

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/247837680>

# Exposure of Violent Video Games to Children and Public Policy Implications

Article in *Journal of Public Policy & Marketing* · May 2008

DOI: 10.1509/jppm.27.1.107

---

CITATIONS

14

---

READS

1,191

3 authors, including:



**Joel Collier**

Mississippi State University

49 PUBLICATIONS 3,490 CITATIONS

SEE PROFILE

# Exposure of Violent Video Games to Children and Public Policy Implications

Joel E. Collier, Pearson Liddell Jr., and Gloria J. Liddell

*As the popularity of violent video games increases, many concerned parents and legislators are trying to legally restrict the purchase or rental of these adult-oriented games from minors. Numerous states have tried to enact violent video game legislation, but all such laws have been overturned by the courts as a violation of First Amendment rights. This essay discusses why both state and local governments have been wholly unsuccessful in restricting minors' access to violent video games and the strict scrutiny requirements that must be met to limit a person's First Amendment rights. Finally, this essay provides recommendations for areas that must be specifically addressed to legally restrict minors' access to these adult-oriented games.*

*Keywords:* video games, violence, children, First Amendment, social responsibility

The computer and video game industry has slowly become a giant in the consumer retail sector, with a market value that now exceeds both the film and the music industries. Currently, the market value of the video gaming industry is more than \$25 billion, and estimates predict an increase to \$54.6 billion by 2009 (Farrand et al. 2006). Long gone are the days of home-brewed games developed by two industrious teenagers in a darkened garage. Gone is the simplicity of *Pong* and *Pac-Man*. Development teams on premier video games may now easily have more than 100 people working on them. Video games have original scores, detailed artwork, directors, producers, and story lines that rival many movies. As evidenced by the video game *Laura Croft: Tomb Raider*, movies are now being based on video games, just as games have long been based on movies. This indicates a dramatic change in the perception of video games in the entertainment industry.

In addition, the demographics of gamers are quickly evolving. The Entertainment Software Association (ESA; 2006) states that more adults between the ages of 18 and 49 are playing video games than adolescents. The popularity of games oriented toward this more mature demographic has skyrocketed. In turn, these games now may include extensive violence, nudity, and drug use. In 2006, *Billboard* magazine noted that five of the top ten video game rentals for the month of July were games oriented toward mature gamers.

---

Joel E. Collier is Assistant Professor of Marketing (e-mail: jcollier@cobilan.msstate.edu), Pearson Liddell Jr. is Associate Professor of Business Law (e-mail: pliddell@cobilan.msstate.edu), and Gloria J. Liddell is Assistant Professor of Business Law (e-mail: gliddell@cobilan.msstate.edu), Department of Marketing, Quantitative Analysis, and Business Law, College of Business and Industry, Mississippi State University. The authors acknowledge the contribution and insight of Joshua N. Liddell.

---

The increase in the popularity of mature games and their availability to children through sources that include Internet retailers have brought scrutiny from parents and legislators about the content of these games and their appropriateness for children. The video game *Grand Theft Auto III*, which rewards players for stealing cars, killing innocent bystanders, and murdering prostitutes (after having sex with them), is a prime example of the type of game that has provoked concern. The mature nature of such games has many people asking whether the video game industry is acting responsibly to protect children from being exposed to this type of graphic content. A Federal Trade Commission (2004) study found that 69% of 13- and 16-year-olds who were unaccompanied by a parent were allowed to purchase a mature game intended for people ages 17 and older.

Not only has the exposure of children to adult-oriented content in video games concerned parents, but it has also caused governments to question whether the sale or rental of these games to minors should be restricted. A wave of legislation on both the state and the federal level has been designed to address these concerns. However, to date, every law that has been passed to restrict minors' access to violent video games has been overturned in the appeals courts as an unconstitutional violation of the First Amendment. This essay discusses how and why these attempts by state legislators have failed in restricting the sale of violent video games and why the courts have found these laws unconstitutional. The essay also outlines future measures that can be used to limit the access of adult-oriented games to minors.

