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## More Gore: Video Game Violence and the Technology of the Future

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# More Gore

## VIDEO GAME VIOLENCE AND THE TECHNOLOGY OF THE FUTURE

### INTRODUCTION

John walked into his local multiplex on a slow Sunday afternoon. He spent the earlier part of the day at home, lazily reading the newspaper, trying to pass the time between meals and his eventual sleep, but found it a difficult task. John was bored; he needed an escape. After making pleasant small talk with the friendly woman behind the ticket counter and gathering some assorted snacks from the concession, John made his way to the middle seat in the sixth row of a half-full theater. A minute or two passed, and then the screen lit up. Suddenly, John was no longer in the theater, the multiplex, or his hometown. Instead, John was riding in the passenger seat of a high-octane sports car zipping through the streets of Prague. Behind the wheel was a svelte British secret agent, steering with one hand, the other tightly wrapped around a nine-millimeter pistol, firing blindly behind him at the two black cars in hot pursuit. Return fire whizzed through the back windshield and past John's ears as the driver turned sharply onto a busy side street. He quipped, "Nothing like a scenic drive through Prague." John grinned. *So much for a slow Sunday afternoon.*

Movies, much like any art form, have the power to transport us to far-away worlds and let us live lives foreign to our own. In the brief moments that we watch a film, read a book, or listen to a song, we live out our fantasies of exciting adventure, enchanting romance, or bone-chilling thrills, and escape from the comparably ho-hum happenings of the everyday. While these experiences can be fulfilling, there is a disconnect between the mind of the watcher/reader/listener and the characters and emotions within the art. In short, the experience is more passive observation than transportation and immersion.

This is what sets video games apart from movies, literature, and other art forms. Video games attempt to bridge that mental gap. They combine the elaborate narratives found in books and movies with a level of tactile control—creating a much

more personal, interactive experience.<sup>1</sup> Instead of simply watching Harrison Ford traverse ancient ruins in *Raiders of the Lost Ark*,<sup>2</sup> games like *Tomb Raider Underworld*<sup>3</sup> and *Uncharted: Drake's Fortune*<sup>4</sup> allow you to control the action yourself, with every dexterous jump performed in accordance with *your* inputs. Rather than cheering on Tom Hanks and his platoon in *Saving Private Ryan*<sup>5</sup> from the sidelines, you can pick up a rifle, stare down the barrel, and fight alongside your allied comrades in games like *Call of Duty: World at War*<sup>6</sup> and *Medal of Honor: Frontline*.<sup>7</sup> In some sense, video games are the evolution of art—edging closer and closer to a fully immersive fantasy experience.

Regardless of this potential for immersion, video games are awarded substantial protection under the U.S. Constitution due to their narrative nature. Specifically, video games fall within the protections of the First Amendment as free speech.<sup>8</sup> Despite this protection, the distinction between video games and other art forms must not be forgotten, especially when thirty-five percent of the industry is composed of minors.<sup>9</sup> Damaging

<sup>1</sup> Ilana Lubin, *Challenging Standard Conceptions of Tradition, Science and Technology in 2006*, 13 CARDOZO J.L. & GENDER 173, 181-83 (2006) (noting the interactive nature of video games and the stark differences between a “viewer” and a “player”).

<sup>2</sup> See generally RAIDERS OF THE LOST ARK (Lucasfilm Ltd. 1981); *Raiders of the Lost Ark*, IMDB, <http://www.imdb.com/title/tt0082971> (last visited Jan. 10, 2010).

<sup>3</sup> See generally Jeff Haynes, *Tomb Raider: Underworld Review*, IGN (Nov. 19, 2008), <http://ps3.ign.com/articles/931/931785p1.html>.

<sup>4</sup> See generally Greg Miller, *Uncharted: Drake's Fortune Review*, IGN (Nov. 13, 2007), <http://ps3.ign.com/articles/834/834931p1.html>.

<sup>5</sup> See generally SAVING PRIVATE RYAN (Paramount Pictures 1998); *Saving Private Ryan*, IMDB, <http://www.imdb.com/title/tt0120815> (last visited Jan. 10, 2010).

<sup>6</sup> See generally Jason Ocampo, *Call of Duty: World at War Review*, IGN (Nov. 11, 2008), <http://xbox360.ign.com/articles/927/927055p1.html>.

<sup>7</sup> See generally Douglass C. Perry, *Medal of Honor Frontline*, IGN (June 3, 2002), <http://ps2.ign.com/articles/361/361335p1.html>.

<sup>8</sup> See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .”); see also *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991) (noting that modern video games, with their highly narrative nature, are more deserving of First Amendment protection than perhaps once conceived); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (likening video games to other protected art forms like movies and literature). Video games are also afforded protection under the Intellectual Property Clause, which grants video game creators the exclusive rights to their work, allowing them to reap the benefits of their labor without fear of any free riders. This creates an incentive for game makers to continue to ply their trade, ensuring the market is consistently ripe with new titles, which in turn furthers the evolution of the art form. See U.S. CONST. art. I, § 8, cl. 8. See generally ASHLEY SAUNDERS LIPSON & ROBERT D. BRAIN, *COMPUTER AND VIDEO GAME LAW* 205-07 (2009).

<sup>9</sup> Bill Pratt, *The Demographic of Video Game Players*, EZINEARTICLES (Apr. 22, 2008), <http://ezinearticles.com/?The-Demographics-of-Video-Game-Players&id=1111304>. It is generally accepted by courts that minors are not possessed of “that full capacity for

material, such as sexually explicit content and graphic violence, becomes much more volatile when displayed in an interactive medium like video games.<sup>10</sup> There is a stark difference between merely watching a gore-filled movie or reading an erotic novel, and actually carrying out violent and sexual actions within a virtual world. In other words, the distinction that makes video games much more powerful than other art forms also has the potential to make risqué material much more venomous.<sup>11</sup> But is this distinction enough to remove video games entirely from standard First Amendment jurisprudence? As video game technology stands now, it doesn't seem so.<sup>12</sup>

Even though the visual effects displayed in modern games are as realistic as they have ever been, actual reality and video games are still quite distinct. Game designers have yet to achieve true photo-realism as to the human form; the difficulty of accurately animating facial expressions, such as subtle eye movements and the natural asymmetry of facial muscles, has created a substantial barrier.<sup>13</sup> Other obstacles exist too, such as the complicated controller in the player's hand, and the fact that the action takes place on a small screen in the player's living room rather than all around him. These factors are constant reminders for gamers that they are simply playing a game and that the experience is not real. In short, the violence in video games today simply isn't real or immersive enough to remove it from First Amendment protection, and the interest in protecting minors is not great enough to overcome strict judicial scrutiny.<sup>14</sup>

But what happens when the line between video games and reality disappears? What happens when graphic

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individual choice which is the presupposition of First Amendment guarantees." See *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

<sup>10</sup> See *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004) (acknowledging that video games have certain "unique characteristics" from other art forms, which may tend to make them more harmful).

<sup>11</sup> See *id.*

<sup>12</sup> See generally *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *cert. granted sub nom.*, *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (argued Nov. 2, 2010) (refusing to remove video games from normal First Amendment jurisprudence); *Interactive Digital Software Ass'n v. St. Louis*, 329 F.3d 954 (8th Cir. 2003); *Kendrick*, 244 F.3d 572.

<sup>13</sup> Jonathan Richards, *Lifelike Animation Heralds New Era for Computer Games*, *TIMES ONLINE* (Aug. 18, 2008), [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article4557935.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article4557935.ece) ("Those types of imperfections . . . are what [make] people look real.")

<sup>14</sup> *Kendrick*, 244 F.3d at 575 (explaining that nobody viewing video game violence would make the mistake that they are in fact watching real life violence, and as such video game violence is not obscene in the same way a violent photograph is).

technology advances to the point where computer-created characters are uncanny in resemblance to the actual human form?<sup>15</sup> What happens when gamers are no longer witnessing the action through a television screen but instead are seeing it all around them through the use of virtual reality?<sup>16</sup> What happens when the characters on screen are not being controlled through a complicated, button-ridden controller but are instead being manipulated by the player's precise full-body physical motions?<sup>17</sup> While this may all sound like science fiction, these technologies are currently in development and will be staples of the video game industry very soon, helping make the game experience indistinguishable from real life.<sup>18</sup>

This note argues that current First Amendment jurisprudence on violent content in video games is premised on many presuppositions that will soon be outdated and irrelevant. Our past notions about video game violence—suggested in cases like *American Amusement Machine Association v. Kendrick*<sup>19</sup>—become untenable in the face of the highly realistic and fully immersive games of the future. A new legal framework will soon be warranted, and this note suggests some options. Additionally, it recommends steps that future video game designers can take to ensure that they continue to be fully protected under the First Amendment.

Part I presents a detailed account of the judicial history surrounding this issue, beginning with the “variable obscenity” standard enumerated in the Supreme Court case *Ginsberg v. New York*.<sup>20</sup> This part then details how state legislatures have attempted to apply this standard to video game violence and how the circuit courts have rejected these attempts.<sup>21</sup> Both the distinctions drawn by the courts between violent content in video games and obscenity in general, as well as the comparisons of games to other art forms, such as literature,

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<sup>15</sup> Richards, *supra* note 13.

<sup>16</sup> See generally Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 CARDOZO L. REV. 1141 (2008).

<sup>17</sup> Ryan Geddes, *Everything You Need to Know About Kinect*, IGN (Jan. 14, 2010), <http://xbox360.ign.com/articles/106/1061205p1.html>; Erik Brudvig, *TGS09: Trying out Natal*, IGN (Sept. 14, 2009), <http://xbox360.ign.com/articles/102/1028409p1.html>; Cliff Edwards, *Microsoft Moves onto Nintendo's Motion Turf*, BUSINESSWEEK (June 1, 2009), [http://www.businessweek.com/technology/content/jun2009/tc2009061\\_527242.htm](http://www.businessweek.com/technology/content/jun2009/tc2009061_527242.htm).

<sup>18</sup> Cam Shea, *Gaming Tech to Watch in 2009*, IGN (Feb. 23, 2009), <http://ps3.ign.com/articles/956/956105p1.html>; Geddes, *supra* note 17.

<sup>19</sup> *Kendrick*, 244 F.3d 572.

<sup>20</sup> *Ginsberg v. New York*, 390 U.S. 629, 635-36 (1968); see also *infra* Part I.A.

<sup>21</sup> See *infra* Part I.B.

will be of particular note.<sup>22</sup> Finally, Part I also points out the loopholes in one of the more instructive circuit-court opinions—*American Amusement Machine Association v. Kendrick*<sup>23</sup>—and explains how these loopholes leave the door open for regulation as video game technology develops.<sup>24</sup> Part II delves into new developments in video game technology that are on the horizon, focusing on the advancements in both the way games are viewed and the way games are played.<sup>25</sup> Part II also evaluates the effect these advancements purport to have on the gaming experience at large, substantially changing the industry from the conditions present today.<sup>26</sup> Part III presents four possible outcomes of these developments.<sup>27</sup> It then moves into a call-to-action for the video game industry, suggesting methods to avoid regulation in the future.<sup>28</sup>

## I. LEGAL BACKGROUND AND HISTORY

Today, video games are awarded full protection under the First Amendment.<sup>29</sup> This was not always the case.<sup>30</sup> Most importantly, before games acquired the narrative qualities they now contain, legislatures often used the variable obscenity standard to create regulations that limited minors' access to violent video games but did not apply to adults.<sup>31</sup> To properly understand how the law has changed since then, it is useful to first illustrate how the variable obscenity standard was derived before evaluating its possible applications to video game violence.

### A. *Ginsberg and the Variable Obscenity Standard*

The Supreme Court's decision in *Ginsberg v. New York* established the legal framework for subsequent state regulation

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<sup>22</sup> See *infra* Part I.B.

<sup>23</sup> *Kendrick*, 244 F.3d 572.

<sup>24</sup> See *infra* Part I.C.

<sup>25</sup> See *infra* Part II.A-B.

<sup>26</sup> See *infra* Part II.A-B.

<sup>27</sup> See *infra* Part III.A.

<sup>28</sup> See *infra* Part III.B.

<sup>29</sup> See *generally, e.g.*, *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (subjecting the challenged statute to the strict-scrutiny standard); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009) (subjecting the challenged statute to the strict-scrutiny standard), *cert. granted sub nom. Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (argued Nov. 2, 2010).

<sup>30</sup> See *People v. Walker*, 354 N.W.2d 312, 316-17 (Mich. Ct. App. 1984).

<sup>31</sup> See, *e.g., id.* at 270-71, 274-75.

of video games.<sup>32</sup> The defendant in this case was the operator of a stationary store on Long Island.<sup>33</sup> He was charged with selling pornographic magazines to a sixteen-year-old boy in violation of a New York criminal statute that prohibited the sale of harmful materials to minors.<sup>34</sup> That statute, section 484-h of the New York State Penal Code, provided a criminal penalty for the sale of pornographic material to minors.<sup>35</sup> The current version of this statute defines “harmful to minors” as follows:

“Harmful to minors” means that quality of any description or representation . . . of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (a) [c]onsidered as a whole, appeals to the prurient interest in sex of minors; and (b) [i]s patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (c) [c]onsidered as a whole, lacks serious literary, artistic, political, and scientific value for minors.<sup>36</sup>

The Nassau County District Court determined that the magazines in question were harmful to minors under the statute’s definition and found the defendant guilty.<sup>37</sup> The defendant appealed this decision but did not challenge the application of section 484-h.<sup>38</sup> Instead, he argued that “the scope of the constitutional freedom of expression secured to a citizen . . . cannot be made to depend upon whether the citizen is an adult or a minor.”<sup>39</sup> In other words, the defendant contended that denying minors’ access to material that is available to adults was an unconstitutional breach of the protections afforded by the First Amendment.<sup>40</sup> The Court rejected this argument on the basis that obscenity is not a protected type of speech,<sup>41</sup> and adopted the principle that certain types of speech may be acceptable for adults but obscene (and thus unprotected) in relation to minors.<sup>42</sup>

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<sup>32</sup> 390 U.S. 629 (1968).

