link In Slaying May Have Merit, Experts Say*, PALM BEACH POST (Fla.), Feb. 21, 2004, at 1C.

36. *Id.*

37. Thompson, "who has been on a one-man crusade against sex and violence in the media since the late 1980s," filed, in October 2003, "a \$246 million lawsuit against Sony Computer Entertainment America Inc., GTA III designers Take-Two Interactive Software and Rockstar Games, and Wal-Mart, in connection with a Tennessee case in which two teenage stepbrothers killed one person and injured another by shooting rifles at passing motorists. They claimed GTA III as inspiration." Kevin Hoffman, *Thrill Kill: Did A Video Game Trigger The Murder Of A Teenage Girl?*, CLEVELAND SCENE (Ohio), Dec. 10, 2003, at News/Featured Stories.

38. 244 F.3d 572 (7th Cir. 2001).

39. 329 F.3d 954 (8th Cir. 2003), *petition for reh'g en banc denied*, 2003 U.S. App. LEXIS 13782 (2003).

40. Dan Richman, *Ban On Violent Videos Struck Down*, SEATTLE POST-INTELLIGENCER, July 16, 2004, at C1.

41. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1190 (W.D. Wash. 2004).

42. *Id.*

43. *Id.*

44. Nick Wadhams, *Video Games Under The Gun*, THE ASSOCIATED PRESS (July 4, 2004), at <http://www.msnbc.msn.com/id/5351969>.

edge that the person is a minor, knowingly sell, rent, distribute, send, cause to be sent, exhibit, or offer to distribute or exhibit by any means, any violent video game to a minor.”<sup>45</sup> In proposing the measure, Assemblyman Leeland Yee proclaimed that “[t]hese violent games are bad for children and should be treated the same way we treat pornography, guns, tobacco, and alcohol.”<sup>46</sup>

Similar to the California legislation, a bill was proposed and pending in the Hawaii legislature in 2004 that would make it “unlawful to sell or furnish any video game that contains graphic violence to a minor under eighteen years of age.”<sup>47</sup> The Hawaiian bill defines graphic violence as “the visual depiction of serious injury to human beings, actual or virtual, including aggravated assault, decapitation, dismemberment, or death.”<sup>48</sup> The measure would, per its terms, “take effect on January 1, 2005”<sup>49</sup> were it to pass and be signed into law.

A fourth sign that more legislation may be on the horizon is that new releases and versions of often-criticized games such as *Doom*,<sup>50</sup> *Mortal Kombat*,<sup>51</sup> and *Grand Theft Auto*<sup>52</sup> are scheduled for release in late 2004 and early 2005.<sup>53</sup> Those releases surely will trigger further public outcry and a flurry of calls for more legislative efforts: recall that Judge Lasnik singled out *Grand Theft Auto III* as “filth.”<sup>54</sup>

A fifth indicator that further legislation is likely in this area stems from the Federal Trade Commission’s July 2004 report, “Marketing Violent Entertainment to Children: A Fourth Follow-up Review of Industry Practices in the Motion Pic-

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45. Assemb. B. 1792, 2003-2004 Leg. Reg. Sess. (Cal. 2004).

46. Jonathan Sidener, *Bills Aim to Limit Violent-Game Sales*, SAN DIEGO UNION-TRIB., Jan. 6, 2004, at C1, available at 2004 WL 58979512.

47. H.B. 2705, 22d Leg. (Haw. 2004), available at [http://www.capitol.hawaii.gov/sessioncurrent/bills/hb2705\\_.htm](http://www.capitol.hawaii.gov/sessioncurrent/bills/hb2705_.htm).

48. *Id.*

49. *Id.*

50. The video game *Doom* has drawn particular wrath and scrutiny because Eric Harris and Dylan Klebold, the two students who committed the violence at Columbine High School near Littleton, Colorado, in April of 1999, played the game repeatedly. See generally Tustin Amole, *Media Seen As Training Ground For Teen Killers: School Slayings Fit Pattern of Video Pulled from Shelves; Games that Provide Practice*, ROCKY MOUNTAIN NEWS, Apr. 23, 1999, at 21A (noting that “Harris and Klebold played computer games such as *Doom*”); Jose Martinez, *High School Horror; Misfit Teens Turned Their Hatred Into A Deadly Obsession*, BOSTON HERALD, Apr. 22, 1999, at 8 (reporting that Klebold and Harris “were savvy computer users who not only played violent video games but wrote so-called ‘wad files’ to their favorite games, like ‘*Doom*’”), available at 1999 WL 3396087.

51. *Mortal Kombat* is a favorite target of current United States Senator and erstwhile Democratic presidential aspirant Joseph Lieberman. See Paul Farhi, *Lieberman Versus Hollywood*, WASH. POST, Dec. 8, 2003, at A01 (writing that Lieberman’s “targets quickly stretched beyond Al Bundy to the broader seep of junk media: Geraldo Rivera and ‘trash’ TV talk shows, violent video games such as ‘*Mortal Kombat*,’ misogynistic ‘gangsta’ rap music, sexually frank prime-time TV programs”).

52. See Rene A. Guzman, *Families That Play Together: Video Games Can Be Bonding Tool*, SAN ANTONIO EXPRESS-NEWS (Tex.), Feb. 27, 2004, at 1F (writing that “it’s ‘*Grand Theft Auto*’ and similar ‘M’-rated games that grab all the attention” from parents “wary of sex and violence in video games”); Amy Hetzner, *Video Games Score Points With New Crowd*, MILWAUKEE J. SENTINEL (Wis.), Feb. 21, 2004, 1A (describing “the publicity about the violence in games such as ‘*Grand Theft Auto*’”).

53. Wadhams, *supra* note 44.

54. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1190 (W.D. Wash. 2004).



ture, Music Recording & Electronic Game Industries.”<sup>55</sup> In particular, that recent report noted that sixty-nine percent of the young teen shoppers, ranging in age from thirteen to sixteen years old, commissioned by the FTC to make attempts at purchasing video games rated “M” by the Entertainment Software Ratings Board (ESRB) were able to do so.<sup>56</sup> The problem, of course, is that “M” stands for mature content that “may be suitable for persons *ages 17 and older*. Titles in this category may contain mature sexual themes, more intense violence and/or strong language.”<sup>57</sup> Parsed differently, nearly seventy percent of children who were ostensibly too immature, under the ESRB’s voluntary guidelines, to play or purchase games rated “M” were able to procure the games directly from retailers and without the permission of parents. This finding may very well provide ample fodder to legislators seeking to enact new laws to restrict minors’ access to such games. In other words, if voluntary compliance only stops about thirty percent of minors from purchasing games designed for those seventeen years of age and older, then surely, the party line will certainly go, legislation is required to prevent the other seventy percent from obtaining them.

The FTC study also found that “even among those retailers with programs in place to restrict sales, 55% of the unaccompanied children were able to buy violent M[Mature]-rated games.”<sup>58</sup> With regard to this result, the FTC admonished the video game industry, writing that “the numbers still fall short of what might be expected given the multi-year effort by the ESRB to encourage retailers to adopt restrictive sales policies.”<sup>59</sup> Such a failure of self-monitoring revealed in 2004 could easily lead to legislative policing in 2005.