## Legislating the Video Game Industry

Numerous bills over the past five years have tried to regulate the sale or rental of video games with "mature" or "adults-only" ratings. The ESA is tracking more than 60 proposed bills nationwide aimed at limiting access to games oriented toward a mature audience (Sweeting 2005). In every case in which a state has approved into law a bill that would restrict video game access to minors, a court has

issued an injunction halting the enforcement of the law, finding it unconstitutional and in violation of First Amendment rights. Examples of these state laws that have been overturned are H.B. 1381 (Louisiana), S.F. 785 (Minnesota), H.B. 3004 (Oklahoma), H.B. 4023 (Illinois), and A.B. 1179 (California). Other states that have had violent video game laws overturned include Michigan, Missouri, Indiana, and Washington. For a detailed description of these violent video game laws and recently proposed legislation, see the Appendix.

With the increased number of states trying to restrict access to violent video games, the ESA has begun to petition for legal fees when the law is found unconstitutional. Recently, the court awarded ESA more than \$500,000 in legal fees against Illinois in an action in which a violent video game law was found unconstitutional. In addition, the court ordered Louisiana to pay the ESA more than \$90,000 in such fees, and Michigan was ordered to pay the ESA \$180,000 in legal fees. Over the past five years, the ESA has recovered more than \$1.5 million in legal fees from states trying to regulate the video game industry.

The ESA is sending the message that any more attempts to restrict the access of video games to minors will be challenged and may result in assessments of legal fees against the states. Thus, efforts to enact such legislation are being met “head on,” both substantively and with potential financial consequences. Doug Lowenstein, president of the ESA, emphasized the organization’s confidence in defending against attempts to legislate the sale or rental of video games by stating, “We can use things like the American Constitution’s guarantee of free speech as a shield to legitimize virtually any content. Indeed, the very essence of art is that it has no boundaries” (Davidson 2005, p. 19).

## The Court Test: Strict Scrutiny

Attempts by the government to regulate the content of speech as opposed to the conduct of parties must meet the requirements of the strict scrutiny test. The strict scrutiny test is a two-pronged test. First, there must be a compelling reason for the government action that is proposed by the law; second, the government must take no more action than is reasonably necessary to remedy the speech content (*R.A.V. v. City of St. Paul* 1992, pp. 395–96). Thus far, legislation to regulate violent video games has not survived either test. The government has not been able to show a compelling reason for its action, and the remedies proposed have been held to be unreasonably restrictive under the circumstances.

In this regard, legislation to regulate the violent content of video games has been unsuccessful because of three critical shortcomings. First, the legislation has attempted to equate violent content with sexually obscene content. Second, the legislation has failed to establish sufficiently a causal nexus between violent video games and harm to children in terms of antisocial or criminal behavior. Third, states have failed to provide remedies that are narrowly tailored to be the least restrictive means for achieving their compelling interests.

With respect to the first critical shortcoming of the states equating violent content with sexually obscene content, the

U.S. Supreme Court has long recognized that there is a difference between obscene and violent speech content (*Winters v. New York* 1948, pp. 518–20). Despite a long-standing recognition of this dichotomy, legislatures continue to attempt to legally equate the two in order to use the historically valid regulation of obscenity as a pretext for regulating violence. An example of such pretext is the Indianapolis ordinance passed in 2000 that was designed to limit minors’ access to violent video games in which the city put violent activity in the same ordinance as obscene activity and tried to regulate them as one (*American Amusement Machine Association v. Kendrick* 2001). Despite these efforts, governmental attempts to regulate violence as obscenity have failed on a consistent basis.

The standard by which speech is judged to be offensive is that it must violate community norms (*Miller v. California* 1973, p. 24), and video games must be judged by this same standard to be considered obscene. A problem to be confronted by legislatures is that some of the best works of literature, such as *War and Peace*, *Frankenstein*, *Dracula*, *The Odyssey*, and *The Divine Comedy*, all include descriptions of extremely bloody, gory, and violent scenes. No state legislature has been compelled to require adult supervision while children read these stories (*American Amusement Machine Association v. Kendrick* 2001, p. 577). In the Illinois case of *Entertainment Software Association v. Blagojevich* (2006), the court based its ruling of unconstitutionality on the premise that a game was following the story line of the *Odyssey*.