<sup>33</sup> *Id.* at 631.

<sup>34</sup> *Id.* at 631-32.

<sup>35</sup> N.Y. PENAL LAW § 484-h (1965). The statute has since been rewritten under Article 235 of the code as “[d]isseminating indecent material to minors.” N.Y. PENAL LAW § 235.20-235.24 (McKinney 2008). All quotations contain the currently enforceable statutory language found in those sections.

<sup>36</sup> *Id.* § 235.20(6).

<sup>37</sup> *See* *People v. Ginsberg*, 290 N.Y.S.2d 239, 240-41 (N.Y. Crim. Ct. 1966).

<sup>38</sup> *Ginsberg*, 390 U.S. at 635.

<sup>39</sup> *Id.* at 636.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 635; *see also* *Roth v. United States*, 354 U.S. 476, 485 (1957).

<sup>42</sup> *Ginsberg*, 390 U.S. at 635-36.

The Court derived this variable obscenity principle using another well-established principle of First Amendment jurisprudence: that the protection adults receive under the First Amendment is not coextensive with that of minors, and as such, “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.”<sup>43</sup> Given that “obscenity is not within the area of protected speech or press,”<sup>44</sup> the Court had no trouble approving the New York statute as constitutional. The Court explained that the definition of material “harmful to minors” was simply a slight variation on other definitions of obscene material accepted by the Court in past decisions.<sup>45</sup> Clarifying, the Court stated that section 484-h merely adjusted these previously accepted definitions of obscenity to account for the realities of society in assessing this material’s appeal to the sexual interests of *minors*.<sup>46</sup> Accordingly, the State’s delineation between adults and minors was not an abridgment of any fundamental constitutional right.<sup>47</sup>

Since no such right was violated, the Court undertook a deferential rational-basis review of the statute.<sup>48</sup> The Court

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<sup>43</sup> *Id.* at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)) (quotation marks omitted). This principle has been consistently reaffirmed, particularly in cases addressing a student’s right to free speech while in school. *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (Stewart, J., concurring) (“Although I agree with much of . . . the Court’s opinion . . . I cannot share the Court’s uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults.”).

<sup>44</sup> *Ginsberg*, 390 U.S. at 635 (citing *Roth*, 354 U.S. at 485).

<sup>45</sup> *Id.* at 635-36. The Court referred again to the *Roth* decision and to the plurality opinion in *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts (Memoirs v. Massachusetts)*, 383 U.S. 413 (1966). In *Memoirs v. Massachusetts*, the Court first referred to a general definition for obscenity proposed in *Roth*. *Id.* at 418. Specifically, “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” *Id.* The *Memoirs* Court then elucidated a three-prong test. For material to be considered obscene, the Court held,

it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

*Id.* The Court in *Ginsberg* noted that that the New York statute seemed to employ *Memoirs*’s three-prong test to define obscenity. *Ginsberg*, 390 U.S. at 635-36.

<sup>46</sup> *Ginsberg*, 390 U.S. at 638 (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966)).

<sup>47</sup> *Id.* at 643.

<sup>48</sup> *Id.* at 639-43. A rational-basis review is applied when there is no breach of a fundamental constitutional right, and no suspect classification is formed. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). This standard of review is the default level of constitutional scrutiny. *Id.*

highlighted two specific interests promoted by the statute: (1) the State's interest in supporting parents' right to raise their children,<sup>49</sup> and (2) the State's independent interest in the health and well-being of its youth.<sup>50</sup> With regard to the first interest, the Court explained that parents are "entitled to the support of laws designed to aid discharge of [their responsibility to care for and nurture their children]," and that the statute affects this by couching its definition of harmful content in what the adult community deems appropriate.<sup>51</sup> As for the second interest, the Court addressed whether New York could have rationally concluded that obscene materials, as defined in the statute, could have damaging effects on the growth and development of minors.<sup>52</sup> The Court pointed out that because obscenity is not protected, the State did not have to show a "clear and present danger" posed by the material in question, but merely that it was rational to believe that this material could cause harm to minors.<sup>53</sup> While studies on the subject were inconclusive, the Court explained that scientific certainty is not necessary, and the fact that a causal link between obscene material had not been *disproven* was enough to establish that the State's belief was not irrational.<sup>54</sup> Accordingly, the statute passed constitutional muster, and the *Ginsberg* Court affirmed the defendant's conviction.<sup>55</sup>

*B. Attempts to Apply Variable Obscenity to Video Game Violence*

Unsurprisingly, state legislatures were pleased with the decision in *Ginsberg*, as it allowed them to regulate certain types of content that may be deemed appropriate for adults but not so for minors. Most notably, states have attempted to use the variable obscenity standard to regulate another

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<sup>49</sup> *Ginsberg*, 390 U.S. at 639.

<sup>50</sup> *Id.* at 640.

<sup>51</sup> *Id.* at 639; see also N.Y. PENAL LAW § 484-h(1)(f)(ii) (McKinney 1965) (currently § 235.20(6)(b)) (defining "harmful to minors" as material that "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors").

<sup>52</sup> *Ginsberg*, 390 U.S. at 641.

<sup>53</sup> *Id.* (citing *Roth v. United States*, 354 U.S. 476, 486-87 (1957)) (explaining that when a statute regulates a form of protected speech, the state must show a compelling interest by proving that the speech poses a "clear and present danger" to the class that the statute purports to protect).

<sup>54</sup> *Id.* at 641-43.

<sup>55</sup> *Id.* at 643, 645.

troublesome type of content that could easily be perceived as inappropriate for minors: content depicting graphic violence.<sup>56</sup> As Justice Stewart made clear in his *Ginsberg* concurrence, “a child—like someone in a captive audience—is not possessed of that full capacity for individual choice [that] is the presupposition of First Amendment guarantees.”<sup>57</sup> It seems warranted, then, that parents and their states would fear that children viewing violent content, without such capacity, may misconceive violence as acceptable. Following this train of thought, states have proposed regulations upon certain outlets that display graphic violence, such as trading cards<sup>58</sup> and videos.<sup>59</sup> While these attempts have failed, violence in video games may be a bird of a quite different feather, due to the interactive and immersive nature of the media.<sup>60</sup> This reasoning led many states to adopt statutes that regulated the sale of video games containing violence to minors.<sup>61</sup>

Early on in the life of the video game industry, courts upheld these regulations, as video games were not considered protected speech due to their inability to “communicate or express some idea or some information.”<sup>62</sup> But once technology advanced to the point that video games—much like other types

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<sup>56</sup> See, e.g., *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 64-65 (2d Cir. 1997) (making it a crime to sell any trading card depicting graphic violence to a minor); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 687-88 (8th Cir. 1992) (Missouri statute (1) barring the sale or rental of videocassettes depicting violence to minors and (2) requiring merchants to display and maintain such tapes in a separate area not accessible to minors).

<sup>57</sup> *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring) (footnote omitted).

<sup>58</sup> See *Gulotta*, 134 F.3d at 64-65. In this case, New York attempted to prohibit the sale to minors of trading cards with depictions of violent crimes. The Second Circuit struck down the regulation as an unconstitutional content-based regulation. *Id.* at 68.

<sup>59</sup> See *Webster*, 968 F.2d at 687-88. Here, a Missouri statute prohibited the sale or rental of videos depicting violence to minors. The Eighth Circuit held that the statute was unconstitutional. *Id.* at 691.

<sup>60</sup> See *Interactive Digital Software Ass’n v. St. Louis*, 329 F.3d 954, 957-58 (8th Cir. 2003); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

<sup>61</sup> See, e.g., CAL. CIV. CODE § 1746-1746.5 (West 2009).

<sup>62</sup> *Marshfield Family Skateland, Inc. v. Marshfield*, 450 N.E.2d 605, 609-10 (Mass. 1983) (explaining that the video games in question were no more than “technologically advanced pinball machines”); see also *America’s Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (“In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element.”); *People v. Walker*, 354 N.W.2d 312, 316 (Mich. Ct. App. 1984) (adopting the rationale of *Marshfield* to hold that video games are not a form of communication entitled to constitutional protection). But see *Rothner v. City of Chicago*, 929 F.2d 297, 302-03 (7th Cir. 1991) (suggesting that video games have the potential for expression covered by the First Amendment).

of art—depicted creative expression in their storylines and characters, courts quickly picked up on the shift and placed video games within the realm of speech protected under the First Amendment.<sup>63</sup> This victory for the video game industry has seemed to put the proverbial nail in the coffin for state attempts to regulate violent content in video games.

A particularly informative and instructive opinion on this issue—and one of the first to accept video games as protected speech under the First Amendment—was written by Judge Posner in *American Amusement Machine Association v. Kendrick*.<sup>64</sup> In *Kendrick*, proponents of the video game industry challenged an Indianapolis ordinance forbidding establishments from allowing an unaccompanied minor to use “an amusement machine that is harmful to minors.”<sup>65</sup> In an attempt to fit within the tenets of *Ginsberg*, the city adopted language very similar to the New York statute in defining the term “harmful to minors.”<sup>66</sup> Unlike the New York statute, however, the Indianapolis ordinance was not limited to amusement machines that appeal to “minors’ prurient interest in sex”; it also included those that appeal to “minors’ morbid interest in violence.”<sup>67</sup> The ordinance went on to limit the definition to machines containing either “graphic violence” or “strong sexual content.”<sup>68</sup> The city primarily argued that the legal definition of obscenity should be extended to include graphic violence in video games, while the plaintiffs countered that their games were not “obscene” as defined by the *Ginsberg* Court.<sup>69</sup>

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<sup>63</sup> See LIPSON & BRAIN, *supra* note 8, at 573.

<sup>64</sup> *Kendrick*, 244 F.3d 572.

<sup>65</sup> See Indianapolis, Ind., General Ordinance 72-2000 (July 10, 2000). This ordinance refers to pay-to-play arcade-type machines, and applies to owners of establishments that operate five or more such machines, seemingly aimed at arcades and other places of public amusement, such as movie theaters that operate arcade machines. *Id.*; see also *Kendrick*, 244 F.3d at 573.

<sup>66</sup> See Indianapolis, Ind., General Ordinance 72-2000.

<sup>67</sup> *Kendrick*, 244 F.3d at 573 (emphasis added). The ordinance’s definition of “harmful to minors” further mimics that found in *Ginsberg*, going on to stipulate that such machines must be “patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for [minors],” and must “lack[] serious literary, artistic, political or scientific value as a whole for [minors].” Indianapolis, Ind., General Ordinance 72-2000; see also *Kendrick*, 244 F.3d at 573.

<sup>68</sup> *Kendrick*, 244 F.3d at 573. Judge Posner noted that, because the plaintiffs did not make game machines containing any “strong sexual content,” the court would only focus on the “violence” prong. *Id.* It seems plain, however, that because such sexual material would easily fall within the *Ginsberg* definition of obscenity, the sex prong of the ordinance would withstand constitutional scrutiny. *Id.* at 579.

<sup>69</sup> *Id.* at 574.

Judge Posner began his assessment of the ordinance by drawing a very important distinction between the regulation of violence and that of obscenity. First, he explained that the First Amendment does not protect obscenity mainly because it is offensive on its face and “violates community norms regarding the permissible scope of depictions of sexual or sex-related activity.”<sup>70</sup> Posner then distinguished obscenity from violent content in video games. In Posner’s view, the city attempted to regulate video game violence not because it was inherently offensive, but because the violent content had the propensity to cause harm—in both the physical sense by causing minors to act violently and the mental sense by subjecting minors to psychological damage.<sup>71</sup> Judge Posner used this distinction to demonstrate that obscenity and violence are two very different categories of objectionable content; under the law, therefore, they should not be treated as one concept.<sup>72</sup>

This distinction alone, however, was not enough for Posner to conclude that video game violence was protected by the First Amendment; simply demonstrating the difference between video game violence and obscenity does not end the inquiry into how video game violence itself should be treated. Accordingly, Posner continued, examining the narrative nature of the video games in question, utilizing analogies to violence used in other art forms (most prominently, literature) to reach his eventual conclusion.<sup>73</sup> He began with some examples of graphic violence depicted in literary classics, like eye gouging in the *Odyssey* and the tortures of the damned in *The Divine Comedy*.<sup>74</sup> Posner posited that no one would expect an ordinance banning minors’ access to those works to be upheld.<sup>75</sup> Citing one of the games in the record, *The House of the Dead*,<sup>76</sup> he reasoned that most of these games are stories in the same sense that the literary works are.<sup>77</sup> *The House of the Dead*, he

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<sup>70</sup> *Id.* at 574-75 (citing *Miller v. California*, 413 U.S. 15 (1973)) (explaining that obscenity is “to many people disgusting, embarrassing, degrading, disturbing, outrageous, and insulting, but it generally is not believed to inflict temporal . . . harm”).

<sup>71</sup> *Id.* at 575-76.

<sup>72</sup> *Id.* at 574.

<sup>73</sup> *Id.* at 577.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> This title was a basic “on rails” light-gun game, with the player using a plastic gun peripheral to shoot zombies and other monsters to protect himself and other humans. See *The House of the Dead*, KILLER LIST OF VIDEO GAMES, [http://www.klov.com/game\\_detail.php?game\\_id=8153](http://www.klov.com/game_detail.php?game_id=8153) (last visited Jan. 4, 2010).

