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Faulting San Andreas: The Call to Arms for Sensible Regulation of Violent Video Games

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Faulting San Andreas: The Call to Arms for Sensible Regulation of Violent Video Games

by

JESSICA WILLIAMS*

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Grand Theft Auto: San Andreas. By now, this video game is a household name. It is the game that critics of the video game industry “love to hate.” It has been categorized as one of the most violent video games, a game where the protagonist earns points for having sex with and then killing a prostitute. Yet, Grand Theft Auto: San Andreas (GTA) was only rated “M” for mature audiences by the

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Entertainment Software Ratings Board (ESRB), the voluntary video game rating system, which meant that the game was geared for teenagers aged seventeen or older. Only upon discovering in 2005 that the game contained embedded, explicit pornography did it garner an “AO” or “adult only” rating, which meant that the game was only suitable for those players aged eighteen or older.

Controversy existed as to whether manufacturers built this pornography into the game at the factory or whether modders, gamers who use software tools to modify different aspects of their favorite games, added the program after the game was released. Modders share modifications, or “mods,” with other gamers by publishing them on the Internet. In the case of GTA, downloading the mod “Hot Coffee” off the Internet modified the original contents of the game and revealed the explicit sex scene. After investigations, the game’s developer, Rockstar, and its publisher, Take Two Interactive, “cracked” and admitted that the pornography was on the disc before it was ever shipped to retailers. Still, the publishers have not taken full responsibility and claim that “the hidden content was programmed to be ‘inaccessible to the player,’” meaning that the content was nonplayable, and manufacturers are not at fault for failing to disclose nonplayable content to the ESRB.

5. Bray, supra note 1. Dutch gamer Patrick Wildenborg states that “the porn movie was built into the game at the factory and his mod simply revealed it.” Wildenborg claims that the “Hot Coffee” program is an “Easter egg,” a secret “mini-program” that a computer engineer adds into the game; an “Easter egg” can be revealed by pressing the correct keys.
7. Id.
8. Id.
11. Id.
12. Bray, supra note 1. President of the ESRB, Patricia Vance, states that “[t]he ESRB has very strict rules... Game companies must fully disclose every game feature that might affect the kind of rating it should get. Sexually explicit scenes fit that description.”
When the ESRB gave GTA an "AO" rating, GTA joined seventeen other "AO" games that received their ratings because of their "prolonged scenes of intense violence and/or graphic sexual content and nudity." Although the difference between an "M" rating and an "AO" rating doesn't seem like much—after all, an eighteen-year-old is only one year more mature than a seventeen-year-old—an "AO" rating can hurt the sales of the game as many retailers will not place the game in a prominent location and some will not even carry the game at all. Because of this rating, Take Two replaced its copies of the GTA with a modified version, which rendered a "potential $50 million shortfall in revenue" for the company, a shortfall that some claim is merely a slap on the wrist for video game manufacturers.

The discovery of the "Hot Coffee" mod is just the latest to stir the fires of those calling for government regulation of video games. Supporters of video game legislation proclaim that the ESRB, the voluntary video game ratings system that describes itself as "a self-regulatory body for the interactive entertainment software industry established in 1994 by the Entertainment Software Association," (ESA) is "broken" and "beyond repair" because it does not detect or uncover embedded material. Furthermore, these detractors note a conflict of interest: the ESRB is owned and operated by the ESA, the industry that it monitors with its ratings. Many feel that this conflict of interest is exemplified by the fact that the ESRB has only labeled twenty three of its ten thousand games as "AO" for "Adults Only."

17. Walsh, supra note 2.
18. Id.
19. Id.; ESRB Game Ratings Advanced Search, supra note 13. Hundreds of other games have received different ratings such as “EC” (“Early Childhood,” games suitable for ages three and older, such as Atari's My Little Pony), “E” (“Everyone,” games suitable for ages six and older, such as Nintendo’s Super Mario Brothers), “E10+” (“Everyone Ten And Older,” games suitable for ages ten and older, such as Activision’s Madagascar), “T” (“Teen,” games suitable for ages thirteen and older, such as Activision Value’s The Hustle: Detroit Streets), and “RP” (“Rating Pending,” games that have been submitted to the ESRB and are awaiting a final rating); ESRB, Entertainment Software Ratings Board, ESRB Game Ratings, http://www.esrb.org/esbratings_guide.jsp#rating_symbols (last
Proponents of video game legislation further argue that retailers do not enforce ratings in their sales of video games to minors. Thus, many legislators have called for state and local government to take charge of enforcing video game ratings by enacting criminal and civil penalties for retailers.