Some states have tried to counter the free speech argument with the counterargument that the statutes are targeting the conduct of the video vendors rather than the content of the video themselves, much like the alcohol and tobacco statutes. However, in case after case, the courts have disagreed with the conduct regulation claim, holding that the laws may unduly regulate the artistic expression in the video games (*American Amusement Machine Association v. Kendrick* 2001, p. 574; *Interactive Digital Software Association v. St. Louis* 2003, p. 958).

The second critical shortcoming in state and federal legislative efforts is the lack of a proven correlation between violent video games and substantive psychological “harm” caused to children. Opponents of violent video games have argued that the mere fact that video games have age ratings indicates that some games have the potential for harm to children. Furthermore, numerous countries outside the United States, including Australia, Germany, Poland, the United Kingdom, Greece, and South Korea, have banned violent video games for the potential harm they may cause. For example, in Argentina, all video games must have the warning label that reads “Overexposure is harmful to health” posted on the packaging.

People who seek increased regulation of violent video games also claim that these games have a cultivation effect on children. The idea is based on Gerbner’s (1969) cultivation theory that media exposure over time can incrementally change a person’s perception of reality. This theory was used by some to explain the school shooting at Columbine High School in Jefferson County, Colo. It was widely reported that the two students who perpetrated the Columbine High School killings were avid players of the

violent video game *Doom*. Recently, Van Mierlo and Van den Bulck (2004) found empirical support for video games having a cultivation effect on children. Their research shows that as children spend more time playing video games, their perception of the number of policemen and the prevalence of violent crime begins to alter.

Arguments in support of the theory that violent video games cause harm to children have arisen from Grossman's (1996) book titled *On Killing*, which details how the military trains soldiers through the use of video games to kill more efficiently. He states that humans possess a reluctance to kill another human being but that this reluctance can be systematically broken down through conditioning techniques. In a follow-up book titled *Stop Teaching Our Kids to Kill*, Grossman (2001) states that violent video games are teaching children to use weapons and hardening them emotionally to the idea of murder. Although not based on critical research, Grossman's work indicates that there may be a link worthy of further analysis between violence and anti-social behavior.

Conversely, some researchers claim that violent video games can actually help children rather than harm them. In the book *Killing Monsters: Why Children Need Fantasy, Super Heroes, and Make Believe Violence*, Jones (2002) argues that violent video games provide a safe fantasy world in which children can learn to control the emotions of anger, violence, and sexuality. He further states that children know the difference between fiction and reality and that parents need to realize that violent video games do not have the same meaning to children as adults. Supporters of the ESA and the video game industry state that millions of gamers play violent video games, and only an extremely small percentage of violent acts can be tied to video games. In essence, they argue that these violent acts correlate more to the mental states of these individuals than to their exposure to mature video games.

To date, the courts have not been persuaded by evidence attempting to establish that video games cause harm to children. Although it seems intuitive to many that violent video games cause some kind of psychological damage to children, the courts will (wisely) not entertain conjecture, supposition, or anecdotal evidence when dealing with free speech concerns (*United States v. Playboy Entertainment Group Inc.* 2000, p. 822). The courts have stated that legislation must demonstrate that the harm is real, not merely conjectural, and that the regulation will alleviate these harms in a direct and material way (*Turner Broadcasting System Inc. v. FCC* 1994).

Although state and local governments have thus far lost these cases (either at the trial or at the appellate court level), the concept of violent video games causing harm to minors is not bereft of viability. None of the courts have ruled out the idea that children can be damaged by exposure to these games. Rather, these courts have expressed a reluctance to validate legislative efforts to condemn them absent conclusive research by the scientific community that condemnation would be the appropriate remedy.

The third critical shortcoming for states is that the current legislation to restrict access to violent video games has not been narrowly tailored to be the least restrictive means for achieving the compelling interests of the state, thus falling

short of the second prong of the strict scrutiny test. A reason state legislation has failed in restricting violent video game access is because of its unconstitutionally vague wording (*Video Software Dealers Association v. Maleng* 2004).