<sup>77</sup> *Kendrick*, 244 F.3d at 577.

explained, featured many “age-old themes of literature,” such as “self-defense, protection of others, dread of the ‘undead,’ [and] fighting against overwhelming odds.”<sup>78</sup> To the point that video games are different because they contain interactive game play, with the players actually effecting the violent depictions, Posner responded that “[a]ll literature [defined to include movies, television, etc.] is interactive; the better it is, the more interactive.”<sup>79</sup> Accordingly, he concluded that video game violence should be afforded the same protection as these literary works, and any regulation of such speech should be subject to strict scrutiny, requiring a compelling interest and a means narrowly tailored to meet that end.<sup>80</sup> Given the dearth of hard scientific evidence that the game machines targeted by the ordinance cause harm to minors, Posner had no trouble holding that the ordinance was unconstitutional.<sup>81</sup>

Since Judge Posner’s opinion in *Kendrick*, courts across the nation have relied on his language and reasoning to strike down regulations of violent content in video games.<sup>82</sup> For example, the Eighth Circuit’s decision in *Interactive Digital Software Association v. St. Louis County* mimicked Posner’s train of thought to the letter—explaining that violence and obscenity are distinct concepts, that today’s video games contain deep stories with themes and messages common in literature, and that the interactive nature of video games is of no consequence.<sup>83</sup> Similar reasoning is seen in the most recent federal circuit-court decision

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<sup>78</sup> *Id.* at 577-78.

<sup>79</sup> *Id.* at 577.

<sup>80</sup> *Id.* at 576-79.; *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (explaining that strict scrutiny should be applied when legislation, on its face, violates a constitutionally guaranteed right).

<sup>81</sup> *Kendrick*, 244 F.3d at 578-80. The city relied primarily on evidence from studies conducted by Craig Anderson and Karen Dill. *See generally* Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCH. 772 (2000). Posner explained that these studies did not give the city a compelling interest in restricting the game machines in question because “there is no indication that the games used in the studies are similar to those in the record of this case . . . . The studies do not find that video games have ever caused anyone to commit a violent act . . . or have caused the average level of violence to increase anywhere.” *Kendrick*, 244 F.3d at 578-79.

<sup>82</sup> *See* *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 952-53, 960-61, 965 (9th Cir. 2009) (striking down a California statute “impos[ing] restrictions and a labeling requirement on the sale or rental of ‘violent video games’ to minors” as unconstitutional), *cert. granted sub nom.* *Schwarzenegger v. Entm’t Merchs. Ass’n*, 130 S. Ct. 2398 (argued Nov. 2, 2010); *Interactive Digital Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 957, 960 (8th Cir. 2003) (finding unconstitutional a St. Louis ordinance that prohibited the sale, rental, or procurement of graphically violent video games to minors).

<sup>83</sup> *See Interactive Digital Software*, 329 F.3d at 957-58.

on the topic, *Video Software Dealer Association v. Schwarzenegger*.<sup>84</sup> In both of these cases, the courts subjected the regulations to strict scrutiny and found little scientific support for the proposed compelling interest in protecting minors from harm caused by video game violence.<sup>85</sup> In fact, since the decision in *Kendrick*, courts have consistently struck down regulations of video games based on their violent content.<sup>86</sup>

### C. *Stumbling Blocks of the Kendrick Opinion*

While historically instructive, the *Kendrick* opinion has many weaknesses, especially when viewed through a more modern lens. These weaknesses open the door to a change in jurisprudence as video game technology continues to advance. The first weakness is Posner's conclusion that the interactive nature of video games is no different than that in other types of literature.<sup>87</sup> In reaching this conclusion, Posner reasoned that all literature is interactive because it "draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience the joys and sufferings as the reader's own."<sup>88</sup> This reasoning is immediately and quite easily contestable. No scientific evidence is needed to observe the stark differences between reading a book or watching a movie, and playing a video game. In the former, the experience is passive viewing; the latter effects a state of direct control over the action.<sup>89</sup> It is one thing to watch Indiana Jones fight Nazis in the movie *Raiders of the Lost Ark*.<sup>90</sup> It is quite another to *make the decision* to pull the trigger and watch the gory results of your actions unfold in games like

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<sup>84</sup> See generally *Video Software Dealers*, 556 F.3d 950.

<sup>85</sup> See *Interactive Digital Software*, 329 F.3d at 958-60; *Video Software Dealers*, 556 F.3d at 961-65. In *Video Software Dealers*, the Supreme Court granted a writ of certiorari, and oral arguments took place on November 2, 2010. 130 S. Ct. 2398.

<sup>86</sup> See, e.g., *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). But it still remains to be seen how the Supreme Court will rule on the California statute challenged in *Video Software Dealers*.

<sup>87</sup> *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001).

<sup>88</sup> *Id.* at 577.

<sup>89</sup> Lubin, *supra* note 1, at 181-82; see also *Maleng*, 325 F. Supp. 2d at 1188-90 (acknowledging that video games have certain "unique characteristics" different from other art forms, which may tend to make them more harmful).

<sup>90</sup> See John Wiggins, *Plot Summary for Raiders of the Lost Ark*, IMDB, <http://www.imdb.com/title/tt0082971/plotsummary> (last visited Feb. 1, 2011).

*Wolfenstein*,<sup>91</sup> especially when these decisions reward the gamer with further progression through the game's story. This decision-making element—this concept of control—is not present in other forms of literature.<sup>92</sup> And given minors' lack of "that full capacity for individual choice,"<sup>93</sup> to rope them all together is unwarranted and erroneous.

More important is Posner's discussion of the offensiveness of obscene content compared to violent content. Posner states plainly that the problem with obscene material is not its propensity to cause psychological or physical harm to minors; rather, obscenity is offensive in the sense that it violates societal norms of what is *appropriate* for minors.<sup>94</sup> While this notion is sound, Posner's next assertion is dubious. To support his conclusion that video game violence is not offensive in the same sense as obscenity,<sup>95</sup> Posner again referred to *The House of the Dead*. Describing the violence in the game, he explained how it

depicts zombies being killed flamboyantly, with much severing of limbs and effusion of blood; but so stylized and patently fictitious is the cartoon-like depictions that no one would suppose it "obscene" in the sense in which a photograph of a person being decapitated might be described as "obscene." It will not turn anyone's stomach.<sup>96</sup>

He reiterated this point later in the opinion, stating that "[t]he characters in the video games in the record are cartoon characters, that is, animated drawings. No one would mistake them for . . . real people."<sup>97</sup> Perhaps this was indeed the case in 2001. With the exponential advances in technology, however, the notion that video game violence cannot be offensive in the same sense as obscenity is tenuous, derived from decade-old arcade technology. In fact, Posner himself noted that the situation may be different if "games used actors and simulated real death and mutilation convincingly."<sup>98</sup>

Regardless of these pitfalls, however, and even in the face of today's realistic graphic technology, courts have refused

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<sup>91</sup> See Jason Ocampo, *Wolfenstein Review*, IGN (Aug. 19, 2009), <http://xbox360.ign.com/articles/101/1014821p2.html>.

<sup>92</sup> Lubin, *supra* note 1, at 181-83.

<sup>93</sup> *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

<sup>94</sup> *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574-75 (7th Cir. 2001).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 575.

<sup>97</sup> *Id.* at 579.

<sup>98</sup> *Id.*

to remove video game violence from the realm of the First Amendment,<sup>99</sup> mainly because states have been unable to categorize video game violence as obscenity. This is a direct result of the *Roth* and, subsequently, the *Ginsberg* definition of obscenity as material relating to minors' *prurient* interests in *sex*.<sup>100</sup> The Supreme Court has never expanded the definition of obscenity beyond sexual content, and thus, subsequent courts addressing video game violence refused to consider such material as fitting within this category of exclusion. Consequently, video game violence is protected speech under the First Amendment; any regulation of that speech is therefore considered "content based," "presumptively invalid" and subject to strict scrutiny.<sup>101</sup>

#### D. Schwarzenegger and the Supreme Court

But the battle is not yet over. On April 26, 2010, the Supreme Court granted certiorari to *Video Software Dealers Association v. Schwarzenegger*, marking the first time that our nation's highest court will rule on an attempt to regulate video game violence.<sup>102</sup> At the circuit-court level in *Schwarzenegger* (the most recent decision on the matter), the State once again put forth the tried-but-seemingly-not-true argument that the variable obscenity standard, as defined in *Ginsberg*, should apply to violent video games.<sup>103</sup> As such, the Ninth Circuit had little trouble rejecting the statute in question, citing the myriad cases entrenching the *Ginsberg* standard in sexual conduct and

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<sup>99</sup> See, e.g., *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009), *cert. granted sub nom.* *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (argued Nov. 2, 2010). Immediately before publication of this note, the pending Supreme Court decision was renamed *Brown v. Entertainment Merchants Association* to account for Edmund G. Brown, Jr.'s replacement of Arnold Schwarzenegger as Governor of California. Mr. Brown was also a party to the original case as the former Attorney General of California. This note refers to the case by its original name.

<sup>100</sup> *Roth v. United States*, 354 U.S. 476, 485-87 (1957); see also *Miller v. California*, 413 U.S. 15, 24 (1972) ("A state offense must . . . be limited to works which . . . appeal to the prurient interest in sex.").

<sup>101</sup> *Video Software Dealers*, 556 F.3d at 958.

<sup>102</sup> *Entm't Merchs. Ass'n*, 130 S. Ct. 2398; Jim Reilly, *Violent Game Law Goes to Supreme Court*, IGN (Nov. 1, 2010), <http://xbox360.ign.com/articles/113/1131462p1.html> ("[I]n April 2009, the U.S. Supreme Court agreed to review the decision, marking the first time a video game case has gone before the Supreme Court.").

<sup>103</sup> Reply Brief of Defendant-Appellants at 2-6, *Video Software Dealers*, 556 F.3d 950 (No. 07-16620), 2008 WL 7730384 (arguing that there is no valid reason to treat the violent content defined in the statute differently from sexually explicit content, and thus, both should fall within the *Ginsberg* definition of variable obscenity).

declining to apply it to violent video games.<sup>104</sup> In particular, the court relied on *Kendrick* to justify its reluctance to adopt such a standard.<sup>105</sup> But the Ninth Circuit seemed to conflate two differing approaches to the regulation of video game violence. On the one hand, the court often referred to the State's argument as a familiar attempt to broaden the definition of obscenity to cover violence.<sup>106</sup> At other times, however, the court noted that the State was instead suggesting an entirely *new* First Amendment category of exclusion—a decidedly novel approach to the matter.<sup>107</sup>

The State seemed to recognize these two different concepts and chose to alter its approach slightly after the Supreme Court granted certiorari. While sticking with the general principle of expanding the *Ginsberg* standard, the State noted in its brief that obscenity is the only historically applicable *parallel* to the violent content regulated by its statute and that it “would not be a misnomer to refer to [this material] as ‘obscene violence.’”<sup>108</sup> In essence, the State set forth that, while violence is not by definition the same as obscenity, certain extreme depictions thereof could be excluded from First Amendment protection under similar justifications, and thus, a new category of exclusion should be adopted.<sup>109</sup> At oral argument, many justices recognized this novel approach to the issue.<sup>110</sup> Though some seemed reluctant to create a new exception,<sup>111</sup> others were cognizant of the new challenges presented by the ever-developing technological world.<sup>112</sup> It is important to recognize and understand this differing approach, as it avoids the most obvious

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<sup>104</sup> *Video Software Dealers*, 556 F.3d at 957-61. The court noted that the State was asking the Court to “boldly go where no court has gone before.” *Id.* at 961.

<sup>105</sup> *Id.* at 960.

<sup>106</sup> *See id.* at 960-61 (“We decline the State’s entreaty to extend the reach of *Ginsberg* and thereby redefine the concept of obscenity.”).

<sup>107</sup> *Id.* at 959 (“The State . . . asks us to create a new category of non-protected material based on its depiction of violence.”).

<sup>108</sup> Reply Brief for Petitioners at 4, *Schwarzenegger v. Entm’t Merchs. Ass’n*, 130 S. Ct. 2398 (Oct. 8, 2010) (No. 08-1448), 2010 WL 4034925.

<sup>109</sup> *See id.* at 2-7.

<sup>110</sup> Transcript of Oral Argument at 14-15, *Video Software Dealers*, 130 S. Ct. 2398 (Nov. 2, 2010) (No. 08-1448), 2010 WL 4317136.

<sup>111</sup> *See id.* at 15-16 (“You are asking us to create . . . a whole new prohibition which the American people . . . never ratified when they ratified the First Amendment.”).

<sup>112</sup> *See id.* at 36 (“[W]e have here a . . . new medium that cannot possibly have been envisioned at the time when the First Amendment was ratified.”); *id.* at 37 (“[T]his presents a question that could not have been specifically contemplated at the time when the First Amendment was adopted.”).

roadblock to previous regulatory attempts: that video game violence is not, by definition, obscenity.

Unfortunately, the Supreme Court has not yet reached a final decision as this note goes to print—though many commentators believe that the California statute will be struck down.<sup>113</sup> However decided, the case may already be irrelevant given its dated technological underpinnings. For example, the law addressed in the case was signed by Governor Schwarzenegger on October 27, 2005.<sup>114</sup> The first home console capable of high-definition graphics—the Xbox 360—was not released until November of that year.<sup>115</sup> Accordingly, it is not possible that the law’s drafters took into account the implications of modern graphics technology, as such technology had not yet been released. Furthermore, an evaluation of the transcript of oral arguments heard by the Supreme Court on this matter produces few if any references to video games of the current console generation.<sup>116</sup> In fact, the only modern game mentioned during oral arguments was *MadWorld*, a standard-definition Wii title that uses black and white highly-stylized cartoon violence instead of photo-realistic gore.<sup>117</sup> The game that received the most attention from the Court was *Postal 2*, a computer-based first-person shooter that was released back in 2003.<sup>118</sup> It seems that no matter how the Supreme Court rules, the decision will not fully account for the increased levels of immersion provided for by modern gaming technology.<sup>119</sup>

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<sup>113</sup> See, e.g., Dahlia Lithwick, *Simulated Originalism: James Madison, Meet Postal 2*, SLATE (Nov. 2, 2010), <http://www.slate.com/id/2273338/pagenum/all/#p2> (“I count only three votes to uphold the California ban . . . . It doesn’t look very good for the California violent video ban.”); Chris Morris, *Analysis: Inside the U.S. Supreme Court on ‘Schwarzenegger v. EMA,’* Gamasutra (Nov. 2, 2010), [http://www.gamasutra.com/view/news/31316/Analysis\\_Inside\\_The\\_US\\_Supreme\\_Court\\_On\\_Schwarzenegger\\_v\\_EMA.php](http://www.gamasutra.com/view/news/31316/Analysis_Inside_The_US_Supreme_Court_On_Schwarzenegger_v_EMA.php).