However, the legislation has not had much success. On December 21, 2005, Judge Ronald M. Whyte of the U.S. District Court for the Northern District of California granted a preliminary injunction, halting the implementation of California’s Assembly Bill 1179, which restricted the sale of violent video games to minors. The bill, proposed by Assembly Speaker pro tem Leland Yee (D-SF/Daly City), was to become effective January 1, 2006.

20. Walsh, supra note 2. A 2005 study conducted by the National Institute on Media and the Family reported that retailers have become more lenient in enforcing their ratings policies, allowing 44 percent of children ages nine to sixteen to purchase “M” rated video games in 2005, compared to 34 percent in 2004.

21. States and cities have also responded with legislation regulating the sales of sexually-explicit video games. This note focuses primarily on legislation regulating the sales of violent video games.


23. Family Entertainment Prevention Act, S. 2126, 109th Cong. (2005). The Family Entertainment Prevention Act would prohibit any business from selling or renting a Mature, Adults-Only, or Ratings Pending game to a person younger than seventeen, would require an annual, independent analysis of game ratings to ensure that the ESRB ratings accurately reflect the content in each game, would grant authority to the Federal Trade Commission to investigate misleading ratings, would allow consumers to file complaints about video games that the Bureau of Consumer Protection would relay to Congress, and would authorize the Federal Trade Commission to conduct an annual, random audit of retailers to determine how easily children and teenagers could purchase “Mature” and “Adults Only” video games. See also Paul Loughrey, Family Entertainment Prevention Act Heads to Congress, (Nov. 30, 2005), http://www.gamesindustry.biz/content_page.php?aid=13330 (last visited Mar. 11, 2006).


25. Video Game Industry Sues California Over Age Limit Law, supra note 22.
California’s preliminary injunction, both Illinois and Michigan witnessed barriers to their respective violent video game legislation—Illinois’s Safe Games Illinois Act was permanently enjoined on December 2, 2005,\(^\text{26}\) and Michigan’s Act was temporarily enjoined on November 9, 2005.\(^\text{27}\) Michigan’s Act was later permanently enjoined on March 31, 2006,\(^\text{28}\) and in August 2006, U.S. District Judge Matthew Kennelly ordered Illinois to pay more than $510,000 in legal fees to the three groups that sued the state over its Safe Games Illinois Act.\(^\text{29}\)

Since 2000, 35 jurisdictions have introduced some type of legislation restricting minors’ access to violent video games.\(^\text{30}\) Yet, not one jurisdiction has been successful in implementing this type of legislation.\(^\text{31}\) A staff attorney with civil liberties group Electronic Frontier Foundation, Kurt Opsahl, stated that California’s preliminary injunction was not surprising and questioned whether putting up “clearly unconstitutional laws” was the best use of the state’s resources: “It does seem to be one in this series of: law passes, gets challenged, gets struck down. Rinse, lather, repeat.”\(^\text{32}\)

Should the government be the one to cleanse our children of the alleged filth of violent video games? Or is this legislation unnecessary and a restriction on California citizens’ First Amendment rights? Although no California precedent exists for the constitutionality of California’s Assembly Bill (AB 1179), AB 1179 will likely run into similar obstacles that Illinois’s legislation faced. Both statutes are built upon similar policies, inferences, and social science research. Even though Assemblyman Yee and the supporters of the legislation had noble intentions in trying to protect our children, AB 1179 infringes on First Amendment rights. Furthermore, with the promise by major manufacturers that their new video consoles will expand parental control of kids’ video games by way of “family settings,”

\(^{31}\) Id.
\(^{32}\) Tamaki & Gaither, *supra* note 24.
children's access to violent video games is best left to their parents.\textsuperscript{33} However, a lingering question remains: how can the ESRB enforce its full disclosure policy so it can accurately label video games?