Finally, a sixth factor suggesting the inevitability of more anti-access violent video game legislation is the collection of scattered, anecdotal cases from across the country and elsewhere in the world<sup>60</sup> in which real-world violence is directly blamed on video games. Such events, although as rare as shootings like that at Columbine High School that are attributed to video games,<sup>61</sup> often garner substantial media attention that, in turn, gathers legislative and public attention.<sup>62</sup> For

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55. FEDERAL TRADE COMMISSION, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FOURTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES, A REPORT TO CONGRESS* (July 2004) [hereinafter *MARKETING VIOLENT ENTERTAINMENT*], available at <http://www.ftc.gov/opa/2004/07/040708kidsviolencrpt.pdf> (last visited October 19, 2004).

56. *Id.* at i, iii.

57. Entertainment Software Ratings Board, *ESRB Game Ratings*, available at [http://www.esrb.org/esrbatings\\_guide.asp](http://www.esrb.org/esrbatings_guide.asp) (last visited July 23, 2004) (emphasis added).

58. *MARKETING VIOLENT ENTERTAINMENT*, *supra* note 55, at 27.

59. *Id.*

60. For instance, “[a]n ultra-violent video game sold in Australia” was “blamed for the cold-blooded slaying of a schoolboy by his teenage friend” in July 2004. Patrick O’Neil, *Censors Pass Violent Video: Game Blamed for Slaying*, *HERALD SUN* (Melbourne, Austl.), July 30, 2004, at 9. In this case, it was alleged that “[t]he method of the killing and weapons used mimicked the disturbing game *Manhunt*, in which a man roams a city massacring every person he encounters.” *Id.*

61. See Brad Knickerbocker, *Five Years After Columbine, The Insecurity Lingers*, *CHRISTIAN SCI. MONITOR*, Apr. 20, 2004, at Features 1 (noting how, in the wake of the situation at Columbine High School, violent video games were blamed, in part, for school violence).

62. Cf. Clay Calvert & Robert D. Richards, *The Irony of News Coverage: How the Media Harm Their Own First Amendment Rights*, 24 *HASTINGS COMM. & ENT. L.J.* 215, 239 (2002) (arguing that “perceptions about school violence created largely by the news media—not realities about school violence, media products or media activities—influence and guide legislative initiatives that carry the potential to curtail First Amendment freedoms”).

instance, in June 2004, video games were being blamed, in part, for the serial-sniper shootings that took place in Ohio along a stretch of Interstate 270 during 2003 and 2004.<sup>63</sup> Likewise, a major media outlet, *The Washington Post*, was quick to point out in June 2004 that a 12-year-old boy who was arrested at school after plotting to frighten or even kill students “liked to play video games.”<sup>64</sup> Such media coverage keeps the supposed link between video games and violence on the public and legislative agendas.<sup>65</sup>

In summary, then, there is a laundry list of reasons why legislative bodies will continue to roll out bills in the foreseeable future that target minors’ access to violent video games. This article argues that such future efforts are futile, fruitless, and doomed to failure.

In particular, Part II of the article analyzes and critiques the recently introduced CAMRA Act that would fund future social science research in this area. Part II demonstrates the lack of viability and sheer pointlessness of such research as it applies to support legislative initiatives directed at video games. Part III then reviews and assesses the helpfulness (or lack thereof) of the three-part roadmap for designing future legislation that was articulated by Judge Lasnik in July 2004 in *Video Software Dealers Ass’n v. Maleng*.<sup>66</sup> This part contends that Lasnik’s suggestions and pointers, although certainly well intended, will fail to cure all of the problems that now plague anti-access video game legislation.

Next, Part IV points out an important irony with the growing number of efforts to regulate fictional images of violence in the entertainment medium of video games. In particular, real-life images of violence on the news, be they printed in newspapers or shown on television, currently escape all government regulation, including the ratings system now employed by all of the broadcast networks and the TV Parental Guidelines rating system implemented by the Federal Communications Commission (FCC) on March 12, 1998.<sup>67</sup> In brief, the federal government seems more concerned about censoring *fictional* images of fantasy violence than it does about controlling images of real-life violence from wartime situations. Put more bluntly, legislative bodies focus on fake violence but not real violence. Compounding the irony is that when the federal government does express concern about the public seeing and accessing real-life images of violence from wars or images reflecting the aftermath of such violence, such as flag-draped caskets and coffins, the interests asserted by the government have nothing to do with protecting the psychological well-being of minors but, instead, have everything to do with influencing public opinion about governmental policies that put real lives in harms way.

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63. Bruce Cadwallader, *Evaluation of Sniper Suspect Nears End*, COLUMBUS DISPATCH (Ohio), June 23, 2004, at 1C.

64. Christina A. Samuels & Josh White, *Armed Boy, 12, Arrested in Va. School Plot*, WASH. POST, June 19, 2004, at A01.

65. The idea that the news media set agendas for the public and others is known as the “agenda-setting function of the mass media.” STANLEY J. BARAN & DENNIS K. DAVIS, *MASS COMMUNICATION THEORY: FOUNDATIONS, FERMENT, AND FUTURE* 312 (3d ed. 2003). Put slightly differently, under the agenda-setting theory there is “an important relationship between media reports and the people’s ranking of public issues.” *Id.*

66. 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

67. Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56, 133-43 (codified as amendments to the Communications Act of 1934 in scattered sections of 47 U.S.C.).

Finally, the article concludes in Part V by placing the current battle over violent video games into the larger cultural and political context of clashing generations weaned on different media and different images. The conclusion calls for the end of legislative initiatives designed to limit minors' access to video games depicting violence.

## II. PROTECTING CHILDREN THROUGH FUNDED RESEARCH: WILL CREDIBLE SOCIAL SCIENCE EVIDENCE EMERGE?

On May 19, 2004, a group of U.S. senators<sup>68</sup> introduced the CAMRA Act, legislation intended to pour millions of federal dollars into research that examines "the role and impact of electronic media in the development of children."<sup>69</sup> The CAMRA Act would establish a program that is "aimed at energizing research into the role of all forms of digital, analog and print media on the cognitive, social, emotional, physical and behavioral development of children from infants through adolescents."<sup>70</sup> Included in the five-year, ninety-million dollar package is a specific reference to "interactive video games."<sup>71</sup>

The inclusion of video games in the funding package is not surprising given the widespread negative press looming over the industry.<sup>72</sup> This measure also is not the first time Congress has paid attention to the potential adverse effects associated with troubling electronic images. In February 2003, Representative Joe Baca (D-Cal.) introduced the "Protect Children from Video Game Sex and Violence Act of 2003,"<sup>73</sup> a bill that would impose criminal penalties on retailers "who sell or rent to minors video games that depict nudity, sexual conduct, or other content harmful to minors."<sup>74</sup> A year-and-a-half later, in August 2004, Baca's congressional home page warned visitors that "[t]hese games allow players to watch strip shows, have simulated sex with prostitutes, assault innocent bystanders, car-jack soccer moms, using illegal drugs, commit mass murder, and kill police officers."<sup>75</sup>

Baca's rhetoric, while expeditious and certainly inflammatory, also happens to be incorrect. The players of these video games are not committing acts of violence or watching sexual performances. They are interacting with fictitious images—cartoon or pixilated—or video images on a computer or television screen. No human being is harmed in the process. Yet, it appears to be part of a larger congressional agenda to prove the adverse impact of these games on children.

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68. The group consists of Sen. Joseph Lieberman (D-Conn.), Sen. Sam Brownback (R-Kan.), Sen. Hillary Rodham Clinton (D-N.Y.), Sen. Mary Landrieu (D-La.), and Sen. Rick Santorum (R-Pa.).