<sup>114</sup> *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009), cert. granted sub nom. *Schwarzenegger v. Entm’t Merchs. Ass’n*, 130 S. Ct. 2398 (argued Nov. 2, 2010).

<sup>115</sup> See *Xbox 360 Sells Out Within Minutes*, BBC NEWS (Dec. 2, 2005), <http://news.bbc.co.uk/2/hi/technology/4491804.stm>. The other HD-capable console—the PlayStation 3—was released a year later on November 11, 2006. See *PlayStation 3 Sells out at Launch*, BBC NEWS (Nov. 11, 2006), <http://news.bbc.co.uk/2/hi/technology/6135452.stm>.

<sup>116</sup> See generally Transcript of Oral Argument, *supra* note 110.

<sup>117</sup> *Id.* at 57; see also Matt Casamassina, *MadWorld Review*, IGN (Mar. 9, 2009), <http://wii.ign.com/articles/960/960344p1.html>.

<sup>118</sup> Transcript of Oral Argument, *supra* note 110, at 12, 42, 57; see also Ivan Deez, *Postal 2 Review*, IGN (Apr. 3, 2003), <http://pc.ign.com/articles/392/392215p1.html>.

<sup>119</sup> See *infra* Part II.

## II. BREAKING BARRIERS

It is difficult to predict the outcome of the *Schwarzenegger* case, or whether the decision will even be relevant in today's high-tech gaming world. But the path advocated by California seems viable, as it tends to focus on the inherent offensiveness of violent content in video games—utilizing comparisons to obscenity as a *parallel* instead of a *synonym*. Under this construction, the question is whether violent video games are inherently offensive in the same *sense* as obscenity rather than the same *way*. In *Kendrick*, Posner suggested that violent video games would meet this standard if their violent content was much more realistic.<sup>120</sup> In fact, the language in *Kendrick* seems to plainly state that violent video games *would* be considered inherently offensive in the same sense as obscenity if such violence *was* indistinguishable from real-life violence.<sup>121</sup> So have we reached this point in time envisioned by Posner? Are we now in a realm where certain violent video games are as inherently offensive as obscenity and should similarly be excluded from First Amendment protection?

Put simply, no. There are too many barriers between the players and the on-screen action to distinguish video game violence from violence featured in more passive types of art indulgence, such as watching a movie or reading a book. Even with the advanced technology of today's gaming systems, one would be hard pressed to mistake the interactive experience as real.<sup>122</sup> These barriers, however, are on the verge of collapsing thanks to the new gaming technology in development. Once these barriers fall and gaming becomes indistinguishable from real life, states will have renewed ammunition to regulate video game violence: the argument that it is offensive on its face (like obscenity). As such, courts will soon need to reevaluate their stance on the First Amendment categories of exclusion.

These barriers fall into two overarching categories: visual and tactile. The first category results from the visual inadequacies that limit players' ability to lose themselves within games. For example, there is the simple fact that the players are viewing their characters and the action through a

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<sup>120</sup> Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 579 (7th Cir. 2001).

<sup>121</sup> *Id.*

<sup>122</sup> See Blitz, *supra* note 16, at 1141-42 ("While fantasy life can be deeply engrossing, it is relatively easy to distinguish from the brick and mortar world in which we [live].").

television screen that is literally separate from their bodies. No matter how intense the in-game violence, players will never be fully immersed because pieces of their living rooms are still well within their peripheries—a constant reminder that what is happening on screen is not real. Moreover, graphic technology is not yet at the point where a player could realistically mistake the on-screen characters for real people. While today's graphics look extremely realistic in comparison to the pixilated graphics of the original Nintendo Entertainment System (NES), there are certain intricacies of the human form that have yet to be mastered by game designers, such as precise facial animation used to display realistic emotions.<sup>123</sup>

The second barrier—the tactile barrier—presents a higher hurdle to jump. Since the origin of gaming, players have controlled the on-screen action using hand-held controllers. Such controllers were originally very simple, with the first NES controller having only four button inputs (including start and select) and one directional pad.<sup>124</sup> Today, however, these controllers have evolved well beyond those limited attributes. For example, the PlayStation 3 comes with a controller with eleven button inputs, one directional input, two joysticks, and motion-sensing capability!<sup>125</sup> With such a complicated device used to interact with the game, how can players ever be fully immersed? The tactile barrier will not be broken until gamers can interact without such complications.

With these barriers in place, the courts may have gotten it right. Gaming simply has not reached the point where it will need to be treated differently than other art forms. At least not yet. There are many different gaming technologies in development that will drastically change the playing field. A few of these barrier-breakers are available in some form today; some are slated for release within the next few years; *all* are extremely real and forthcoming. When used in tandem, these advancements will require a reevaluation of our current video-game-violence jurisprudence. But to fully understand how they will change the gaming experience, each one must be addressed individually.

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<sup>123</sup> Richards, *supra* note 13.

<sup>124</sup> See "Navie," *Top 7 Video Game Controllers*, GAMEGIRL (June 7, 2008), <http://gamegirl.blogfaction.com/article/101818/top-7-video-game-controllers> (depicting the original NES controller).

<sup>125</sup> David Carnoy, *Sony DualShock 3 Review*, CNET REVIEWS (Apr. 4, 2008), [http://reviews.cnet.com/game-accessories/sony-dualshock-3-black/4505-10110\\_7-32913551.html#reviewPage1](http://reviews.cnet.com/game-accessories/sony-dualshock-3-black/4505-10110_7-32913551.html#reviewPage1).

### A. *The Visual Barriers*

The *Kendrick* opinion strongly supports the proposition that seeing is believing (as the old saying goes). According to Posner, games have not reached the same level of offensiveness as obscenity because nobody would *see* a violent video game and *believe* that the depicted violence was in fact real.<sup>126</sup> This presumption still holds true today, given the many visual barriers in place. More specifically, gamers will not mistake a game for real life until the action no longer takes place on a TV screen within their peripheries but instead transpires all around them, and until video game graphics achieve a level of uncanny resemblance to what we see in the real world. Developments in virtual reality and graphics technology, however, will soon break down the visual barrier between video games and reality.

#### 1. Virtual Reality

For a long time, the concept of virtual reality (or VR) was purely science fiction. The idea is that instead of viewing a game on a television screen that only comprises a fraction of our view, players would experience the game as if it were happening all around them.<sup>127</sup> The result would be a fully immersive experience, lacking visual clues that the player is not in fact within the game world.<sup>128</sup> The most common method of creating a virtual reality is through the use of a “head-mounted display” (HMD) that surrounds the user’s entire scope of vision with the game’s graphics.<sup>129</sup> This HMD would also be able to track eye movement and precise turning of the wearer’s head—shifting the perspective displayed on the device’s screen to realistically mimic the real-world changes in human visual experience.<sup>130</sup> In short, an effective virtual-reality peripheral would remove players from their bedrooms and place them squarely within the virtual world depicted in the game they play.

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<sup>126</sup> See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001).

<sup>127</sup> Blitz, *supra* note 16, at 1141-42.

<sup>128</sup> *Id.* at 1142 (citing FRED MOODY, *THE VISIONARY POSITION: THE INSIDE STORY OF THE DIGITAL DREAMERS WHO ARE MAKING VIRTUAL REALITY A REALITY* xxiii (1999)) (defining “virtual reality” as “a computer interface that appears to surround the user with an artificial environment, often called an *immersive world*, or an *immersive environment*”).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (citing MICHAEL HEIM, *VIRTUAL REALISM* 7 (1998)).

With the promise of full immersion, it is no surprise that game designers have tried their hand at creating HMDs. One such product—made for use with last-generation systems like the PlayStation 2 and Xbox—proved to be fairly ineffective.<sup>131</sup> The Vuzix Company,<sup>132</sup> however, has had much more success. Most notably, their iWear VR920 video eyewear has wowed critics with the accuracy of its head tracking.<sup>133</sup> Though it only works with a limited number of PC games, the VR920's ability to recreate head movements has been described as “almost unbelievable” and “bring[ing] a new level of realism” to games.<sup>134</sup> Pushing the bar even further is the Vuzix Wrap 920, a pair of media sunglasses that not only utilize a fully immersive display but also provide for “augmented reality” through transparent screens that allow three-dimensional overlays to be viewed on top of real life.<sup>135</sup> Both the VR920 and

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<sup>131</sup> See Gerry Block, *Trimersion Virtual Reality Review*, IGN (Apr. 4, 2007), <http://gear.ign.com/articles/778/778513p1.html>. This primitive model, labeled the Trimersion Virtual Reality Package, seemed to have the necessary components of an effective virtual-reality peripheral—namely, an HMD with the capability to track the head movements of the wearer. But it ended up being quite limited in use and did not create the true immersion its creators had hoped for. *Id.* Visually, the screens used in the HMD were low quality and were not “a pleasure to look at.” *Id.* The visor also made 180-degree turns nearly impossible, and the head-tracking system had a tendency to cause the player to look down in the real world when trying to look straight ahead in the game world. *Id.* To add insult to injury, the package was also incapable of registering small changes in the head position. *Id.* Needless to say, the Trimersion Virtual Reality Package fell quite short of allowing players to lose themselves in the virtual world.

<sup>132</sup> See generally VUZIX, <http://www.vuzix.com/home/index.html> (last visited Dec. 30, 2010).

<sup>133</sup> Ben Kuchera, *VR on the Cheap: A Review of the Vuzix iWear VR920 Video Eyewear*, ARS TECHNICA (Nov. 7, 2007), <http://arstechnica.com/hardware/reviews/2007/11/virtual-reality-headset-review.ars>. For detailed information on the iWear, see generally *iWear VR920 Product Information Page*, VUZIX, [http://www.vuzix.com/consumer/products\\_vr920.html](http://www.vuzix.com/consumer/products_vr920.html) (last visited Feb. 12, 2011), and *iWear VR920 Product Sheet*, VUZIX, [http://www.vuzix.com/site/\\_photo/sheet/Vuzix\\_VR920\\_Sheet.pdf](http://www.vuzix.com/site/_photo/sheet/Vuzix_VR920_Sheet.pdf) (last visited Mar. 25, 2011).

<sup>134</sup> *iWear VR920—PC—Review*, GAMEZONE (Nov. 15, 2007), [http://pc.gamezone.com/reviews/item/iwear\\_vr920\\_pc\\_review](http://pc.gamezone.com/reviews/item/iwear_vr920_pc_review) (“[O]nce you get the calibration set correctly, the panning is smooth as silk”). *But see* Dustin Chadwell, *The Next Generation of Virtual Reality Gaming Headsets Has Arrived. Does It Work as Advertised?*, GAMING AGE (Nov. 14, 2009), [http://www.gaming-age.com/review/hardware/vuzix\\_vr920](http://www.gaming-age.com/review/hardware/vuzix_vr920) (noting that the head tracking is not perfect, especially when quick head motions are used in certain first-person shooter games).

<sup>135</sup> See *Wrap 920 Product Information Page*, VUZIX, [http://www.vuzix.com/iwear/products\\_wrap920.html](http://www.vuzix.com/iwear/products_wrap920.html) (last visited Dec. 30, 2010); *Wrap 920 Product Sheet*, VUZIX, [http://www.vuzix.com/site/\\_photo/sheet/Wrap\\_920\\_Product\\_Sheet\\_329PB0005\\_A.pdf](http://www.vuzix.com/site/_photo/sheet/Wrap_920_Product_Sheet_329PB0005_A.pdf); *Vuzix Announces New Wrap 920AV Video Eyewear with Revolutionary “See-Thru” Quantum Optics Technology*, MY DIGITAL LIFE (Jan. 8, 2009), <http://www.mydigitallife.info/2009/01/08/vuzix-announces-new-wrap-920av-video-eyewear-with-revolutionary-see-thru-quantum-optics-technology>. For more information about the distinctions between virtual reality and

Wrap 920 are now available on store shelves. Vuzix has also recently announced plans for their next VR headset—the Wrap VR1200—demonstrating the company’s dedication to support and perfect the technology in the future.<sup>136</sup>

In truth, VR has yet to be adopted for widespread use with console and PC video games.<sup>137</sup> Still, given its potential for full-immersion gaming, there is no question that, once perfected, VR will become a staple of the gaming industry. The theoretical implications of widespread implementation are staggering. Through the use of VR, players can enter the shoes of their favorite game heroes, experiencing their virtual fantasy world as if it were the players’ own. While certain to enrich the gaming experience, VR may have many undesirable results, especially when used by children. For example, consider the popular science-fiction horror game *Dead Space*.<sup>138</sup> This game is of the “survival horror” genre, pitting players in the shoes of a space engineer who must fight his way through the dark, claustrophobic corridors of a decrepit spacecraft, using his mining tools to fend off hordes of bone-chilling monsters known as “necromorphs.”<sup>139</sup> The game has been described as “unsettling,” “disturbing,” and “violent and horrible”—filled with unimaginable creatures and a terrifying atmosphere.<sup>140</sup> With virtual reality in place, players would not simply see the blood-splattered walls on screen, but would experience the tight passageways and scary atmosphere all around them. The grotesque necromorphs would be charging right into their faces, sneaking up from behind them, surrounding them from every angle, as if they were truly attacking the players and not

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augmented reality, see Kevin Bonsor, *How Augmented Reality Will Work*, HOW STUFF WORKS, <http://www.howstuffworks.com/augmented-reality.htm> (last visited Feb. 12, 2011).