This note provides a background of First Amendment rights in violent video game legislation, focusing on the more recent statutes and cases in Indianapolis, St. Louis, Washington, and Michigan in Part I. Part II offers a detailed description and analysis of the Safe Games Illinois Act, focusing exclusively on the Violent Video Game Legislation (VVGL) and its corresponding case, \textit{Entertainment Software Association v. Blagojevich}.\textsuperscript{34} Part III examines California's legislation, AB 1179, and the ensuing and pending case, \textit{First Amendment Video Game Software Dealers Association v. Schwarzenegger}.\textsuperscript{35} Comparing and contrasting California's legislation to that of Illinois, Part III analyzes the alleged constitutionality of the California legislation. Part IV offers the following proposal: the need for this legislation is becoming increasingly unnecessary as video game manufacturers continue to implement and improve parental controls on their consoles. The true focus should be on educating parents and adequately punishing manufacturers who do not fully disclose the contents of their games. Part V provides a summary of the note.

\section{I. Background}

As there is no constitutional "authority suggesting that patently graphic violence"\textsuperscript{36} is unprotected speech, legislation that attempts to curtail the distribution of materials that contain violent imagery or language is challenged under the First Amendment. Under the First Amendment,\textsuperscript{37} content-based regulations on speech are presumptively

\begin{itemize}
  \item \textsuperscript{34} \textit{Blagojevich}, 404 F. Supp. 2d. 1051 (N.D. Ill. 2005).
  \item \textsuperscript{35} \textit{Schwarzenegger}, 401 F. Supp. 2d. 1034, 1037 (N.D. Cal. 2005).
  \item \textsuperscript{37} "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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.
\end{itemize}
invalid and subject to strict scrutiny. Under the strict scrutiny standard, a state may impose a content-based restriction on speech only if it has a compelling interest and has chosen the least restrictive means to further this interest. Thus, if a less restrictive alternative would serve the state’s purpose, then the state must use that alternative.

At the foundation of American rights is the First Amendment, and for the most part, the Supreme Court has been unwilling to budge in its protection of free speech. *Ashcroft v. The Free Speech Coalition* exemplifies how far the Supreme Court will go to protect First Amendment rights. In declaring the ban on virtual child pornography in the Child Pornography Prevention Act of 1996 (CPPA) unconstitutional, the Supreme Court stated that

> [t]he mere tendency of speech to encourage lawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and the imminent illegal conduct... First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.

The Court, however, lowers the bar when analyzing the constitutionality of obscene material. In reviewing the constitutionality of obscene material, courts apply the “*Miller* standard,” which holds that patently graphic sexual imagery may be completely prohibited. In *Miller v. California*, the Supreme Court held that the standard to determine whether a material was obscene depended on whether “the average person, applying contemporary community standards” would deem that the material appealed to the prurient interest, that it lacked serious literary, artistic, or scientific value, and that it depicted sexual conduct as defined by state law.

Conversely, in reviewing the constitutionality of violent imagery and language, the court will usually employ the “*Brandenburg* test.” In *Brandenburg v. Ohio*, the Supreme Court reversed the conviction of the defendant, a leader of a Ku Klux Klan group, who had been convicted under the Ohio Criminal Syndicalism Statute for advocating violence against minorities during a Klan rally held at an Ohio farm. The Court emphasized that the First Amendment did

42. *Id.* at 33-34. *See also* Amar and Brownstein, *supra* note 36.
44. *Id.* at 444-47.
not permit a state to forbid violent language unless that violent language were to cause "imminent lawless action." The Court set forth the appropriate test to apply when determining if violent language is protected:

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Thus, the necessary test to apply when examining violent communications consists of the following: 1) whether the communications are "directed to" or aimed at producing lawless action; 2) whether the lawless actions are "imminent;" and 3) whether the communications are "likely" to bring about the lawless actions. Speech aimed at producing lawless action at some indefinite time in the future will not satisfy the Brandenburg test. In addition, speech "does not lose its First Amendment protection merely because it has a tendency to lead to violence." Thus, only words that are likely to produce imminent lawless action do not receive any constitutional protection.

A. American Amusement Machine Association v. Kendrick

When reviewing state-enacted violent video game legislation, courts have consistently refused to classify violence as obscenity and apply the Miller standard. In Kendrick, one of the first cases, Judge Posner struck down an Indianapolis ordinance that limited minors' access to video games deemed harmful due to their graphic violence in a unanimous panel of the Seventh Circuit. In his opinion, Judge Posner concluded that video games are within the ambit of First Amendment protection, but he rejected the social science evidence

45. Id. at 447.
46. Id.
47. Id.
48. Id.
50. Brandenburg, 395 U.S. at 447. The three other categories of speech that are not protected by the First Amendment are 1) obscene speech; 2) defamatory invasions of privacy; and 3) fighting words. Miller, 413 U.S. at 36-37; Beauharnais v. Illinois, 343 U.S. 250, 258 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
offered by Indianapolis as not providing the "compelling grounds necessary to support a content-based regulation of speech."  