69. Children and Media Research Advancement Act, S. 2447, 108th Cong. (2004).

70. Press Release, Joe Lieberman, United States Senator, Lieberman, Brownback, Clinton Call for Research Into Effects of Media on Children (May 19, 2004), at <http://lieberman.senate.gov/newsroom/release.cfm?id=221745> (last visited Oct. 19, 2004).

71. See CAMRA Act, *supra* note 69.

72. See *supra* notes 60-65 and accompanying text (describing how media coverage of violence linked to video games keeps legislative efforts targeting such games on politicians' agendas).

73. H.R. 669, 108th Cong. (2003).

74. *Video Game Violence*, Website of Representative Joe Baca, (last visited Oct. 19, 2004) at <http://www.house.gov/baca/hotissues/video.htm>.

75. *Id.*

Of course, not all of the federal government's attention to the issue comes from Congress. The Federal Trade Commission continues to study and report on the marketing of Mature ("M")-rated video games to children under the age of seventeen.<sup>76</sup> In its most recent—and fourth in as many years—Report to Congress, the Commission notes that despite some positive efforts by the industry to curtail marketing techniques to underage users, the industry continues to advertise M-rated games "in media with large teen audiences."<sup>77</sup> Perhaps these constant reminders motivated Congress to allocate federal dollars.

The willingness of Congress to open up its coffers to researchers who wish to study the physical and psychological effects of media usage no doubt will be viewed as a godsend to funding-starved academics in the social sciences. Indeed, a new field of study, "ludology"—from the Latin root *ludus*, meaning game—has begun to emerge in the United States and Europe, replete with the trappings of academe, such as peer-reviewed journals and professional associations.<sup>78</sup> Such programs are popping up in prestigious places like the Annenberg School for Communication at the University of Southern California<sup>79</sup> and Princeton University, where a conference called "Form, Culture and Video Game Criticism" was held in March 2004.<sup>80</sup> Academics stand ready to delve deep into the 30-year history of video games.<sup>81</sup> And Congress is poised to pay for it.

Even some media commentators believe the time for serious, funded study has arrived. An opinion piece appearing in *Newsday* in June 2004 argued that "[s]olid data about how media influence children's learning and social development could help families make smarter choices, help consumers exercise their pocket-book muscles and help lawmakers fashion programs that encourage development of the best in media content and protect children from the worst."<sup>82</sup>

Before this improbable alliance of liberals and conservatives, pundits and professors gets too far ensconced in the murky muddle of federal grant-making, it is useful to examine just what Congress hopes to learn from this massive effort and, more important, whether the results will have any utility in crafting legislation that will withstand constitutional challenges—especially given that federal courts con-

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76. See MARKETING VIOLENT ENTERTAINMENT, *supra* note 55.

77. *Id.* at 28 (noting, nonetheless, that "[t]he Commission's review of marketing practices by the motion picture, music recording, and electronic games industries reveals that the movie and games industries continue to comply, for the most part, with their self-regulatory limits on ad placement, and that the music industry has made some progress in this area as well").

78. Michael Erard, *The Ivy-Covered Console*, N.Y. TIMES, Feb. 26, 2004, at G1 (describing the "nascent field" of game studies as an amalgam of other fields, such as computer science, literary studies and film studies).

79. See McNamara, *supra* note 33, at E1 (noting that "USC's computer games project is probably the largest and most diverse collection of professors and students studying the vast yet mysterious world of video games").

80. See Erard, *supra* note 78, at G1.

81. *Id.*

82. Linda Campbell, *Media Influence on Kids Needs Study*, NEWSDAY (N.Y.), June 30, 2004, at A41 (noting that even adversarial political forces can reach agreement on the issue that "[p]arents and policy-makers need more comprehensive, systematically gathered information about the impact of TV, computer games, movies and the Internet on young minds and sensibilities").

sidering such measures have soundly rejected the social science evidence offered to date.<sup>83</sup>

### A. CAMRA's Unsteady Focus

Senator Joe Lieberman's press release announcing the introduction of the CAMRA Act notes that although much is known about the media, "we still lack perhaps the most important piece of information—what effect is [sic] media having on our children?"<sup>84</sup> Indeed, the CAMRA Act acknowledges "important gaps in our knowledge about the role of electronic media and in particular, the newer interactive digital media, in children's healthy development."<sup>85</sup> Moreover, the Act intends to establish a centralized program for facilitating the funded research in the hope that "a single, well-coordinated research effort" would be "a more productive approach for generating valuable findings about the impact of the media on children."<sup>86</sup>

While coordination of the research agenda certainly will be bureaucratically expedient, the *type* of social science funded must become the critical consideration for the National Institute of Child Health and Human Development—the agency entrusted with shepherding the program under the CAMRA Act—if the results are to have any value in the legislative and legal processes.

The drafters of the bill have set forth broad research parameters in "core areas of child development": cognitive, physical and socio-behavioral analyses.<sup>87</sup> Yet, the bill fails to recognize that much of the social scientific research produced to date in the interactive video game arena—a research area the Act specifically singles out for study—falls far short of what is needed to establish credible evidence in a constitutional challenge in court. In short, the social science methodologies employed in this area remain suspect, and Congress would be wise to more carefully circumscribe the research agenda before allocating federal funds that would yield little return on the investment.

83. See, e.g., *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (restricting minors' access to violent video games); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003), *petition for reh'g en banc denied*, 2003 U.S. App. LEXIS 13782 (8th Cir. July 9, 2003) (making it unlawful to sell or rent graphically violent video games to minors without parental consent); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) (blocking the sale or rental to minors of video and computer games that depict physical harm to law enforcement personnel).

84. See Lieberman, Brownback, Clinton Call for Research Into Effects of Media on Children, *supra* note 70.

85. S. 2447, 108th Cong. § 2(a)(3) (2004).

86. *Id.* § 2(a)(9).

87. *Id.* § 3. Specifically, the Act calls for research in the following areas:

- (1) COGNITIVE- The role and impact of media use and exposure in the development of children within such cognitive areas as language development, attention span, problem solving skills (such as the ability to conduct multiple tasks or 'multitask'), visual and spatial skills, reading, and other learning abilities.
- (2) PHYSICAL- The role and impact of media use and exposure on children's physical coordination, diet, exercise, sleeping and eating routines, and other areas of physical development.
- (3) SOCIO-BEHAVIORAL- The influence of interactive media on childhood and family activities and peer relationships, including indoor and outdoor play time, interaction with parents, consumption habits, social relationships, aggression, prosocial behavior, and other patterns of development.

*Id.*

*B. Video Games and Weird Social Science*

The judicial experience in handling constitutional challenges is fairly recent, but the principles applied when the government attempts to create restrictive regulation on the basis of content are long established. As noted above,<sup>88</sup> courts addressing the constitutionality of video game legislation—bills that single out a specific subject matter or type of content for regulation—necessarily must determine whether the state has a compelling interest in creating policies that infringe upon otherwise protected expression. At its core, the compelling interest set forth in legislative attempts to date is the psychological well-being of minors who play video games and, concomitantly, the physical harm and violence that those minors may cause to others after playing the games.

What follows naturally, then, is for the courts to determine whether the government can present sufficient evidence that links adverse psychological results and subsequent aggressive conduct to the playing of video games. Put slightly differently, if the government is claiming that video games bring about these untoward consequences of violence, it must be able to convince a court that a direct *causal* link exists. Therein lies the problem.