<sup>136</sup> At the time of this writing, the Wrap VR1200 was slated for a Spring 2011 release. Wrap VR1200 Product Information Page, VUZIX, [http://www.vuzix.com/consumer/products\\_wrap\\_vr1200.html](http://www.vuzix.com/consumer/products_wrap_vr1200.html) (last visited Mar. 25, 2011); *Vuzix Announces Its Next Generation Virtual Reality Video Eyewear—The Wrap VR1200*, VUZIX (Jan. 4, 2011), [http://www.vuzix.com/site/\\_news/Press%20Release%202011-04-2011%20Wrap%20VR1200%20-FINAL%20FINAL-1.pdf](http://www.vuzix.com/site/_news/Press%20Release%202011-04-2011%20Wrap%20VR1200%20-FINAL%20FINAL-1.pdf).

<sup>137</sup> While Vuzix devices are compatible with many PC games, a limited number actually support the head-tracking technology as a viewpoint-control option. See *Virtual Reality Support for iWear VR920 & Wrap 920 Eyewear*, VUZIX, [http://www.vuzix.com/consumer/products\\_vr920\\_support.html](http://www.vuzix.com/consumer/products_vr920_support.html) (last visited Dec. 30, 2010).

<sup>138</sup> Jeff Haynes, *Dead Space Review*, IGN (Oct. 10, 2008), <http://ps3.ign.com/articles/918/918859p1.html>.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*; see also Lark Anderson, *Dead Space Review*, GAMESPOT (Oct. 13, 2008, 6:21 PM), <http://www.gamespot.com/xbox360/action/deadspace/review.html> (noting the game’s “[t]ruly terrifying gameplay” and “disturbingly twisted visuals”).

their in-game characters.<sup>141</sup> What is more, through the use of augmented reality, players could see the terrible necromorphs chasing them through their *own* homes. Needless to say, any fear that gamers experienced while playing *Dead Space* on their television screens would be substantially amplified through the use of VR—with the scary and violent happenings appearing much more realistic as gamers become fully immersed in the game world.

The potential dangers of this immersion have been demonstrated by VR systems used to treat certain psychological disorders.<sup>142</sup> One study of particular note is *Virtual Iraq*, which aims to treat soldiers who are experiencing post-traumatic stress disorder (PTSD).<sup>143</sup> By allowing soldiers to experience the battlefield in a controlled, virtual environment, many were able to better cope with what they experienced while away at war.<sup>144</sup> But despite the positive effect on *soldiers*, the experience had an almost Newtonian equal-and-opposite effect on certain *civilians*.<sup>145</sup> For example, an actor training for a role in a war-themed movie stepped into the simulation and was presented with a full battle experience.<sup>146</sup> Ten minutes in, he stopped the

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<sup>141</sup> Haynes, *supra* note 138 (describing scenes where the monsters unexpectedly crawl out of vents and creep up on the player from behind).

<sup>142</sup> Virtual reality has often been used to help treat certain fears through controlled exposure. See, e.g., Will Knight, *Computer Games Can Treat Phobias*, NEWSIDENTIST (Oct. 20, 2003, 2:50 PM), <http://www.newscientist.com/article/dn4292-computer-games-can-treat-phobias.html> (showing how VR displays are used with games to cure fears like arachnophobia and claustrophobia through exposure therapy); Sam Lubell, *On the Therapist's Couch, a Jolt of Virtual Reality*, N.Y. TIMES, Feb. 19, 2004, available at [http://imsc.usc.edu/press/pdfs/04\\_02\\_19.pdf](http://imsc.usc.edu/press/pdfs/04_02_19.pdf) (treating public-speaking anxiety through use of a VR audience).

<sup>143</sup> See Sue Halpern, *Virtual Iraq*, NEW YORKER (May 19, 2008), available at [http://www.newyorker.com/reporting/2008/05/19/080519fa\\_fact\\_halpern?currentPage=all](http://www.newyorker.com/reporting/2008/05/19/080519fa_fact_halpern?currentPage=all); see also *Virtual Iraq—VR Based Therapy for Post-Traumatic Stress Disorder*, DEFENSE UPDATE (Dec. 1, 2005), <http://defense-update.com/products/v/VR-PTSD.htm>. The therapy used in *Virtual Iraq* is known as Virtual-Reality Exposure Therapy and Arousal Control (VRET-AC); it relies heavily on the concepts of “immersion” and “presence.” See Dennis Patrick Wood, Brenda K. Wiederhold & James Spira, *Lessons Learned from 350 Virtual-Reality Sessions with Warriors Diagnosed with Combat-Related Posttraumatic Stress Disorder*, 13 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 3, 3-5 (2010) (defining immersion, presence, their interrelation, and how they are achieved through the use of virtual reality).

<sup>144</sup> Halpern, *supra* note 143 (“The first thing [one patient] noticed, after a few weeks of Virtual Iraq exposure therapy, was that he was able to sleep without medication. He was more relaxed, and he could joke around. . . . [He said that] [t]oward the end, it was pretty easy to talk about what had happened over there. We went over all the hot spots in succession. I could talk about it without breaking down.”).

<sup>145</sup> See *id.*

<sup>146</sup> *Id.*

simulation because it was affecting him physically.<sup>147</sup> The actor “started to sweat. His heart was racing. His hands were numb. He was having a hard time holding the rifle. His face went white. He bit his lips.”<sup>148</sup> Clearly, the VR experience present in this study was extremely jarring. Given the multitude of games that feature intense war-themed graphics, sounds, and action,<sup>149</sup> widespread adoption of VR technology has the potential to enhance realism of video games to extreme levels—levels even adults may not be comfortable experiencing.

## 2. Uncanny Graphics

Much of Posner’s conclusion that video game violence is not offensive in the same sense as obscenity was based on the fact that video games are visually distinguishable from real life.<sup>150</sup> Almost a decade later, the same remains true. While high-resolution displays and advanced computer processors have allowed for very detailed and realistic environments, the characters in games still do not perfectly resemble human beings.<sup>151</sup> Certain intricacies of human emotion—such as subtle eye movements and the natural asymmetry of the human face—pose trouble for game designers trying to accurately recreate human facial expressions.<sup>152</sup> Another problem is detailed in the uncanny valley theory, developed by Dr. Masahiro Mori.<sup>153</sup> According to this theory, as analogues to the human form come closer and closer to identically resembling an actual human being, there is a drop-off point at which, instead of looking human, the analogues look like scary human corpses and elicit negative feelings in viewers.<sup>154</sup> Due to the difficulty of

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See, e.g., Ocampo, *supra* note 6; Nate Ahearn, *Battlefield: Bad Company Review*, IGN (June 20, 2008), <http://ps3.ign.com/articles/883/883276p1.html>; Hilary Goldstein, *Call of Duty 4: Modern Warfare Review*, IGN (Nov. 5, 2007), <http://xbox360.ign.com/articles/832/832599p1.html>.

<sup>150</sup> See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001) (describing the violence in the games in question as “stylized” and “cartoon-like”).

<sup>151</sup> For example, the PS3 title *Killzone 2* has received immense praise as being a graphical masterpiece, yet the flaws in the facial design of the characters tended to detract from the action. See *Killzone2 Review*, CRAVEONLINE (Mar. 3, 2009), <http://www.craveonline.com/gaming/article/killzone-2-review-73715> (“The only downside to the graphics are actual character models in *Killzone 2*”).

<sup>152</sup> Richards, *supra* note 13.

<sup>153</sup> See Marisa Brook, *A Walk in the Valley of the Uncanny*, DAMN INTERESTING (May 24, 2007), <http://www.damninteresting.com/a-walk-in-the-valley-of-the-uncanny>.

<sup>154</sup> *Id.*

accurately animating the human face in video games, game designers have been fighting an uphill battle. Unable to achieve perfection, they have been forced to create character models with faces that are further from uncanny resemblance in an effort to avoid falling into the uncanny valley and repulsing the game players.<sup>155</sup> In other words, game designers are purposely creating characters that look more like cartoons and less like realistic humans and will continue along this trend until the uncanny valley can be avoided completely.

Recently, however, Image Metrics, a California-based computer-imagery company, has overstepped the uncanny valley with their creation of “Emily,” a computer-generated human analogue that has been revered as truly photo-realistic.<sup>156</sup> Using one-to-one pixel mapping, Image Metrics developed a technique that allows them to track facial movements down to the minutest detail, such as “the movement in the top 3-4mm of the right side of the smile.”<sup>157</sup> Through this technique, the company has made great strides in overcoming the obstacles mentioned earlier, such as properly animating the eyes and problems with symmetry.<sup>158</sup> The results are outstanding, gaining much buzz around the Internet,<sup>159</sup> and truly must be seen to be believed.<sup>160</sup>

Though Image Metrics has often worked in the game-design field,<sup>161</sup> this technology has yet to be implemented in video games, primarily because the processors available for computers and installed in home consoles like the PlayStation 3 and Xbox 360 are not capable of handling the complicated

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<sup>155</sup> See Richards, *supra* note 13 (“For many years now, animators have come up against a barrier known as ‘uncanny valley,’ which refers to how, as a computer-generated face approaches human likeness, it begins [to] take on a corpse-like appearance . . . . As a result, computer game animators have purposely simplified their creations so that the players realise [sic] immediately that the figures are not real.”).

<sup>156</sup> *Id.* For a video of Emily, see *The Emily Project*, IMAGE METRICS, <http://www.image-metrics.com/project/emily-project> (last visited Feb. 1, 2011).

<sup>157</sup> Image Metrics’ method involves the facial mapping of individual pixels in a video instead of applying motion-capture dots to certain facial reference points. See generally Richards, *supra* note 13.

<sup>158</sup> *Id.*

<sup>159</sup> See *Image Metrics Emily Cg Facial Animation Blows My Mind*, TECHNABOB (Aug. 20, 2008), <http://technabob.com/blog/2008/08/20/image-metrics-emily-facial-animation-blows-my-mind> (“[Y]ou’d be really hard-pressed to tell the difference between digital Emily and real-world Emily.”).

<sup>160</sup> *The Emily Project*, *supra* note 156.

<sup>161</sup> Richards, *supra* note 13 (noting that Image Metrics has produced facial animations for popular titles like the *Grand Theft Auto* series).

computation involved in animating an analogue like Emily.<sup>162</sup> But processors with enough power *will* be available for PCs in the next ten years and will likely be included in the coordinate generation of home consoles.<sup>163</sup> In other words, the ability to create games with photo-realistic graphics is at hand; game designers are simply waiting for graphics-processing technology to catch up.

As soon as this technology is implemented in video games, video game violence will become tremendously more offensive. For example, the game *Medal of Honor: Frontline* opens with a stage recreating D-Day from World War II.<sup>164</sup> Players arrive on the shores of Normandy surrounded by their comrades, who subsequently get mowed down by oncoming rifle fire. Through the use of photo-realistic graphics, the players will see this carnage as the actual soldiers saw it—with real-looking humans dying in realistic ways, suffering realistic flesh wounds and losing realistic limbs, all the while grimacing and cringing with uncanny accuracy. This is no longer the “cartoon-like” violence Posner labeled inoffensive in *Kendrick*<sup>165</sup> and could *alone* warrant a jurisprudential reevaluation by the courts.

### B. *The Tactile Barrier and Motion Control*

In *Kendrick*, Posner refused to treat the violence in video games differently from violence in other art forms, such as movies and literature.<sup>166</sup> He posited that the interactive

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<sup>162</sup> *Id.* (“If you’re trying to process the graphics in a photo-realistic animation, in real-time, there’s a lot of computation involved.”). But strides are being made with regard to facial motion capture in this generation of video games, the most stunning example being the use of Australian company Depth Analysis’s MotionScan camera technology in the upcoming Rockstar Games *L.A. Noire*. See Tim Stevens, *L.A. Noire’s Amazing MotionScan Facial Capture System Demonstrated*, ENGADGET (Dec. 17, 2010, 3:45 PM), <http://www.engadget.com/2010/12/17/l-a-noires-amazing-motionscan-facial-capture-system-demonstrat>; Jake Gaskill, *L.A. Noire Facial Recognition Tech Video Drops, Perfectly Maps Jaws*, G4TV (Dec. 16, 2010), <http://g4tv.com/thefeed/blog/post/709238/LA-Noire-Facial-Recognition-Tech-Video-Drops-Perfectly-Maps-Jaws.html> (“The facial animation tech at work in the game . . . has, until now, only been seen in major blockbuster movies, and, in fact, this marks the tech’s first appearance ever in a video game.”). *But see* Evan Narcisse, *Face-to-Face with “L.A. Noire’s” Cutting-Edge Tech*, TIME TECHLAND (Dec. 17, 2010), <http://techland.time.com/2010/12/17/face-to-face-with-l-a-noires-cutting-edge-tech> (“As good as this stuff looks, we’re deep into Uncanny Valley-land here. It remains to be seen if the MotionScan performances will be at all off-putting for people who want to play the game.”).

<sup>163</sup> Richards, *supra* note 13 (“[T]he line between what was real and what was rendered would not be blurred completely until 2020.”).

<sup>164</sup> See generally Perry, *supra* note 7.

<sup>165</sup> *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001).

<sup>166</sup> *Id.* at 577.

component of video games is no different from the immersive qualities of the best books and cinema.<sup>167</sup> Perhaps with the current state of gaming technology, the immersive quality of video games does not warrant any special treatment. After all, how immersed can a player get when he is required to control his on-screen character through complicated button inputs? But the fact remains that games *are* different from movies and literature in that they contain this element of control and decision making. Once games can be controlled using methods that do not constantly remind players that they are in fact simply playing a video game, such as through advanced motion-sensing technology, it may be warranted to treat them differently from other types of media.