The state of Washington tried to enact H.B. 1009, which would regulate the sale of all games that portray violent acts toward law enforcement officers, both intentional and unintentional. The courts found that this was far more restrictive than necessary. Even racing games rated as acceptable for children under the age of 10 would require anyone purchasing these items to be 18 years of age or older. In addition, the court found this to be too restrictive because retailers would need to know the exact content of every game in their inventory to effectively prevent access of inappropriate games to minors. Similarly, an Illinois bill (H.B. 4023) wanted to restrict access to all video games that had human-on-human violence. Because of its vague wording, this bill would restrict even many popular sports games, such as hockey and football. Furthermore, the bill did not account for violence against fictitious extraterrestrial beings, who account for a large portion of the victims in violent video games. As with H.B. 1009, the court found this legislation to be too broadly tailored and too restrictive to achieve its goal.

Although it is true that video game producers have had numerous successes in their efforts to forestall the implementation of these laws, the video game industry is still vulnerable. The video game industry remains exposed on at least two fronts: (1) review of these laws by the U.S. Supreme Court and (2) future widely accepted research that links video game use to criminal or antisocial behavior of minors. To date, the U.S. Supreme Court has not been faced with a case of this nature. Therefore, it is not inconceivable that the Supreme Court may hold that the nature and sufficiency of the evidence presented in *Entertainment Software Association v. Blagojevich* (2005), or a case similar to it, is indeed adequate to support a finding of violent video games being harmful to children.

If we consider some historical First Amendment cases, it is apparent how the Supreme Court has viewed legislative efforts to regulate activities that have a potential negative impact on minors. For example, in *FCC v. Pacific Foundation* (1978), the Court held that the Federal Communications Commission could sanction the airing of a monologue with the "F" word without proof of harm to children. The same result was had in *Ginsberg v. New York* (1968); in upholding a statute preventing the sale of sexually oriented magazines to minors, the Court held that the state has a duty to work with parents to protect the welfare of children. Furthermore, in *Ginsberg*, the Court held that though there was no scientific consensus that sexually oriented magazines harmed children, there was also no consensus that they did not, and the Court would not require a scientific certainty before it would allow the state to prohibit such activity. Thus, based on the reasoning applied in these areas, there may be a precedential basis for a finding against the video game industry in many cases. It is certainly plausible that the same reasoning applied in these cases would avail in the case of violent video games with the courts considering not so much the existence of scientific evidence to prove harm

but rather the lack of evidence to prove that harm would not result.

## Recommendations

The numerous legislative efforts that have recently been put forth to restrict minors' access to violent video games are eerily similar to Albert Einstein's definition of insanity: doing the same thing over and over and expecting a different result. Several states have introduced the same legislation with the same vague wording as other legislative efforts that have been deemed unconstitutional in the courts of appeals. These efforts have been totally unsuccessful and have resulted in the states expending large sums of money in legal fees awarded to the ESA. If states are going to legislate the sale of violent video games, empirical research must be produced showing that these games are "harmful" to children. The correlation of violent video games to harm of children must be definitively demonstrated to satisfy the requirements of the first prong of the strict scrutiny test. To date, there is an insufficient amount of evidence to show that violence depicted in video games has any more influence on children than the violence represented in any of the other print or media violence that children are exposed to on a daily basis. Until researchers can specifically state that certain types of violent acts in video games are harmful to children, the courts will presumably take no compelling interest in restricting violent video games from minors.

Subsequently, legislators need to consider alternative methods of keeping violent video games out of the hands of children. A more fruitful option may be to legislate the age ratings of these games (Chapman 2005). Age ratings are

currently given out by the Entertainment Software Ratings Board (ESRB), which is a self-governing body of the ESA. There are six category ratings given to video games: EC (early childhood), E (Everyone), E10+ (Everyone 10+), T (Teen; 13+), M (Mature; 17+), and AO (Adults Only). Since the ESRB's inception in 1994, fewer than 30 games have been given an "adults-only" rating. This category has historically been reserved for strong sexual content in game play. The major retail stores, such as Wal-Mart, Target, Best Buy, and Circuit City, refuse to carry video games with this age rating. Because of the financial hardships that go along with this rating, many watchdog groups claim that this category is rarely used for violence (*ABC Ahead of the Curve* 2006). A more appropriate action might be to legislate the ratings of these ultraviolent video games as an adults-only rating, thus letting the retailers voluntarily remove these titles. With this option, the accessibility of these types of games to minors would be severely limited, and adults might reconsider transporting children to a specific outlet to buy an adult-oriented video game. Furthermore, the government regulation would be limited only to games (speech) that the government has a compelling interest in regulating. A special state board could determine the type and level of violence for the adults-only category.