The social science research about the effects of video games on users has not impressed the courts reviewing it. The findings of these studies rely largely on drawing faulty correlations and associations between playing video games and harm to minors.<sup>89</sup>

For instance, in *Interactive Digital Software Ass'n v. St. Louis County*,<sup>90</sup> involving an ordinance that made it unlawful to sell or rent graphically violent video games to minors without parental consent, the court called the testimony of a psychologist—who purportedly found a link between playing video games and aggressive behavior—a “vague generality” that fell “far short of a showing that video games are psychologically deleterious.”<sup>91</sup> Causality will continue to be “difficult to establish because many intervening and extraneous variables are involved.”<sup>92</sup>

In other words, blaming a youngster’s aggressive behavior on his playing of video games remains problematic because it is impossible to isolate that factor from other variables, such as poor upbringing, mental illness, hormonal imbalance, socio-economic status, and lack of supervision—just to name a few. As Buffalo State College psychology professor Michael MacLean remarked:

You have to put gaming in context with whatever else a child is doing. . . . If he’s involved in sports and school activities and has an active social life, it may not be a concern. But if all he does is go up to his room and play video games all night, it could be a problem.<sup>93</sup>

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88. See *supra* note 5 and accompanying text.

89. See generally MICHAEL SINGLETARY, MASS COMMUNICATION RESEARCH: CONTEMPORARY METHODS AND APPLICATIONS 227 (1994) (writing that “[i]t is important to recognize that correlation is not the same as causation. In other words, if two variables are correlated, it does not necessarily follow that one *causes* any change in the other.”).

90. 329 F.3d 954 (8th Cir. 2003).

91. *Id.* at 959.

92. ROGER D. WIMMER & JOSEPH R. DOMINICK, MASS MEDIA RESEARCH 168 (2003) (highlighting the hazards of drawing causal connections by surveying human behavior).

93. Anthony Violanti, *Game’s On: Face-to-Face Competition Adds Social Skills to the Computer World*, BUFFALO NEWS, Apr. 12, 2004, at A9.

Yet, even the latter, more extreme scenario has not been proven to be the case by credible social science evidence.

The use of social science generally in law is not without controversy.<sup>94</sup> The problems associated with correlational studies were noted above, but even laboratory experimentation has proved no better an indicator of causality. In a recent law review article,<sup>95</sup> Marjorie Heins, director of the Free Expression Policy Project, examined claims by social scientists that exposure to media violence leads to aggressive behavior. In study after study, Heins pointed out the limitations of the methodologies used and noted that “[l]aboratory experiments, which can show short-term imitation, are too artificial to offer any insight into TV’s real-world impact.”<sup>96</sup>

Heins’s concern about “bogus claims of proven harm”<sup>97</sup> is reminiscent of Judge Richard Posner’s rejection of a pair of studies presented as evidence in *American Amusement Machine Ass’n v. Kendrick*<sup>98</sup>—a case involving an Indianapolis ordinance restricting minors’ access to “harmful” video arcade games<sup>99</sup>—because the research did not mirror the situation that the ordinance purported to remedy. Posner sharply dismissed the studies, writing that:

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. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments.<sup>100</sup>

Judge Posner’s position makes it clear that if future research is to have any supportive role in establishing a compelling governmental interest, the studies must be precisely on point—involving minors not adults, using specific video games

94. See Matthew D. Bunker & David K. Perry, *Standing at the Crossroads: Social Science, Human Agency and Free Speech Law*, 9 COMM. L. & POL’Y 1, 23 (2004) (concluding that more work needs to be done to resolve the conflict that lies at the intersection of First Amendment law and social science).

95. Marjorie Heins, *On Protecting Children from Censorship: A Reply to Amitai Etzioni*, 79 CHI.-KENT L. REV. 229 (2004).

96. *Id.* at 241 (describing research by Jonathan Freedman, among others, who “was astounded at the disparity between the claims being made and the actual results” in media effects work).

97. *Id.* at 239.

98. 244 F.3d 572 (7th Cir. 2001).

99. INDIANAPOLIS, IND. GENERAL ORDINANCE no. 72-2000, § 831-1 (2000) (defining “harmful to minors” to mean:

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 material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years, and: (1) Contains graphic violence; or, (2) Contains strong sexual content.

*Id.*).

100. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d at 578-79 (referring to studies reported in Craig A. Anderson & Karen E. Dill, *Personality Processes and Individual Differences—Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 PERSONALITY & SOC. PSYCH. 772 (2000)).

that are to be regulated, conducted outside artificial laboratory settings, and most important, proving causation and not simply correlation. •

The same lack of concrete, causal evidence proved fatal to the Washington statute. In discussing this statute, Judge Lasnik concluded that “the current state of the research cannot support the legislative determinations that underlie the Act because there has been no showing that exposure to video games that ‘trivialize violence against law enforcement officers’ is likely to lead to actual violence against such officers.”<sup>101</sup>

Despite the clear directive from the federal courts on the type of evidence needed to establish the government’s compelling interest, Congress has failed to heed this advice. In particular, it has failed to limit the funding under the CAMRA Act to those studies that focus on finding a *causal* connection between media violence and aggressive behavior in minors. Instead, the government undoubtedly will leave the choice solely to the researcher to determine both the hypothesis and methodology. Even a cursory glance at what currently is occupying the field’s attention is enough to defeat hopes that the results of the ninety million dollar federal enterprise will yield results lawmakers can use.

In addition to the correlational studies presented as evidence in the handful of cases involving video game legislation, other recent research has amounted to little more than a content analysis<sup>102</sup> of popular video games. Consider, for example, a pair of studies conducted by the Center on Media and Child Health at Children’s Hospital Boston and the Kids Risk Project at the Harvard School of Public Health. In one study, researchers found that the ratings affixed to video games by the Entertainment Software Rating Board were not always indicative of the games’ content and suggested parents take an active role in discussing the games with their children.<sup>103</sup> In another, the researchers concluded that “[t]een-rated video games contain significant amounts of violence and death.”<sup>104</sup>

While perhaps interesting, these studies say nothing about the critical question of causation and thus will do little to bolster a legislature’s ability to demonstrate a compelling need for restricting minors’ access to violent video games. In the end, the government undoubtedly will spend many millions of dollars on research that might contribute to ratcheting up the rhetoric about the evils of video games but, without proving causality, will have little effect on legislative efforts to curb minors’ access to them. This, of course, begs the question: Is this money well spent? The answer, it should be clear from the analysis above, is a resounding no.

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101. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004).

102. A content analysis is “a method reducing text to numbers. It amounts to counting the occurrence of elements that appear in text” in an objective and systematic manner. SINGLETARY, *supra* note 89, at 281.

103. Press Release, Children’s Hospital Boston, Ratings of Teen-Rated Video Games do not Always Fully Describe Content (Feb. 17, 2004), at [http://www.hms.harvard.edu/news/pressreleases/ch/0204video\\_games.html](http://www.hms.harvard.edu/news/pressreleases/ch/0204video_games.html) (last visited Nov. 6, 2004).

104. Press Release, Children’s Hospital Boston, Teen-Rated Video Games Loaded with Violence (Mar. 11, 2004), at <http://www.childrenshospital.org/cfapps/CHDeptPagePressDisplay.cfm?Dept=Press%20Room&PageNbr=82&ParentPage=1> (last visited Nov. 6, 2004).