The use of motion-based controls is a fairly new development in how players interact with games, and it has created a powerful buzz in the game industry. The motion-control craze began with the release of the Nintendo Wii. The Wii was the first home console to allow players to utilize their physical motions to control the action on screen.<sup>168</sup> While this technology has been successful in its own right, leading the Wii to outclass its competitors in worldwide sales,<sup>169</sup> it has been unsuccessful in fully breaking the tactile barrier. The technology in the Wii remote is not sophisticated enough to process intricate physical motions. While this is fine for mimicking the simple act of throwing a bowling ball in *Wii Sports*,<sup>170</sup> games like *The Legend of Zelda: Twilight Princess*<sup>171</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> See generally Matt Casamassina, *IGN's Nintendo Wii FAQ*, IGN (Sept. 19, 2006), <http://wii.ign.com/articles/733/733464p1.html> (“The Wii system is the fruit of a new Nintendo philosophy that is determined to emphasize original and fresh gameplay endeavors . . . . [The] Wii’s biggest innovation lies with a potentially revolutionary new controller.”). Using a combination of high-tech accelerometers (known as “Micro Electro-Mechanical System” (MEMS) units) and infrared sensors, the handheld Wii remote controller (affectionately labeled the “Wii-mote”) tracks its own relative motion, translating a player’s wrist flicks and twists into commands for the on-screen counterparts to follow. See Michel Marriot, *At the Heart of the Wii, Micron-Size Machines*, N.Y. TIMES, Dec. 21, 2006, at C12, available at [http://www.nytimes.com/2006/12/21/technology/21howw.html?\\_r=3&oref=slogin&oref=slogin](http://www.nytimes.com/2006/12/21/technology/21howw.html?_r=3&oref=slogin&oref=slogin).

<sup>169</sup> *Hardware Totals*, VGCHARTZ, [http://www.vgchartz.com/hardware\\_totals.php](http://www.vgchartz.com/hardware_totals.php) (last visited Feb. 12, 2011) (demonstrating that the Nintendo Wii ranks fifth all-time in total units sold with 84.72 million worldwide, whereas the competing Microsoft Xbox 360 and Sony PlayStation 3 rank ninth and eleventh with 51.29 million and 47.34 million units sold respectively).

<sup>170</sup> Matt Casamassina, *Wii Sports Review*, IGN (Nov. 19, 2006), <http://wii.ign.com/articles/745/745708p1.html> (noting that the Wii remote works very well for recreating real-life bowling).

and *Ready 2 Rumble Revolution*<sup>172</sup> have been less successful in recreating more advanced motions like sword fighting and boxing, respectively. In short, the Wii technology is not up to the task of creating a fully immersive experience due to its inability to accurately process a player's motions beyond the simplest activities, removing most of the "reality" from the motion-based experience. Nintendo *has* recently introduced the Wii MotionPlus, a small device that plugs into the bottom of the Wii remote to increase its ability to recreate players' motions with near one-to-one accuracy. Critics have claimed that this peripheral is a marked improvement over the capability of the standard Wii remote.<sup>173</sup> But even with the Wii MotionPlus, players are still required to hold a controller in their hands, often necessitating a combination of button inputs with physical motions, which acts as a constant reminder that they are, in fact, simply playing a video game.

The Nintendo Wii's commercial success has informed its competitors that players want motion-based controls due to the potential for these controls to make players' interaction with their games more realistic. Both Sony and Microsoft have developed, and recently released, new motion-sensing technologies for use with their systems.<sup>174</sup> It is Microsoft's device, however, that is the most intriguing and offers the greatest potential for players to lose themselves within games.

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<sup>171</sup> Matt Casamassina, *The Legend of Zelda: Twilight Princess Review*, IGN (Nov. 17, 2006), <http://wii.ign.com/articles/746/746691p2.html> (explaining that swinging the Wii remote to make the main character attack does not create one-to-one movement recognition but simply replaces a button press with a wrist flick).

<sup>172</sup> Craig Harris, *Ready 2 Rumble Revolution Review*, IGN (Mar. 18, 2009), <http://wii.ign.com/articles/964/964019p1.html> ("Ready 2 Rumble Revolution is the latest game that attempts all sorts of various Wii waggle for all of its attacks, and ultimately fails at giving players the precision they need to pull them off.").

<sup>173</sup> See Martin Robinson, *Wii MotionPlus Arrives*, IGN UK (Jun. 12, 2009), <http://wii.ign.com/articles/994/994199p1.html>; see also Craig Harris, *Wii Sports Resort Review*, IGN (July 26, 2009), <http://wii.ign.com/articles/100/1004395p3.html> ("[This game is] a wonderful demonstration of the capabilities of the Wii Motion Plus peripheral, and shows just how much it changes Wii motion sensing for the better. The device is incredibly accurate.").

<sup>174</sup> Sony's offering, the PlayStation Move, combines a Wii remote-like controller with a motion-detecting camera called the PlayStation Eye. See Giancarlo Varanini, *PlayStation Move: What You Need to Know*, GAMESPOT (June 17, 2010, 1:05 PM), <http://move.gamespot.com/updates/index.php?id=6266516>. Out of the three (the Wii, the Move, and the Kinect), the Move may in fact provide for the most accurate motion detection, but its potential for full immersion is still limited by the complicated controller in the player's hand. See generally Scott Lowe, *PlayStation Move Review*, IGN (Sept. 17, 2010), <http://gear.ign.com/articles/111/1117286p1.html> ("At the end of the day, the PlayStation Move has the potential to be the best motion control system on the current crop of consoles.").

Microsoft's motion-detecting peripheral for use with the Xbox 360 console, originally labeled Project Natal, is called the Kinect.<sup>175</sup> The Kinect is a camera that allows players to control the game experience utilizing a combination of actions used every day to interact in the real world—full-body physical movement, facial expressions, and speech—with no need for a handheld controller whatsoever.<sup>176</sup> While in development, the original Project Natal prototype repeatedly blew critics away.<sup>177</sup> It had been reported that the Natal's ability to recognize extremely precise movement was astounding, with onscreen characters recreating wild arm waving and random hip thrusting perfectly, as well as accurately detecting different movement speeds for calculating how hard a player is attempting to hit a ball, swing a bat, etc.<sup>178</sup>

Unfortunately, some of the magic seems to have been lost in the transition between the Project Natal and the now-available Microsoft Kinect. Accurate motion detection is still present, but the final product contains a lack of immersion and responsiveness due to some unpleasant lag between the player's movements and the on-screen representations

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<sup>175</sup> See Tor Thorsen, *Project Natal Renamed Kinect, Due in November*, GAMESPOT (June 13, 2010, 8:40 PM), <http://kinect.gamespot.com/updates/index.php?id=6265354>.

<sup>176</sup> Scott Lowe, *Microsoft Kinect Review*, IGN (Nov. 3, 2010), <http://gear.ign.com/articles/113/1132213p1.html> ("Microsoft has paired an RGB VGA camera with a resolution of 640 x 480, a depth sensor of the same resolution, and a multi-array microphone into a single peripheral that can gauge distance and motion, digitally map a 3D space, and even visually recognize players and accept voice commands; and it does it all in real time."); see also Edwards, *supra* note 17; Geddes, *supra* note 17.

<sup>177</sup> The groundbreaking device purported to detect a player's full body and motion in a 3D space "with spectacular accuracy." Martin Robinson, *GC 2009: Project Natal Preview*, IGN UK (Aug. 20, 2009), <http://xbox360.ign.com/articles/101/1016309p1.html>. According to people who had tried the device, it worked exactly as described. See, e.g., Jeremy Dunham, *E3 2009: I've Played Natal and It Works*, IGN (June 2, 2009), <http://xbox360.ign.com/articles/989/989269p1.html>.

<sup>178</sup> See Robinson, *supra* note 177. The potential power and effectiveness of the Natal peripheral was also demonstrated by the large number of game developers and publishers that were ready to jump on board even before its official release, confirming that their future titles would support the use of Project Natal. See, e.g., Jim Reilly, *All Future Epic Games to Support Natal*, IGN (Oct. 9, 2009), <http://xbox360.ign.com/articles/103/1033630p1.html>; Jim Reilly, *Fable III Getting Natal Support, Micro-Transactions*, IGN (Oct. 22, 2009), <http://xbox360.ign.com/articles/103/1037764p1.html>; Tom Magrino, *Unreal the 'Unofficial Engine' of Natal*, GAMESPOT (Oct. 9, 2009, 11:44 AM), <http://www.gamespot.com/news/6232564.html>; see also Hilary Goldstein, *Crytek Considering Natal*, IGN (Aug. 12, 2009), <http://xbox360.ign.com/articles/101/1013226p1.html> ("The Natal project sounds fascinating. . . . Just making games higher and higher resolution is never going to be the future, there needs to be other routes too.").

thereof.<sup>179</sup> Even with its limitations, however, the Kinect is most assuredly a portent of things to come, demonstrating that motion-controlled gaming is here to stay, and the ability to create a fully immersive controller-less experience is only *slightly* beyond our reach.<sup>180</sup> And the importance of this technology is only further validated by the extent to which game creators have praised it<sup>181</sup> and the way the Kinect has absolutely flown off store shelves.<sup>182</sup>

By taking the controller completely out of the player's hand, future devices like the Microsoft Kinect have the potential to create interactive gaming experiences that go far beyond the simple "toggle stick" described by Posner.<sup>183</sup> For example, current controllers require you to guide your soccer team to victory in a game like *FIFA Soccer 11*<sup>184</sup> by using complicated button presses and the pitch of an analog stick. The Kinect and its future progeny, however, will allow your own precise leg and body movements to control how your players pass, aim, shoot, steal, and dribble—just like in real life. Delineations between a pass and a shot would not be about pressing either the "A" button or the "B" button, but would rely

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<sup>179</sup> See Lowe, *supra* note 176 (noting that the finalized model no longer has the integrated processing unit that was included in the Natal prototype, and while the Kinect is still accurate in detecting motion, there is a noticeable delay in the translation between the camera and the console, and this delay "will certainly stand in the way of more advanced gaming applications").

<sup>180</sup> The only reason for the lag in the Kinect seems to be the result of a decision designed to decrease the retail price of the device. See *id.* ("The impact of Microsoft's decision to ditch onboard processing, presumably to cut costs, has resulted in a hit to the sensor's responsiveness." (emphasis added)).

<sup>181</sup> One creator stated that "technology-wise, it surpasses anything that exists right now"; another described using it for the first time as just "like the 2D to 3D shift . . . that was the degree of shock I felt" and said that "it has the potential to change lifestyle dramatically." Erik Brudvig, *TGS 09: Kojima on Natal-Like 2D to 3D Shift*, IGN (Sept. 24, 2009), <http://xbox360.ign.com/articles/102/1027989p1.html>.

<sup>182</sup> See Paul Miller, *Microsoft Announces 2.5 Million Kinects Sold in First 25 Days*, ENGADGET (Nov. 29, 2010, 7:44 PM), <http://www.engadget.com/2010/11/29/microsoft-announces-2-5-million-kinects-sold-in-first-25-days>; Bianca Bosker, *Microsoft's Kinect Selling Twice as Fast as the iPad*, HUFFINGTON POST (Nov. 30, 2010), [http://www.huffingtonpost.com/2010/11/30/kinect-selling-twice-as-fast-as-ipad\\_n\\_789752.html](http://www.huffingtonpost.com/2010/11/30/kinect-selling-twice-as-fast-as-ipad_n_789752.html); Brett Walton, *Kinect Sales Reach 4 Million Units Worldwide*, GAMRFEED (Dec. 14, 2010), <http://gamrfeed.vgchartz.com/story/83079/kinect-sales-reach-4-million-units-worldwide> ("In the same timeframe from launch, Nintendo's Wii managed to sell 2.9 million units and Sony's PlayStation Move sold just over 900,000 units (camera + at least one Move controller)—less than 1/4 of the sales of Kinect."); see also Brendan Sinclair, *Kinect to Reach 7.6 Million in 2011—Report*, GAMESPOT (Dec. 23, 2010, 11:03 AM), [http://www.gamespot.com/news/6285819.html?tag=latest\\_headlines%3Btitle%3B4](http://www.gamespot.com/news/6285819.html?tag=latest_headlines%3Btitle%3B4).

<sup>183</sup> *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

<sup>184</sup> See generally Guy Cocker, *FIFA Soccer 11 Review for Xbox 360*, GAMESPOT (Oct. 1, 2010, 2:48 PM), <http://www.gamespot.com/xbox360/sports/fifasoccer11/review.html>.

on how hard you kick, what part of your foot makes contact with the ball, where your body is pivoted to aim, and so on. You could even use your own voice to call for a pass!

The same applies, however, for games that contain graphic violence. For example, the protagonists in games like *Metal Gear Solid 4*<sup>185</sup> and *Tom Clancy's Splinter Cell: Conviction*<sup>186</sup> are forced to utilize stealth, and as such, often find the need to sneak up behind enemies, choke them into submission, and, if they choose, snap their necks in order to remain unnoticed. Using devices like the Kinect, players would be able to mimic actual strangling motions, with the quick flicks of their hands used to take their enemies by surprise. It is not hard to imagine minors playing a game like *Metal Gear Solid 4* in their living rooms, wringing their hands in real life to brutally incapacitate his or her enemies in the game. Through the introduction of the Kinect, the level of interactivity in games that Posner and subsequent courts have likened to that of books and movies will be a faint memory. This is no longer sitting, clicking, and flicking. This is *being*.