B. Interactive Digital Software Association v. St. Louis County

Though not binding on other federal circuits, other courts have often echoed Judge Posner's reasoning in Kendrick. In 2003, the Eighth Circuit declared a St. Louis County violent video game ordinance unconstitutional. Writing for a unanimous panel and ordering a permanent injunction against enforcement of the legislation, Judge Morris Sheppard Arnold mirrored the opinion in Kendrick and stated that video games are within the ambit of First Amendment protection, but that the St. Louis County ordinance could not survive strict scrutiny review. Like the Seventh Circuit, the Eighth Circuit refused to treat graphic violence as obscenity and therefore refused to apply the Miller standard. Additionally, Judge Arnold questioned whether any evidence could support the assertion that violent video games damaged the psychological well-being of minors: "[b]efore the County may constitutionally restrict the speech at issue here, the County must come forward with empirical support for its belief that 'violent' video games cause psychological harm to minors. In this case... the County has failed to present the 'substantial supporting evidence' of harm that is required."

In presenting its argument, St. Louis relied on the same social science research that Indianapolis presented in Kendrick—that is, the work of Dr. Craig A. Anderson. Dr. Anderson has been cited as one of the nation's pre-eminent researchers on the effect of exposure to violent video games. Although rejected by both the Seventh and

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53. Id.
54. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 960 (8th Cir. 2003).
55. Id. at 957-58.
56. Id. at 960.
57. Id.
58. Id. at 959.
Eighth Circuits, his research would again be presented in the 2005 Illinois case, *Blagojevich*.61

C. *Video Software Dealers Association v. Maleng*

In 2004, Judge Robert S. Lasnik of the U.S. District Court enjoined the state of Washington from enforcing legislation that restricted minors’ access to violent video games in *Video Software Dealers Association v. Maleng*.62 Similar to the Seventh and Eighth Circuits, Judge Lasnik refused to expand the legal definition of obscenity to include portrayals of graphic violence63 and rejected the research presented by Dr. Anderson.64 Specifically, Judge Lasnik noted that social science failed to provide concrete evidence to support the legislature’s belief that video games cause violence. He stated that “neither causation nor an increase in real-life aggression is proven by these studies,” the law is “both over-inclusive and under-inclusive,” the law “impact[s] more constitutionally protected speech than is necessary to achieve the identified ends,” and the law is unconstitutionally vague65 because a reasonable person would not be able to tell which speech was prohibited and which was not.66 In his opinion, Judge Lasnik suggested that this type of legislation could potentially pass muster if social science studies supported the legislative findings67 and the video games contained “violent images, such as torture or bondage, that appeal to the prurient interest of minors.”68

D. *Entertainment Software Association v. Granholm*

More recently, U.S. District Court Judge George Caram Steeh permanently enjoined a Michigan law (the “Act”) that imposes civil and criminal penalties for a person who knowingly disseminates an “ultra-violent explicit” video game to a minor.69

63. *Id.* at 1188.
66. *Id.* at 1191.
67. *Id.* at 1190.
68. *Id.* at 1190.
In passing this legislation, the Michigan Legislature also looked at studies by Dr. Anderson and by Dr. William Kronenberger, another expert who would testify in Blagojevich.70

When first issuing a preliminary injunction in 2005, Judge Steeh relied on the reasoning of the Seventh Circuit in Kendrick and declared that “[a] cursory review of the research relied upon by the state shows that it is unlikely that the State can demonstrate a compelling interest in preventing a perceived ‘harm.’”71 Additionally, the court noted that the law would have a chilling effect on adults’ expression as the Act’s threat of criminal penalties would engender self-censorship by game creators and retailers.72 Furthermore, the court expressed concern that a retailer could not “reasonably, economically, or easily” determine whether the content of a video game was prohibited under the Act to minors.73 Noting that “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” the court held that the Act was unlikely to survive strict scrutiny and temporarily enjoined the violent video game portion of the Act.74