### III. THE LASNIK FACTORS: A CRITIQUE OF "KEY CONSIDERATIONS" FOR FUTURE LEGISLATION

Although U.S. District Court Judge Robert S. Lasnik struck down Washington's violent video game law, his order in *Video Software Dealers Ass'n v. Maleng* makes it exceedingly clear that the judge is no fan of violent video games. For instance, he wrote that the games at issue in *Maleng* frequently involve "obnoxious" stories.<sup>105</sup> What's more, Judge Lasnik opined that many of the games "promote hateful stereotypes and portray levels of violence and degradation that are repulsive."<sup>106</sup> He specifically called the games *Grand Theft Auto III* and *Postal II* "filth."<sup>107</sup>

Perhaps it was the cognitive dissonance<sup>108</sup> of issuing an opinion protecting video games to which one personally objects that caused Judge Lasnik to articulate three "[k]ey considerations"<sup>109</sup> for future attempts to regulate violent video games. While he recognized that "the Court cannot give advisory opinions on cases or controversies not before it,"<sup>110</sup> Judge Lasnik nonetheless laid out the considerations in what appears, on its face, to be an effort to improve the odds of future laws being held constitutional. The three key considerations spelled out by the judge are whether:

- a regulation covers "only the type of depraved or extreme acts of violence that violate community norms and prompted the legislature to act";<sup>111</sup>
- a regulation prohibits "depictions of extreme violence against all innocent victims, regardless of their viewpoint or status";<sup>112</sup> and
- "social scientific studies support the legislative findings at issue."<sup>113</sup>

As described in substantial detail in Part II of this article, the chances of social scientific studies ever supporting legislation in this area are slim to none.<sup>114</sup> The third suggestion of Judge Lasnik thus is easily rendered nugatory, and more attention must be paid here to the first two of his trio of considerations. That is the task of the remainder of this part of the article.

#### A. The First Key Consideration

The first key consideration the judge proposes — whether a regulation covers "only the type of depraved or extreme acts of violence that violate community norms and prompted the legislature to act"<sup>115</sup> — is troublesome for two primary reasons. First, it is plagued by the use of the term "community norms." Why is this language problematic? Because community norms are completely irrelevant to the interests that underlie laws such as Washington's statute: curbing and curing "hostile and antisocial *behavior* in minors."<sup>116</sup> While "norms" may be relevant

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105. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1184.

106. *Id.* at 1188.

107. *Id.* at 1190.

108. See generally JAMES B. STIFF, *PERSUASIVE COMMUNICATION* 68-75 (1994) (discussing the theory of cognitive dissonance).

109. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1190.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Supra* notes 68-104 and accompanying text.

115. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1190.

116. *Id.* at 1187 (emphasis added).

for determining whether something is *offensive* to the tastes of people in a particular community, offensiveness is not the injury that video game laws seek to redress. That injury is *behavioral*—stopping, as Judge Lasnik himself put it, “real-life aggression in minors.”<sup>117</sup> Whether viewing an image causes an individual’s *behavior* simply is not the same as whether viewing an image causes benign offensiveness for a community.

Put differently, offensiveness is the type of harm that laws targeting sexually explicit speech like obscenity—not violent images—are designed to counter. This was a major point spelled out by Judge Richard Posner in the video-game regulation case of *American Amusement Machine Ass’n v. Kendrick*.<sup>118</sup> In striking down an Indianapolis, Indiana law that, like Washington’s statute, limited minors’ access to video games depicting certain images of violence,<sup>119</sup> Judge Posner wrote for a unanimous United States Court of Appeals for the Seventh Circuit that:

The main worry about obscenity, the main reason for its proscription, is not that it is harmful, which is the worry behind the Indianapolis ordinance, but that it is *offensive*. A work is classified as obscene not upon proof that it is likely to affect anyone’s *conduct*, but upon proof that it violates *community norms* regarding the permissible scope of depictions of sexual or sex-related activity.<sup>120</sup>

Judge Posner draws a clear distinction between physical conduct and mental offense, and it is only on the latter subject that community norms are relevant. Whether a message causes an actual behavioral change in an individual is not affected by the community norms of what constitutes either good or offensive taste. Judge Posner added that “[n]o proof that obscenity is harmful is required either to defend an obscenity statute against being invalidated on constitutional grounds or to uphold a prosecution for obscenity. Offensiveness is the offense.”<sup>121</sup>

In the State of Washington, of course, offensiveness is *not* the offense with which the legislature is concerned when it comes to video games. The alleged harms that motivate the statute are, in contrast, physical aggression and violence engaged in by video game players against others. As Judge Posner wrote in reference to the Indianapolis law, “[t]he basis of the ordinance, rather, is a belief that violent video games cause temporal harm by engendering aggressive attitudes and behavior, which might lead to violence.”<sup>122</sup> Whether consuming a message has such an effect is not a normative issue; it is not something that is related to community norms of likes and dislikes for certain images and messages. In a nutshell, then, Judge Lasnik’s suggestion that “community norms” should be a key consideration in determining whether future legislation targeting minors’ access to video games is off base. Norms would only be relevant on matters of *sensorial offensiveness*, not *physical aggressiveness*.

Lasnik, thus, is off course when he suggests to legislators in his order in *Maleng* that a regulation targeting video games might be constitutional if it targets only those games that “contain violent images, such as torture or bondage, that appeal

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117. *Id.* at 1189.

118. 244 F.3d 572 (7th Cir. 2001).

119. *Id.* at 573.

120. *Id.* at 574 (emphasis added).

121. *Id.* at 575.

122. *Id.*

to the *prurient interest* of minors.”<sup>123</sup> The term “prurient interest,” which is borrowed from the *Miller* test for obscenity,<sup>124</sup> embodies normative standards of offensiveness. In particular, it means sexual material that “appeals to a shameful or morbid interest in sex.”<sup>125</sup> These are value-laden concepts and what, in turn, is shameful or morbid is based on contemporary community norms under *Miller*.<sup>126</sup> As stressed above, however, concerns about restricting images of violence deal with psychological and behavioral harms to minors and others, not about offensiveness or matters of taste.

A second problem with the first key consideration articulated by Judge Lasnik is the use of the phrase “depraved or extreme acts of violence.”<sup>127</sup> While a legislative body might use such terms when drafting a proposed ordinance, it must also do something else that is not easily accomplished. Namely, it must define the words “depraved” and “extreme” with such particularity as to prevent a successful challenge based on grounds of vagueness.

The term “extreme,” in particular, suggests a matter of degree. In other words, there may be violence that is “minimal” or “moderate,” in contrast to that which is “extreme.” How is a reasonable person—a person of “ordinary intelligence”<sup>128</sup> under the void-for-vagueness test—supposed to know the difference between such subtle gradations? It would be no simple chore for any legislative body to adequately define such terms and, in particular, to define “extreme.” Is the extremeness determination to be based on the *quantity* of violent acts—if a particular number or amount of violent incidents occurs, then is the video game to be dubbed extremely violent?—or is it based on the *qualitative* nature of the acts? If it is a qualitative determination, then a laundry list of specific acts of violence must be described that contain the qualitative elements sought to be regulated.