### III. CHANGING THE GAME(S)

The world in which Posner exclaimed that games are not offensive in the same way as obscenity is today a far cry from the world imagined by these upcoming technologies. Moreover, when these technologies are used in tandem, the experience will assuredly be astoundingly real. For example, imagine a hypothetical home console called the "Omega." The system has been built from the ground up to take full advantage of Image Metrics' face-mapping technology, with the processing power to create perfect human analogues in games. In other words, the game world has become visually indistinguishable from real life. The line has been blurred. Next, imagine that instead of viewing these images in 2D on a TV screen, players see the virtual world all around them using a perfected VR headset in the vein of the Vuzix devices

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<sup>185</sup> Jeff Haynes, *Metal Gear Solid 4: Guns of the Patriots Review*, IGN (June 12, 2008), <http://ps3.ign.com/articles/881/881472p1.html> ("[Y]ou may need to use everything from playing dead to rolling on the ground to evade visual contact to new [close-quarters combat] attacks, such as lying atop an enemy and choking them silently to incapacitate opponents.").

<sup>186</sup> See Hilary Goldstein, *Splinter Cell: Conviction Review*, IGN (Apr. 9, 2010), <http://xbox360.ign.com/articles/108/1082854p1.html> ("[The player-controlled character] Sam lurks in the shadows, finds his moment to pounce and strikes with deadly efficiency.").

mentioned earlier. This alone seems like an experience that is way more intense than anything the public has played before. The line fades. But it gets better. Imagine now that gamers are playing the Omega in front of a Kinect-like device. The device detects the players' precise head tilts and turns, and changes the perspective they are seeing through the VR helmet to create a seamless, 360-degree virtual world. The line vanishes. Now imagine further that the players are interacting with the characters in the game world using precise full-body motions and vocal commands, with zero need for a handheld controller. The line is a mere afterthought. It is fully conceivable that with all of these technologies working hand in hand, the gaming experience will be *completely* indistinguishable from real life.

The Omega's danger—and, more importantly, its offensiveness—becomes clear when violent content is added to the mix. The possibilities are extremely jarring. For example, take a game like *Manhunt*,<sup>187</sup> which has players performing gory and brutal stealth kills on heavily armed enemies with everyday objects, such as plastic bags, shards of glass, and crowbars. This game has already given birth to a Nintendo Wii sequel, *Manhunt 2*,<sup>188</sup> which lets players actuate these horrible acts with rudimentary motion controls (imprecise wiggles and waggles). But what if *Manhunt 3* was to come out on the Omega? Players are dropped into a dark and dingy alleyway that is indistinguishable from the one down the street from their apartment. They notice a large, stalking shadow in the distance, brandishing a baseball bat. The player tilts his head all around, sizing up the situation, when he notices a broken beer bottle lying next to a dumpster. As silently as possible, the player creeps up behind his assailant, and when close enough, grabs the man and plunges the broken glass into his neck using precise arm motions. The player twists and turns his wrist,

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<sup>187</sup> See Douglass C. Perry, *Manhunt*, IGN (Nov. 19, 2003), <http://ps2.ign.com/objects/549/549938.html>.

<sup>188</sup> Jeff Haynes, *Manhunt 2 Review*, IGN (Oct. 29, 2007), <http://wii.ign.com/objects/883/883115.html>. Because of the game's increased level of violence and the inclusion of motion controls, *Manhunt 2* generated particular controversy. It came close to receiving an "Adults Only" rating from the Entertainment Software Review Board and also faced many challenges from the British Board of Film Classification as per the Video Appeals Committee's decision to allow the game to retail in the UK. See generally Martin Robinson, *Manhunt 2 Take to Court*, IGN (Dec. 18, 2007), <http://wii.ign.com/articles/842/842082p1.html>; Rob Burman & Matt Casamassina, *Rockstar Responds to Manhunt 2 Ban, AO Rating*, IGN (June 20, 2007), <http://wii.ign.com/articles/797/797920p1.html>. *Manhunt 2* was also designated as one of the scariest games of the last generation by IGN. See *13 Scariest Games of This Generation*, IGN (Oct. 29, 2008), <http://wii.ign.com/articles/925/925281p1.html>.

digging deeper into the man's flesh. Blood pours out, and the player watches as the man, bearing an uncanny resemblance to an actual human being, cringes and cries out in pain until he slowly fades away; the man is dead in the player's arms. Using precise motion controls in an immersive, photo-real environment to recreate such violent murders would shock the conscience, especially when considering minors. Isn't this type of gaming experience just as offensive to community standards of what is appropriate for minors, just as "obscene," as any sexually explicit content?

A. *Adapting the Law as the Technology Advances*

Considering the implications of a console like the Omega, the validity of Judge Posner's decision in *Kendrick* and, consequently, the subsequent decisions that use *Kendrick* as a model for striking down regulations of violent video games, must soon be brought under rigorous scrutiny. Posner entrenched his reasons for differentiating between the dangers of obscenity and those of video game violence in the notion that video games are no more immersive or interactive than movies or literature,<sup>189</sup> and that the violence in video games would never be mistaken for real-life violence.<sup>190</sup> These conclusions, however, will not be true for much longer. Accordingly, our jurisprudence regarding state regulation of video game violence will need to adapt to account for the increasing offensiveness of this violence and its similarity to the deplorable characteristics of obscenity. While it is unclear precisely how such adaptation will proceed, there are four plausible possibilities: (1) the development of a technological tipping point, (2) the expansion of the legal definition of obscenity, (3) the development of more narrowly tailored statutes, or (4) the creation of a new category of First Amendment exclusion.

1. A Technological Tipping Point

The first possibility is that courts and their judges will adopt a technology-based tipping point, establishing a distinct point in time at which *all* games become so "real" that *all* of their violent content is removed from First Amendment protection. This would be an umbrella rule of sorts and would

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<sup>189</sup> Am. Amusement Mach. Ass'n v. *Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

<sup>190</sup> *Id.* at 575.

not be premised on the specific qualities of the games being regulated in each particular instance. Instead, it would presume that, based on the new technology, the games to follow would be *too* realistically violent; thus, they should all be removed from the protection of the First Amendment, and any regulation of them would only have to pass muster under the lenient rational-basis standard. The justification for such an umbrella rule could be that judges and juries are ill equipped to make detailed value judgments based on the violent qualities of the particular video games being regulated. Courts would be more comfortable removing games entirely to avoid trying their hands at such intricate evaluations. Before video games had the potential to convey a narrative storyline, they were not protected under the First Amendment.<sup>191</sup> It is conceivable that once we reach a technological tipping point at which games have the potential to be disturbingly realistic and immersive in their depictions of violence, games will once again be excluded from First Amendment protection.

While perhaps conceivable in justification, such an umbrella rule would be troubling in practice, and is far and away the most unlikely of ways the law may adapt to the advancing video game technology. Just as judges are ill equipped to make game-by-game value judgments of violent content, they are similarly ill equipped to devise a particular “point of no return” for video game technology. Furthermore, such a rule would tend to be overinclusive, since not all video game violence is created equally. Using the suggested tipping point, states would find success in regulating games that display little to no violence whatsoever as long as they could demonstrate some conceivable reasonable justification for the regulation. In short, a blanket rule applicable to all video games seems unworkable, and courts would be hard pressed to establish it in the first place.

## 2. The Expansion of Obscenity

A second possible method for the law governing video game violence to adopt is that courts will expand the legal definition of obscenity to include violent content in video games. This is the most common argument made by proponents of regulating video game violence, and is the argument raised

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<sup>191</sup> See, e.g., *People v. Walker*, 354 N.W.2d 312, 316-17 (Mich. Ct. App. 1984).

by the city of Indianapolis in *Kendrick*<sup>192</sup> and St. Louis County in *Interactive Digital Software Association v. St. Louis*.<sup>193</sup> While unsuccessful so far, perhaps as technology advances and video game violence becomes increasingly offensive to normal standards of what is appropriate (especially for minors), the differences between video game violence and obscenity will become less important. After all, it is not sex as sex that causes the fears associated with obscenity, but the fact that the sexual content stands in stark contrast to community standards of what is appropriate.

This route is advocated by Jennifer Chang in her note, *Rated M for Mature: Violent Video Game Legislation and the Obscenity Standard*.<sup>194</sup> At the heart of Chang's argument is a reevaluation of the obscenity standard detailed by the Supreme Court in *Miller v. California*.<sup>195</sup> In that case, the Court again expressly limited the obscenity exclusion to "works which . . . appeal to the prurient interest in sex."<sup>196</sup> The Court further expressed its concerns for overbroad utilizations of the obscenity standard by states to regulate speech: "We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct."<sup>197</sup> Chang points out that this limitation seems more concerned with the potentially broad scope of the obscenity exclusion, and not the actual definition of the term "obscenity."<sup>198</sup> She then explains how the Court *itself* noted that its limitation of obscenity is not in line with the general understanding of the term "obscenity" and that sexual content is just one subgroup thereof.<sup>199</sup> Utilizing these notions, Chang goes on to conclude that Courts citing *Miller* in video

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<sup>192</sup> *Kendrick*, 244 F.3d at 574 ("[T]he City asks us to squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity.").

<sup>193</sup> *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 957, 958 (8th Cir. 2003) ("We reject the County's suggestion that we should find that the 'graphically violent' video games in this case are obscene as to minors.").

<sup>194</sup> Jennifer Chang, *Rated M for Mature: Violent Video Game Legislation and the Obscenity Standard*, 24 ST. JOHN'S J. LEGAL COMMENT 697 (2010).

<sup>195</sup> *Id.* at 703-05. See generally *Miller v. California*, 413 U.S. 15 (1973). Note that *Miller* postdates previously cited cases like *Memoirs* and *Roth*, and is as such a further clarification and elucidation of the principles established therein. *Id.* at 15.

<sup>196</sup> *Miller*, 413 U.S. at 24 (emphasis added).

<sup>197</sup> *Id.* at 23-24.

<sup>198</sup> Chang, *supra* note 194, at 704.

<sup>199</sup> *Id.* at 704-05 (citing *Miller*, 413 U.S. at 18 n.2).

game violence cases should not be so quick to toss out the idea that violence could fall within the definition of obscenity.<sup>200</sup>

Despite Chang's analysis, it is unlikely that courts will opt to go this route. The Supreme Court has been very clear in cases like *Roth* and *Ginsberg* that the term obscenity, in its legal sense as a category of exclusion from First Amendment protection, relates specifically to sexually explicit content.<sup>201</sup> Lower courts have been reluctant to expand this definition because of its extremely narrow application by the Supreme Court.<sup>202</sup> As Chang noted, one concern for this limitation is to avoid opening the floodgates to a vast number of state regulations under the obscenity exclusion.<sup>203</sup> For example, if *video game* violence is included in the definition of obscenity, there would be little to stop states from trying to regulate *other types* of violent content, such as that found in movies and television, under the same definition. But there is another, perhaps more pertinent, motivation for limiting the definition of obscenity—one that a handful of justices noted during the *Schwarzenegger* oral arguments. Essentially, as both Justices Scalia and Sotomayor pointed out, obscenity and violence are distinct concepts; the former was recognized as excluded from First Amendment protection when the Bill of Rights was originally ratified, whereas the latter has no historical tradition of being regulated.<sup>204</sup> As such, violence cannot be treated under the same umbrella as obscenity, since a prohibition against violence, unlike sexual content, is one “[that] the American people . . . never ratified when they ratified the First Amendment.”<sup>205</sup> For these reasons, without more direction from the Supreme Court, it is highly likely that the definition of “obscenity” will remain strictly limited to sexual content.

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<sup>200</sup> *Id.* at 724.

<sup>201</sup> *See, e.g.,* *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1965) (explaining that, to be considered obscene, material must appeal to a “prurient interest in sex” and offend standards relating to the depiction of “sexual matters”).

<sup>202</sup> *See, e.g.,* *Interactive Digital Software Ass'n v. St. Louis*, 329 F.3d 954, 958 (8th Cir. 2003) (“[W]e have previously observed that ‘[m]aterial that contains violence but not depictions or descriptions of sexual conduct cannot be obscene.’” (quoting *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) (second alteration in original))).

<sup>203</sup> Chang, *supra* note 194, at 703.

<sup>204</sup> Transcript of Oral Argument, *supra* note 110, at 8, 15-16.

<sup>205</sup> *Id.* at 15-16.

### 3. The Ability to Narrowly Tailor Increases

The third possible path for a change in video game violence law as a result of advancing technology is that states will develop much more narrowly tailored statutes more likely to survive strict scrutiny. A major part of the game industry's argument in *Schwarzenegger* is that the English language is simply too imprecise to draft a statute that is sufficiently narrow; thus, all attempts to regulate video game violence are over-inclusive and invalid under strict scrutiny.<sup>206</sup> But this may not be the case as technology develops. By limiting a regulation's application to very specific characteristics present in the fully immersive violent games of the future, the scope would be much narrower and the harm of this content might be more readily discernable. In this context, these regulations could be deemed constitutional. For example, a state legislature could draw up a statute that prohibits sale of video games that contain "fully immersive graphic violence" or "photo-realistic gore in an immersive virtual world," and define these terms as requiring a virtual reality that is indistinguishable from real life, intense images of graphic violence inflicted upon photo-realistic human beings, and a level of interactivity that goes beyond button inputs, such as motion-tracked re-creations of physical violence. Such detailed regulations would only apply to a specific, much more narrowly tailored category of games: those that truly achieve disturbingly realistic violence. By authoring regulations in this way, legislatures would avoid the pitfall of over-inclusion.

It is worth pointing out that states would still need to demonstrate a compelling interest in regulating video game violence to survive strict scrutiny. This has generally been difficult given the inconclusive studies about the potential for violent video games to actually cause damage.<sup>207</sup> But it is plausible that, given today's evidence of the physical effects of intense VR experiences (like the one described in *Virtual Iraq*),<sup>208</sup> the evidence will be more conclusive when our gaming technology takes the jump into the real.