We hope that this essay furthers discussion about this important topic and the potential dangers of exposing children to adult-oriented content. It is clear that violent video games are a growing concern with not only parents but also state governments. The ongoing war over violent video games and children's access to these titles is far from over, but the ESA has resoundingly won the first battle.

---

### Appendix. Violent Video Game Legislation

---

Proposed Legislation	Origin	Details	Legislative Activity	Current Procedural Posture
H.B. 4023	Illinois	The act would impose a \$1,000 fine to retailers that sell mature or adults-only-rated video games to minors and would require warning labels in addition to the existing ESRB labels. The act would also require retailers to post a sign in the store specifically explaining the ESRB rating system.	Law passed and overturned in appeals court for its unconstitutionally vague wording of violence and its inability to be the least restrictive means of achieving its goal.	Court ordered the state to pay \$510,528.64 to ESA in lawyer fees.
S.B. 249	Michigan	Act would prohibit a person from selling or renting a violent video game to minors. A "violent video game" is defined as (1) depicting human-on-human violence in which the player kills, seriously injures, or otherwise causes serious physical harm to a human or character, (2) and taken as a whole, to the average person, applying contemporary statewide standards, it lacks serious literary, artistic, political, and scientific value and appeals to the minors' morbid interest in violence. A violation of the bill would be a misdemeanor punishable by up to one year's imprisonment, a maximum fine of \$5,000, or both.	Law passed and overturned in appeals court for its failure to pass the strict scrutiny standard.	Court ordered the state to pay \$182,349 to ESA in lawyer fees.

## Appendix. Continued

Proposed Legislation	Origin	Details	Legislative Activity	Current Procedural Posture
H.B. 1381	Louisiana	A judge would determine whether a video game was offensive to prevailing standards and contributed to a minor's morbid interest in violence. If the game met these standards, it would be pulled from store shelves in Louisiana, and retailers found guilty of selling one of these games to a minor would face fines between \$100 and \$2,000 and a prison term of up to one year.	Law passed and overturned in appeals court as a First Amendment violation, citing the evidence that violent video games are harmful is "tenuous and speculative."	Court ordered the state to pay \$91,000 to ESA in lawyer fees.
H.B. 1009	Washington	Act would impose a \$500 fine on retailers that sell any video game depicting violence against "law enforcement officers" to those under the age of 17.	Law passed and overturned in appeals court for its unconstitutionally vague wording.	Court ordered the state to pay \$344,000 to ESA in lawyer fees.
S.F. 785	Minnesota	Minors under the age of 17 would be fined \$25 for purchasing or renting mature or adults-only-rated games. The law also required retailers to post a sign with a 30-point font or larger noting that children under the age of 17 are prohibited from purchasing or renting these games under penalty of the law.	Law passed and overturned in appeals court as failing to be narrowly tailored and passing an unenforceable law.	No further action taken.
H.B. 3004	Oklahoma	Any retailer selling, renting, or even displaying games determined to contain inappropriate violence could be charged with a felony. This law would require retailers to have such games hidden from sight, similar to pornographic material. Video games deemed to have inappropriate content would be determined by an Oklahoma judge rather than using the ESRB ratings.	Law passed and overturned in appeals court as a First Amendment violation, stating that there is no persuasive evidence that violent video games cause harm to children.	No further action taken.
H.B. 319	Delaware	Would require all video games for purchase or for rent rated by ESRB. In addition, all retailers must check for identification to ensure that minors under the age of 17 could not rent or purchase mature or adults-only-rated video games. Failure to check for proper identification and selling or renting these video games to minors would result in a Class A misdemeanor.	Failed to make it out of committee after ESA testified to the unconstitutionality of the bill.	Bill was reintroduced as H.B. 360; still pending in committee.
A.B. 1179	California	Act would end the sale and rental of violent video games that depict serious injury to human beings in a way that is especially heinous, atrocious, or cruel to persons who are under 18 years of age. Retailers that violate the act would be liable in an amount up to \$1,000 for each violation.	Law passed and overturned in appeals court as a First Amendment violation, citing failure to pass the strict scrutiny test.	No further action taken.
H.B. 257	Utah	Act would amend an existing law to include violent video games in material that is not fit for minors. The law would treat violent video games and pornography as the same.	Bill passed House committee but was never voted on in the Senate because of the constitutional concerns for the bill.	Bill has been reintroduced as H.B. 050 that specifically addresses "harm to children" and is still in committee.
S.B. 238	Indiana	Act would make it unlawful to sell or rent a mature or adults-only video game to a minor. Retailers that violate the act would be subject to \$1,000 fine for each instance.	Bill passed the House committee, but after ESA testified to the unconstitutionality of the bill, it was not put forth to a vote in the Senate.	Bill's sponsor David Ford (R) is currently revising the bill to address the First Amendment concerns.