Thus, it is modifying the word “violence” with the word “extreme” that actually compounds the vagueness problems. Not only is it difficult to find a suitable and workable definition of “violence,” but it also is a difficult endeavor to divine a solid definition of “extreme.” Using the phrase “extreme violence” thus exacerbates problems of concept explication.<sup>129</sup>

Importantly, the two federal appellate courts that have struck down or enjoined anti-access video game laws have not found it necessary to reach the vagueness issue, thus providing little help here to legislators grasping for better ways to define the terms in their bills. The United States Court of Appeals for the Eighth Circuit in *Interactive Digital Software Ass’n v. St. Louis County* held that “[b]ecause we have already determined that the ordinance cannot survive strict constitutional scrutiny, we do not reach the issue of whether the ordinance is unconstitutionally vague.”<sup>130</sup> The Seventh Circuit Court of Appeals’ decision in *American Amusement Machine Ass’n v. Kendrick* suggests that merely tracking language from the obscenity test created by the United States Supreme Court in *Miller v. Califor-*

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123. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d at 1190 (emphasis added).

124. *See supra* note 18 (setting forth the *Miller* test for obscenity).

125. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985).

126. *See supra* note 18 (setting forth the *Miller* test for obscenity).

127. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d at 1190.

128. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

129. *See generally* STEVEN H. CHAFFEE, COMMUNICATION CONCEPTS 1: EXPLICATION (1991) (describing the difficulties of explicating communication concepts).

130. 329 F.3d 954, 960 (8th Cir. 2003).

*nia*<sup>131</sup> will not solve vagueness issues because sex and violence are two different concepts and, concomitantly, definitions for one form of content are not appropriate for another form of content.<sup>132</sup> There are no suggestions given in *Kendrick* by Judge Posner for eliminating vagueness issues.

### B. The Second Key Consideration

The second key consideration identified by Judge Lasnik is whether a regulation prohibits “depictions of extreme violence against all innocent victims, regardless of their viewpoint or status.”<sup>133</sup> This suggestion seems very wise to the extent that it cautions legislative bodies against enacting viewpoint-based laws on violence. Viewpoint-based discrimination has been described by the United States Supreme Court as “an egregious form of content discrimination,”<sup>134</sup> and the late Justice William Brennan once remarked that “[v]iewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of ‘free speech.’”<sup>135</sup> As former Stanford Law School Dean Kathleen M. Sullivan and the late professor Gerald Gunther have written, “[t]he Court generally treats restriction of the expression of a particular point of view as the paradigm violation of the First Amendment.”<sup>136</sup>

The irony of Lasnik’s suggestion, however, is that it actually appears to embrace and embody viewpoint-based discrimination. In particular, Lasnik suggests that a regulation should “prohibit depictions of extreme violence against all *innocent victims*, regardless of their viewpoint or status.”<sup>137</sup> The use of the phrase “innocent victims” suggests, by implication, that depictions of extreme violence committed against all “guilty” or “deserving” individuals—apparently, criminals or the proverbial bad guys—would be permissible. Parsed differently and more bluntly, a regulation would be viewpoint-based if it allowed the sale or rental to minors of video games depicting extreme violence against *guilty* individuals but not against *innocent* individuals.

For example, consider a hypothetical regulation that prohibits the sale or rental to minors of video games depicting violence against George W. Bush but that allows for the sale or rental of video games depicting violence against “the evil doers,”<sup>138</sup> as Bush might put it. This would be viewpoint based and patently unconstitutional. From a constitutional perspective, then, there should not be any differences made in a statute about who is the target of violence depicted in video games.

131. 413 U.S. 15, 29 (1973); see *supra* note 18 (setting forth the *Miller* test for obscenity).

132. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 574-75 (7th Cir. 2001).

133. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1190 (W.D. Wash. 2004) (No. C03-1245L).

134. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

135. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

136. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 212 (2d ed. 2003).

137. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d at 1190 (emphasis added).

138. This term was used by George W. Bush to describe those who committed the terrorist attacks on the United States on September 11, 2001. See John F. Harris, *Bush Gets More International Support For U.S. ‘Crusade’ Against Terrorism*, WASH. POST, Sept. 17, 2001, at A01 (quoting President George W. Bush for the proposition that “we will rid the world of the evil-doers”), available at 2001 WL 27733021.

Furthermore, how is one to distinguish an “innocent” victim from a “deserving” victim? Innocence and guilt, in the fantasy world of a video game, are subjective and slippery concepts that best are left to the eyes of the beholder or, in this case, the player. There is, in other words, no clear fenceline that separates the good guys from the bad guys.<sup>139</sup>

In summary, Judge Lasnik’s efforts to guide future legislative initiatives, while well intended, do not necessarily provide the type of sound judicial advice that will improve the chances of such measures being upheld if challenged by members of the video game industry.

#### IV. MISSING THE MARK ABOUT IMAGES OF VIOLENCE IN THE MEDIA: THE IRONY OF OUR OBSESSION WITH REGULATING FAKE IMAGES

While legislators seem compulsively concerned with preventing minors from viewing fake and fantasy images of violence on video games, they seem oblivious to the fact that images of real violence are bombarding children on a daily basis. No effort is being made by the government to shield children from such images, despite the real-life problems that they may cause. The *San Francisco Chronicle* reported in May 2004 that “[a]s increasingly gruesome images emerge from the war in Iraq—from charred bodies strung from a bridge in Fallujah to abused Iraqi prisoners to [Nicholas] Berg’s beheading—teachers and parents are struggling with how much to tell children.”<sup>140</sup>

It seems odd, in light of the fervor that lawmakers exhibit toward video games, that the battle cry against images of real violence in the media is far more faint—if it exists at all. In fact, the violent videotape that is beamed across the nation’s television screens each day from foreign battlefields,<sup>141</sup> unstable borders,<sup>142</sup> real and makeshift prisons,<sup>143</sup> and other holes of captivity<sup>144</sup> is not just unregulated, it is not even subject to the *voluntary* ratings system in place for televised entertainment programs.<sup>145</sup> News programming remains exempt from the ratings process, no matter how gory or grotesque the images may be.<sup>146</sup>

Even if news programs were rated, however, it is uncertain whether those ratings would be used by parents. The so-called v-chip technology has existed in

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139. Cf. *A Few Good Men* (Columbia Pictures 1992) (describing a fenceline as a “big wall separating the good guys from the bad guys”).

140. Heather Knight, *The Impact of Grisly Images on Children in Bay Area*, S.F. CHRON., May 16, 2004, at A1.

141. See generally Brad Smith & Walter Belcher, *Violent Images Spur Debate on Coverage, Effect on Politics*, TAMPA TRIB., Apr. 1, 2004, at 4 (discussing the impact of the attack on American soldiers in Fallujah), available at 2004 WL 58709749.

142. See generally Joseph Berger, *Israelis Shoot 4 Palestinians Said to Have Set Bomb by Road*, N.Y. TIMES, July 31, 2004, at A3 (describing how the four Palestinians were caught “trying to plant a bomb along a Gaza road near the Israeli border fence”), available at Proquest 671776781.

143. See Davis, *supra* note 24, at 4A.

144. See generally Matthew B. Stannard, *Beheading Seen as War Tactic: Experts Say Terrorists Employing Grisly Form of Propaganda*, S.F. CHRON., May 13, 2004, at A1 (discussing the video of Nick Berg being decapitated while being held captive in Iraq), available at Proquest 636218491.

145. See TV Ratings, Federal Communications Commission at <http://www.fcc.gov/parents/tvratings.html> (last visited Nov. 5, 2004).

146. *Id.*

television sets manufactured since January 1, 2000, to block out disturbing entertainment programs, but according to recent news commentary, "almost nobody uses it."<sup>147</sup>

The current full-scale effort in several states and in Congress to cut off the access of minors to violent video games thus seems disingenuous, given the relative nonchalance of lawmakers to the mass exposure to violence in other media. That point has not gone unnoticed by courts considering the constitutional validity of these laws.