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<sup>206</sup> *Id.* at 42 ("[T]he English language is not susceptible [to] that level of precision.").

<sup>207</sup> See, e.g., *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962-64 (9th Cir. 2009), *cert. granted sub nom. Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (argued Nov. 2, 2010); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578-80 (7th Cir. 2001); Transcript of Oral Argument, *supra* note 110, at 35 ("[T]he current studies don't suggest much of anything about harm.").

<sup>208</sup> Halpern, *supra* note 143.

#### 4. A New Category of Exclusion

The fourth and final possible way in which the law will adapt to the ever-advancing landscape of video game technology is one that, given Posner's language in *Kendrick*, has a high likelihood of success.<sup>209</sup> Instead of trying to cram video game violence under the umbrella of the obscenity exclusion, states could quite easily argue for a new category of exclusion from the First Amendment that covers disturbingly realistic video game violence. This is the path advocated by the State of California in *Schwarzenegger*.<sup>210</sup> In *Kendrick*, Posner made it very clear that obscenity and violence were different because of the reasons states try to regulate them.<sup>211</sup> On the one hand, obscenity is, on its face, offensive to the norms of what is appropriate for minors.<sup>212</sup> On the other hand, it is the potential for violent video games to cause *harm* that previous state regulations had been addressing.<sup>213</sup> Posner demonstrated that video game violence was not offensive in the same sense as obscenity because the violence was unrealistic, stylized, cartoon-like, and the characters in games would never be mistaken as actual human beings.<sup>214</sup> He also commented that the interactivity in video games does not go beyond that of reading a book or watching a movie.<sup>215</sup>

Using this language, in a world where consoles like the Omega exist, courts would have no trouble turning these misconceptions on their head. Video game violence *will* turn stomachs and be extremely realistic. People *will* mistake the characters in games for actual human beings. The interactivity and immersion *will* go far beyond that of other art forms. In other words, video game violence *will* be offensive in the same sense as obscenity, as it will completely violate the norms of what society deems appropriate, especially for minors. And when any material reaches this level of offensiveness, there is

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<sup>209</sup> Two of the justices (Scalia and Alito) noted the legitimacy of this avenue during the *Video Software Dealers* oral arguments due to the inability for the First Amendment to conceive of the potential offensiveness of violent video games. See Transcript of Oral Argument, *supra* note 110, at 36-38.

<sup>210</sup> See Reply Brief for Petitioners, *supra* note 108, at 4 (defining this category as "obscene violence").

<sup>211</sup> *Kendrick*, 244 F.3d at 574-76.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 575.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 579.

no reason it shouldn't be dealt with on the same playing field as other material at this level—namely, obscenity. Once these upcoming technologies become a reality, courts would be hard pressed *not* to create a new standard for unprotected speech, such as “photo-realistic interactive violence.” And with this new category of exclusion created, a showing of actual harm would no longer be necessary, as state regulations of speech under this exclusion would be assessed under the lenient rational-basis analysis instead of strict scrutiny.<sup>216</sup>

### B. *Game Designers: How to Protect Themselves*

Regardless of how the law changes, the outcome is the same: a higher probability that games will be regulated one way or another. This spells trouble for the video game industry for a few reasons. First, consumers demand better graphics and interactivity. When new technology is available, consumers expect that it be utilized, and console manufacturers and game designers would take much flak if they opted to forgo building their new games and systems to utilize the most advanced and interactive technology available.<sup>217</sup> Second, game designers want to ply their trade in new ways, breaking the barriers between games and reality to create truly remarkable immersive experiences that have never been seen before. Much like any artists, it is the goal of game designers to take steps into new territories that have yet to be explored and revolutionize their trade. With such demand for the utilization of new technology coming from all sides, the video game industry may be fighting an unwinnable fight. On the one hand, if game companies follow technological trends and design consoles like the Omega, they run the risk of opening the door to greater regulation of the industry. On the other hand, if

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<sup>216</sup> Ginsberg v. New York, 390 U.S. 629, 641-43 (1968) (discussing how scientific certainty is not needed to satisfy the rational-basis analysis).

<sup>217</sup> One example is the amount of heat Nintendo has received after the Wii was released without high-definition graphics capabilities. Many reviews of the console identified its last-generation graphics as one of its biggest downsides. *See, e.g.*, Sandy Berger, *Nintendo Wii Review*, HARDWARE SECRETS (Nov. 9, 2009), <http://www.hardwaresecrets.com/article/Nintendo-Wii-Review/858/4> (“The graphics in the Wii are simplistic and somewhat stilted compared to the realism and quality of the graphic display offered by the [Xbox 360] and the [PS3].”); Jess Bakalar, *Nintendo Wii Review*, CNET (Nov. 13, 2006), [http://reviews.cnet.com/consoles/nintendo-wii/4505-10109\\_7-31355104-2.html?tag=rvwBody](http://reviews.cnet.com/consoles/nintendo-wii/4505-10109_7-31355104-2.html?tag=rvwBody) (“[The Wii] doesn't have nearly as much polygon-pushing power as the Xbox 360 or the PlayStation 3. . . . [I]f you're looking for state-of-the-art eye candy, you're going to want to opt for the PS3 or the Xbox 360.”).

companies opt instead to forgo utilizing technological advancements, they may lose support from both customers and game designers. Is the industry left with no options? Will gaming eventually be truncated either by state regulations or a refusal to utilize new technology?

Perhaps to some degree game companies are in a tight spot, but there are a few weapons in the industry's arsenal to help maintain control over game content while still continuing to satisfy their customers. Primarily, game creators should try and be reasonable in their use of the new technology. For example, many designers have been extremely successful in creating games with engrossing tales and fantastic game play without utilizing the most realistic graphics possibly achievable.<sup>218</sup> Techniques like cel-shading<sup>219</sup> have been used to create extremely striking environments and characters, quite distinct from the real world but still immersive in their own right. By using advanced graphics technology to further stylize their games (instead of making them look more like real life), designers can continue to create artistic masterpieces without toeing the line between gaming and reality, and forcing courts to adopt a new scheme of regulation. Some examples of this technique include the titles *MadWorld*<sup>220</sup> and *No More Heroes*.<sup>221</sup> Both games feature high levels of blood and violence but do so in a cartoon, stylized world.<sup>222</sup> This allows the designers to employ an effective level of violence to reach their narrative and thematic goals without threatening Posner's assertion that video games are easily distinguishable from real life.<sup>223</sup> Furthermore, designers can limit their depictions of violence in games even when utilizing photo-real graphics. Just because a game features gunplay and sword

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<sup>218</sup> One example of a title that achieved critical acclaim while utilizing a stylized graphic technique is the new *Prince of Persia* for the PS3 and Xbox 360. See generally Hilary Goldstein, *Prince of Persia Limited Edition Review*, IGN (Dec. 4, 2008), <http://ps3.ign.com/articles/935/935926p1.html>.

<sup>219</sup> See Sami Hamlaoui, *Cel-Shading*, GAMEDEV, <http://archive.gamedev.net/reference/programming/features/celshading> ("Cel-Shading is the 'art' of rendering your objects to look like cartoons.") (last visited Jan. 12, 2010).

<sup>220</sup> See Casamassina, *supra* note 117.

<sup>221</sup> See Bozon, *No More Heroes Review*, IGN (Jan. 22, 2008), <http://wii.ign.com/articles/846/846921p1.html>.

<sup>222</sup> *Id.* ("Since the entire game embraces a style of punk/retro visuals, otherwise overly-violent scenes are . . . more like Tarentino's Kill Bill films, where you *know* you're witnessing violent actions, but the style is so heavy that it's really dulled down and far more tolerable."); Casamassina, *supra* note 117 (discussing how the combination of excessive blood and the overdone stylized presentation transform otherwise disturbing scenes of violence into moments of comedy).

<sup>223</sup> *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001).

fighting in a photo-realistic world doesn't mean they need to have excessive dismemberment and buckets of gore. We don't need to see limbs, organs, and entrails; a quick spray of red goes a long way.

Another option is to avoid overly gruesome uses for advanced motion-detecting devices like the Kinect. Recreating swinging a sword in a fantasyland is one thing. Mimicking brutal murders with strangling, stabbing, and punching motions is quite another. In short, designers should use technology to enhance the game experience, but recognize a line between what adds to an immersive experience and what is gratuitous and offensive. Games need not require players to tear enemies limb from limb with their own bare hands to create an immersive experience and an encapsulating narrative.

Finally, the industry may also do well to adopt new self-regulation tactics. Currently, the Entertainment Software Review Board (ESRB) ranks games based on their appropriateness for certain ages, from early childhood and everyone, to mature (17+) and adults only (18+).<sup>224</sup> The ESRB also employs certain content descriptors that inform purchasers exactly what a game contains, such as "alcohol references," "blood and gore," "cartoon violence," and others.<sup>225</sup> These ratings have not been adopted into law by any state, but the ESRB works closely with retailers to provide in-store signage and to create a basis for the store's own policy (such as asking for identification when someone purchases a mature-rated title).<sup>226</sup> As a sign of good faith and also as another way to demonstrate to courts that restrictive means are not necessary, the ESRB would do well to recognize the changes in technology and adjust their system accordingly. For example, the ESRB could adopt a new content descriptor, such as "photo-realistic blood and gore" or "fully immersive violence," and could rate games that garner these descriptions as "adults only."

## CONCLUSION

Every issue of the popular video game magazine *GamePro* concludes with a "parting shot," a full-page

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<sup>224</sup> *Game Ratings and Descriptor Guide*, ESRB, [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp) (last visited Jan. 12, 2010).

<sup>225</sup> *Id.*

<sup>226</sup> *Enforcement*, ESRB, <http://www.esrb.org/ratings/enforcement.jsp> (last visited Jan. 12, 2010).

screenshot from an upcoming game that is meant to elicit excitement about the unreleased title. In “Issue 254” of the periodical, the parting shot featured a particularly gory execution featured in the game *Aliens vs. Predator*.<sup>227</sup> The picture is supplemented by a short blurb, describing the intensity and realism of the game’s violence:

Aliens vs. Predators doesn’t shy away from the gore . . . . For instance, the Predator’s trophy kills are perhaps the most shocking and violent sequences we’ve ever seen in a game. After grabbing a helpless marine by the throat, his terrified face is centered in your view. As your wrist blades plunge under his chin, the head is separated from the body and a foot of blood-drenched spinal cord follows. The marine’s face twists in anguish and you can’t help but feel a little frightened by the realism.<sup>228</sup>

The description alone is startling and seems plainly offensive in the sense of what is appropriate material for minors. When imagined through the lens of a gaming system like the hypothetical Omega, this idea almost becomes a fact.

The bottom line is that the law must adapt to the changing technological climate. Before *Kendrick*, in cases like *City of Warren v. Walker*, video games were not awarded First Amendment protection because they did not—by their very nature—contain the requisite communicative elements.<sup>229</sup> Once technology advanced to the point where games were capable of containing narratives and characters similar to those in movies and literature, the law adapted and awarded video games protection under the First Amendment.<sup>230</sup> As technology further develops, it is inevitable that the offensiveness of video game violence will reach a level similar to that of obscenity. Accordingly, the law will need to adapt once again. Precisely how the law should change is uncertain. What is certain, however, is that Posner’s dated view of the video game landscape presented in *Kendrick* will soon be a distant memory. A departure from *Kendrick* and its progeny will be necessary to properly account for

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<sup>227</sup> *Parting Shot*, GAMEPRO, Nov. 2009, at 96.

<sup>228</sup> *Id.*; see also Kevin VanOrd, *Aliens vs. Predators Review for PC*, GAMESPOT (Feb. 18, 2010, 5:24 PM), <http://www.gamespot.com/pc/action/aliensvspredatorworkingtitle/review.html> (“You yank your foe’s head and spine right out of his body, stare into his terrified eyes, and stroke the dangling bit of anatomy.”).

<sup>229</sup> See, e.g., *People v. Walker*, 354 N.W.2d 312, 316 (Mich. Ct. App. 1984).

<sup>230</sup> See, e.g., *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (awarding video games full protection under the First Amendment based on the similarities of their narratives to literature); *Rothner v. Chicago*, 929 F.2d 297 (7th Cir. 1991) (explaining that some games may be capable of narrative qualities, so it cannot be said that all games do not deserve First Amendment protection).

the extreme offensiveness of the disturbingly photo-realistic, fully immersive games of the near future.

Some may consider the points raised in this note to be mere speculation about an uncertain technological future. While this view has some merit, it is impossible to look at the progress we have seen in video games since their inception less than thirty years ago—from the pixilated paddles of *Pong*<sup>231</sup> to the graphic Greek goriness of *God of War 3*<sup>232</sup>—and not ponder what games will look like and how they will be played within the next decade. This note does not suggest that video game violence *must* be regulated, nor does it support the scientifically questionable notion that video game violence indeed threatens to cause some sort of psychological or physical harm to minors. But it is without question that the legal foundations underlying the repeated refusal to remove video game violence from the protections of the First Amendment will no longer hold water once video games achieve full immersion through future technological advancements. Eventually, we will hit a tipping point. It is important to consider the legal ramifications now to allow game designers the ability to make educated decisions about their future products. And with *Schwarzenegger* currently being decided by the Supreme Court, these considerations are as poignant as ever.

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<sup>231</sup> *Killer List of Video Games*, PONG, [http://www.arcade-museum.com/game\\_detail.php?game\\_id=9074](http://www.arcade-museum.com/game_detail.php?game_id=9074) (last visited Jan. 5, 2010).

<sup>232</sup> See Chris Roper, *God of War III Review*, IGN (Mar. 8, 2010), <http://ps3.ign.com/articles/107/1075014p1.html> (“[T]his is a very M-rated game, one filled with blood, gore and detached limbs . . . Truly, God of War III presents some of the most impressive visuals that I’ve ever seen in a game. . . . [I]t is at times the best looking game ever.”).

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