## References

- ABC Ahead of the Curve* (2006), "Video Game Ratings: Are Present Ratings Keeping Inappropriate Materials Away from Children?" (June 14), ABC news anchor John Yang interviews David Walsh, president of the National Institute on Media and the Family.
- American Amusement Machine Association v. Kendrick* (2001), 244 F.3d 572 (7th Cir.).
- Billboard* (2006), "Top Video Game Rentals," (July 8), 67.
- Chapman, Todd C. (2005), "Game Over for Minors? Analyzing the Constitutionality of Illinois' Restrictions on Video Game Sales," *Southern Illinois University Law Journal*, 30 (Winter–Fall), 145–67.
- Davidson, John (2005), "Pop Culture Pariah: Why Are Videogames the Favorite Demon of the Mainstream Media," *Computer Gaming World*, 255 (October), 17–19.
- Entertainment Software Association v. Blagojevich* (2005), 404 F.Supp. 2d 1051 (N.D. Ill.).
- (2006), 469 F.3d 641 (7th Cir.).
- ESA (2006), "2006 Essential Facts About the Computer and Video Game Industry," (May 10), (accessed February 6, 2008), [available at [http://www.theesa.com/archives/2006/05/2006\\_essential.php](http://www.theesa.com/archives/2006/05/2006_essential.php)].
- Farrand, Tom, David Nichols, Tom Rowley, and Matt Avery (2006), "Brands and Gaming: Are You Ready to Play?" *Young Consumers*, 7 (2), 8–13.
- FCC v. Pacifica Foundation* (1978), 438 U.S. 726.
- Federal Trade Commission (2004), "Marketing Violent Entertainment to Children: A Fourth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording, and Electronic Game Industries," Federal Trade Commission report, (July).
- Gerbner, George (1969), "Towards 'Cultural Indicators': The Analysis of Mass Mediated Message Systems," *AV Communication Review*, 17 (2), 137–48.
- Ginsberg v. New York* (1968), 390 U.S. 629.
- Grossman, Dave (1996), *On Killing: The Psychological Cost of Learning to Kill in War and Society*. Boston: Back Bay.
- (2001), *Stop Teaching Our Kids to Kill: A Call to Action Against TV, Movie, and Video Game Violence*. New York: Crown Publishers.
- Interactive Digital Software Association v. St. Louis* (2003), 329 F.3d 954 (8th Cir.).
- Jones, Gerard (2002), *Killing Monsters: Why Children Need Fantasy, Super Heroes, and Make Believe Violence*. New York: Basic Books.
- Miller v. California* (1973), 413 U.S. 15.
- R.A.V. v. City of St. Paul* (1992), 505 U.S. 377.
- Sweeting, Paul (2005), "Hot Coffee Burns," *Video Business*, 25 (30), 14.
- Turner Broadcasting System, Inc. v. FCC* (1994), 512 U.S. 622.
- United States v. Playboy Entertainment Group Inc.* (2000), 529 U.S. 803.
- Van Mierlo, Jan and Jan Van den Bulck (2004), "Benchmarking the Cultivation Approach to Video Game Effects: A Comparison of the Correlates of TV Viewing and Game Play," *Journal of Adolescence*, 27 (1), 97–111.
- Video Software Dealers Association v. Maleng* (2004), 325 F.Supp. 2d 1180 (W.D. Wash.).
- Winters v. New York* (1948), 333 U.S. 507.

Copyright of *Journal of Public Policy & Marketing* is the property of *American Marketing Association* and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.