From a legal perspective, one of the difficulties courts have encountered with legislative attempts to curtail children's access to violent video games is that most of these measures suffer from *under-inclusiveness*.<sup>148</sup> Judge Lasnik made this point with the Washington statute, writing: "the Act is too narrow in that it will have no effect on the *many other channels* through which violent representations are presented to children."<sup>149</sup>

Clearly today, with frequent pictorial images from war-torn Iraq,<sup>150</sup> along with beheadings by terrorist organizations,<sup>151</sup> the computer-generated images that are found in even the most violent video games cannot measure up to the real-life brutality that passes, without warning, across television screens and in the printed media on a daily basis. In fact, the pictures have become so intense in recent months that pediatricians are now warning parents that "real-life news bulletin violence may be damaging to children under age eight."<sup>152</sup> Medical experts are encouraging parents to "consider curbing their children's viewing of news as the use of brutal imagery has increased since the September 11 terrorist attacks and the war in Iraq."<sup>153</sup>

The pictures are relentless and numbing, and the potential impact of the exposure is immeasurable. As Karen Hunter, reader representative for the *Hartford Courant*, explained, "[j]ust as the jolt from one repulsive act begins to subside, another horrid scene is beamed in."<sup>154</sup> A major difference between violent video games, which may be played sporadically, and graphic images of wartime violence is that "with television's endless news shows, newspapers in living color, the Internet, magazines and talk radio, the war is on 24-7."<sup>155</sup>

The news media are grappling with the issue of just how much gruesome, war-related violence is too much. As MSNBC news anchor Keith Olbermann

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147. Mike Himowitz, *Parents Make True Decisions on Filtering What Kids See*, BALT. SUN, July 1, 2004, at 1D (noting that "controlling youngsters' exposure to sex and violence obviously is not important enough for most parents to spend even the minimal time it takes to punch a few buttons on the remote control").

148. See, e.g., *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1189 (W.D. Wash. 2004); see *supra* text accompanying note 13.

149. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1189 (emphasis added).

150. See, e.g., Smith & Belcher, *supra* note 141, at 4.

151. See, e.g., Curtius & Miller, *supra* note 25, at A1.

152. *Danger in TV News*, SUNDAY TELEGRAPH (New S. Wales, Austl.), July 4, 2004, at 19 (discussing a recent study published in the *Pediatrics Journal* suggesting "that violent images shown on news may make children unnecessarily anxious") (on file with authors).

153. *Id.*

154. Karen Hunter, *Shock and Awe, 24-7; Scenes from the Occupation*, HARTFORD COURANT, May 16, 2004, at C3 (noting that "America can't help but witness this war"), available at 2004 WL 79446261.

155. *Id.*

recently noted, “[t]his story 100 percent needs to be told. But how much needs to be shown without having genuinely disgusting things forced down [viewers’] throats?”<sup>156</sup> The balance between reporting the news accurately and portraying sensational images is a delicate one. As ABC News *Nightline* executive producer Leroy Sievers told that show’s audience, “if we try to avoid showing pictures of bodies, if we make it too clean, then maybe we make it too easy to go to war again.”<sup>157</sup> When the “horrificing images of dead Americans” got too intense, CBS news anchor Dan Rather warned the audience “that the images weren’t appropriate for children.”<sup>158</sup>

Parents, of course, are in the best position to assess just what media images their children can view and, conversely, what should be screened from them. With the protracted coverage, “[p]arents of children of all ages are coping in their own way with the violence that stares out from every television screen and newspaper box documenting events in Iraq.”<sup>159</sup> They are uniquely positioned to understand their children’s sensibilities and act accordingly.

The one piece missing—and deliberately so—from this effort on the part of both news executives and parents to handle the visuals related to war and terrorism is government involvement. As noted above,<sup>160</sup> news programs do not carry ratings or warnings to parents—outside of the occasional anchor-voiced admonition—as to the age-appropriateness of the report. Moreover, there is no legislative initiative designed to require broadcasters or the printed press to tone down reports or caution audience members as to the content. Any such effort undoubtedly would be stopped cold by the First Amendment—as have the measures controlling access to computer and video games to date.<sup>161</sup>

The irony appears lost on the lawmakers who insist on introducing bills that substitute the government’s power for—or impose their own judgment on—parental authority. Running throughout all of the legislative efforts to curb minors’ access to video games is the belief—indeed, the stated interest—that children’s exposure to violence, no matter how cartoonish, is detrimental to their psychological well-being and development and results in an aggressive nature that may prove harmful to themselves or others. Yet, these self-styled protectors of children are silent with respect to the barrage of violent images reaching young eyes through the news on a daily basis.

Instead, the government recognizes, with respect to news coverage, that parents are best fit to determine the appropriateness of their children’s exposure to real-life violence. Inexplicably, that same approach does not carry over into fictional, computer-generated violence.

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156. David Folkenflik, *Showing Horrors of War: Editors Back Away from Worst Images*, BALT. SUN, Apr. 2, 2004, at 1C (describing the decision-making process of editors and news producers when the story is particularly violent) (alteration in original), available at 2004 WL 72801107.

157. James Gerstenzang & Elizabeth Jensen, *Media Are Torn Over the Images*, L.A. TIMES, Apr. 1, 2004, at A1 (describing how “broadcasters and news executives were torn between a question of taste and the demand to give viewers and readers information that could affect the course of history”), available at 2004 WL 55903480.

158. Folkenflik, *supra* note 156.

159. Anne Sutherland, *Graphic Images in the News Cause Dilemma for Parents: Fear Iraq Photos Could Traumatize Kids*, GAZETTE (Montreal, Que.), May 14, 2004, at A8.

160. See *supra* notes 148-57 and accompanying text.

161. See sources cited *supra* note 4.

Ironically, the governmental control that does exist with respect to Iraqi war pictures consists primarily of a Pentagon restriction on photographing the caskets of military personnel. The ban, which has been in effect since 1991, was implemented *not* out of concern for children seeing these non-violent, though disturbing, images, but instead came about when former President George H. W. Bush reportedly ordered it “after a television network aired split-screen images showing Bush golfing while caskets were arriving at the [Dover Air Force Base].”<sup>162</sup>

The issue came to a head in April 2004 when the military “mistakenly released photographs to an activist who posted them on a website.”<sup>163</sup> The incident was triggered when the United States Air Force granted—much to the government’s chagrin—the Freedom of Information Act<sup>164</sup> (FOIA) request of Russ Kick for “all photographs taken after February 2003 of caskets containing the remains of U.S. military personnel at Dover Air Force Base in Delaware.”<sup>165</sup> Kick displayed them for the world to see on his own website, The Memory Hole.<sup>166</sup> *The Seattle Times* and other news organizations ran stories with the accompanying visuals of military caskets.<sup>167</sup>

The ban on news photographs of flag-draped caskets, which continues today, serves the political purpose of shifting the public’s attention away from the casualties of war and enables the administration in power to push forth its own agenda of military strength.

## V. CONCLUSION

In March 2004, the president of the American Amusement Machine Association,<sup>168</sup> Michael R. Rudowicz, remarked that when it comes to controlling minors’ access to video games, the “introduction of bills seems almost automatic each year”<sup>169</sup> in some states. Why is such habituality the case, especially when deci-

162. Erin Kelly, *U.S., War of Images is Part of Battle in Iraq*, GANNETT NEWS SERV. (Washington), Nov. 27, 2003 (noting that “although the ban is not new, [current President] Bush has been criticized for failing to lift it or to attend funerals for fallen soldiers”).

163. *End Coffin Photo Ban*, HARTFORD COURANT, June 24, 2004, at A12 (editorializing that “[t]here’s no good reason to block news photographers from taking pictures of flag-draped coffins arriving at Dover Air Force Base in Delaware”).

164. 5 U.S.C. § 552 (2002), available at 2004 WL 82654075.

165. Lynn Smith, *‘Coffins’ and Now Chaos; Unlikely Provocateur Russ Kick Ignites Controversy with Photos of U.S. Military Dead*, L.A. TIMES, Apr. 26, 2004, at E1, available at 2004 WL 55908884.

166. The Memory Hole website at <http://www.thememoryhole.org> (last visited Oct. 19, 2004).

167. Ray Rivera, *Images of War Dead a Sensitive Subject*, SEATTLE TIMES, Apr. 22, 2004, at A22 (explaining how “Americans have long struggled with the morality of showing images of war dead, especially fellow Americans”).

168. This organization describes itself on its website as:

an international non-profit trade organization representing the manufacturers, distributors and part suppliers of the coin-operated amusement industry. AAMA was founded in 1981 by a small group of amusement coin-operated machine manufacturers concerned with the future of their industry. A Board of Directors, selected by its members, governs the AAMA. Committees work with the Association staff to develop programs to promote and protect the industry. Members donate their time, effort and expertise on a voluntary basis.

About the AAMA, at <http://www.coin-op.org/AboutAAMA.htm> (last visited Oct. 19, 2004).

169. *More States Enter Legal Row Over Video Violence*, AB UK, Mar. 2004, at 8.



sions like Judge Lasnik's opinion are the common judicial response to such measures once enacted?

The nature of the political process may go a long way in answering that question. Professor Kenneth L. Karst observed in a recent law journal article that "in the culture clashes of the last generation, political strategists have mobilized constituencies by sounding an emotion-laden theme: the use of regulatory law to influence the socialization of children."<sup>170</sup> Karst's thesis clearly provides an appropriate framework for understanding the repeated proposal and enactment by politicians of regulatory laws targeting video games that are designed to influence the socialization of children by shielding them from graphic images of violence. Politicians like Washington's Mary Lou Dickerson, the woman behind the statute struck down by Judge Lasnik in July 2004,<sup>171</sup> certainly play and pander to the "emotion-laden theme"<sup>172</sup> of such regulations that Karst describes. For instance, Dickerson told a journalist in June 2004 that "ultraviolent video games are *bad news for kids*."<sup>173</sup> She has ramped up the emotional rhetoric and hyperbole in the past as well, calling video games "more dangerous than other forms of media"<sup>174</sup> and contending, with full bombastic flair, that "the courts will decide the sickening level of violence, brutality and racism being peddled for profit to children cannot be wrapped in our precious First Amendment."<sup>175</sup> Similarly, U.S. Rep. Joe Baca, the man behind the federal bill targeting video games that was described earlier in this article,<sup>176</sup> sounds an emotion-laden theme when he states in a press release that children "play these games repeatedly and the repetition is *brainwashing*."<sup>177</sup>

Despite the fact that future video game legislation is destined for failure if and when it is challenged in court, its propagation and promulgation will persist. Why? In a word, the answer is politics.<sup>178</sup> As Professor Karst writes, "[w]hen political

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170. Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CALIF. L. REV. 967, 969 (2003).

171. See Richman, *supra* note 40, at C1 (describing "law's sponsor" as "Rep. Mary Lou Dickerson, D-Seattle").

172. Karst, *supra* note 170, at 969.

173. John Cook, *Court Duel on Video Violence: Is State's New Law Constitutional? Judge Must Decide*, SEATTLE POST-INTELLIGENCER, June 25, 2004, at C1, available at 2004 WL 60143265 (emphasis added).

174. Kevin Blocker, *Violent Games Draw Attention of Lawmakers*, SPOKESMAN REV. (Spokane, WA), Nov. 14, 2003, at B1.

175. Ian Ith, *Judge Blocks Law Restricting Sale of Violent Video Games*, SEATTLE TIMES, July 11, 2003, at B1, available at 2003 WL 3641389.

176. See *supra* notes 73-75 and accompanying text.

177. News Release, U.S. Rep. Joe Baca, Baca Says Video Game Industry Self Regulation Isn't Working; Too Many Children Still Being Harmed, (Oct. 15, 2003) (emphasis added) available at [http://www.house.gov/baca/latestnews/release101503\\_2.htm](http://www.house.gov/baca/latestnews/release101503_2.htm) (last visited Oct. 19, 2004).

178. It is interesting to note that several entertainers astutely recognize and are keenly aware that the censorship today of media content that targets children is driven by politics and, more specifically, the politics of fear. For instance, Eminem sings that "It's all political, if my music is literal, and I'm a criminal how the fuck can I raise a little girl? I couldn't. I wouldn't be fit to." Eminem, *Sing for the Moment*, on THE EMINEM SHOW (Interscope Records 2002), available at [http://www.eminem.com/tracklisting\\_eminemshow.html](http://www.eminem.com/tracklisting_eminemshow.html). In Michael Moore's Academy Award-winning documentary, *Bowling for Columbine*, singer Marilyn Manson describes himself as "the poster boy for fear because I represent what everyone's afraid of because I do and say what I want." BOWLING FOR COLUMBINE (Dog Eat Dog Films Production 2002). The soundclip of Manson's interview with Michael Moore in the movie is available online at <http://www.michaelmoore.com/books-films/bowlingforcolumbine/media/clips/index.php> (last visited

operatives evoke fear about the socialization of children, their central purpose is to mobilize cultural constituencies. Once fears are aroused, a candidate can promise to save the children by using the socialization process, and on this basis seek constituents' support."<sup>179</sup> Karst notes that the socialization process to which he refers "prominently includes the messages of television, movies, videos, popular music, Internet chatter, and *video games*."<sup>180</sup>

Dickerson, Baca and their ilk are nothing more than peddlers of fear, promising to, as Karst put it, "save the children" as they mobilize constituencies that support their re-election bids. Children are merely used as a tool in cultural politics. As Marjorie Heins, the director of the Free Expression Policy Project recently wrote in a law journal article, "[c]oncerns about sex and violence in the media, and their possible ill effects on young people, continue to drive our cultural politics."<sup>181</sup>

The authors of this article thus call upon legislators to cease the production of legislation designed to limit minors' access to video games depicting graphic violence. It is the responsibility of parents and guardians, not the government, to protect children from harms, be they real or imagined, that may—and "may" clearly is a more accurate descriptor than the alternative word "are"—be caused by playing this increasingly popular form of entertainment. As Part IV has suggested, legislative focus is better placed on the impact of viewing real-life images of violence—an ever-present part of a post-September 11, 2001 America. There are, in other words, more important things to worry about than video games.

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Oct. 19, 2004). Although *Bowling for Columbine* has been criticized for a number of important inaccuracies, the documentary accurately reflects Manson's words—there is no indication that the soundclip has been altered. See Michael Gove, *Aren't Facts Boring Little Things That Get in Truth's Way?*, THE TIMES (London), May 25, 2004, at Features 18 (describing factual errors in *Bowling for Columbine*).

179. Karst, *supra* note 170, at 971.

180. *Id.* at 1003 (emphasis added).

181. Heins, *supra* note 95, at 229.