The court reiterated these concerns when it declared the Act unconstitutional and permanently enjoined it on March 31, 2006.75

II. Entertainment Software Association v. Blagojevich

In each of these cases—Indianapolis, St. Louis, Washington, and Michigan—Dr. Anderson’s, and in some cases Dr. Kronenberger’s, testimony was instrumental in the determination. Illinois’s case, Blagojevich, was no exception. In November 2005, Blagojevich, the latest case to permanently enjoin a violent video game statute, held the “Safe Games Illinois Act” unconstitutional.76 Being that the Illinois and California legislation are built upon similar policies, inferences, and social science research, the findings in the Illinois case are a troubling harbinger for the California legislation, which was temporarily enjoined in December 2005.77

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70. Granholm, 404 F. Supp. 2d at 982.
71. Id. at 982.
72. Id. at 983.
73. Id.
74. Id. (citing Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998)).
75. Granholm, 426 F. Supp. 2d at 656.
76. Blagojevich, 404 F. Supp. 2d at 1083.
77. Schwarzenegger, 401 F. Supp. 2d at 1048-1049.
A. The Facts

Plaintiffs, several associations that create, sell, and rent video games, brought suit against defendants, the Governor of Illinois, the Illinois Attorney General, and the State’s Attorney of Cook County, Illinois, alleging that the Illinois Violent Video Games Law (VVGL)\(^7\) and Sexually Explicit Video Games Law (SEVGL) violated the First Amendment.\(^7\) Plaintiff Entertainment Software Association (ESA) is a group of publishers of interactive entertainment that evaluates and responds to proposed legislation that seeks to regulate the entertainment software industry.\(^8\) Plaintiff Video Software Dealers Association (VSDA) is a trade association for the home video industry and tracks and responds to proposed regulations of video games.\(^9\) Plaintiff Illinois Retail Merchants Association (IRMA), comprised of approximately one thousand retail members, examines pending legislation in Illinois, communicates its position to the General Assembly, and decides whether to join litigation based on the opinion of affected retailers within the association.\(^10\) Plaintiffs sought declaratory and injunctive relief against the VVGL and the SEVGL on the ground that the statutes violated their First Amendment rights to free expression.\(^11\) Defendants responded with motions to dismiss for lack of standing, Eleventh Amendment immunity, and partial motion for summary judgment.\(^12\) All parties consented to joining the trial on the merits with the preliminary injunction hearing.\(^13\)

Illinois’ VVGL and SEVGL are two criminal statutes that were signed into law on July 25, 2005,\(^14\) to become effective on January 1, 2006.\(^15\) The VVGL creates criminal penalties, fines that range from five hundred to one thousand dollars,\(^16\) for retailers who sell or rent violent video games to minors, who fail to label violent video games

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\(^7\) Because of the scope of this note, I will only focus in detail on the VVGL (Illinois Violent Video Games Law).

\(^8\) Blagojevich, 404 F. Supp. 2d at 1055.

\(^9\) Id. at 1055-56.

\(^10\) Id. at 1056.

\(^11\) Id.

\(^12\) Id. at 1058.

\(^13\) Id. at 1057.

\(^14\) Blagojevich, 404 F. Supp. 2d at 1055.

\(^15\) Id. at 1058.

\(^16\) Id. at 1057 n.2.

\(^17\) Id. at 1057; 720 ILL. COMP. STAT. 5/12A-15(a)-(c)(2005), permanently enjoined by Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); 720 ILL. COMP. STAT. 5/12A-25(b)(2005).
with “a two inch by two inch label stating ‘18,’” and who allow violent video games to be purchased in a self-checkout line. The statute defines “violent video games” as those games that include “depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm [“depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape”] to another human.”

"Serious physical harm” includes depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape."  

B. The Expert Testimony  

As much of the controversy surrounding these types of cases comes from the evidentiary support, or lack thereof, many courts’ decisions hinge upon the applicability of recent research regarding violent video games and youth. This case was no exception. Almost one-third of the court’s opinion was spent detailing the expert testimony surrounding two main issues: 1) whether minors who play violent video games experience an increase in aggressive thoughts, affect, and behavior and 2) whether minors who play violent video games experience a decline in brain activity in the region of the brain that controls behavior. Defendants presented Dr. Craig Anderson to address the issue of whether minors who play violent video games experience an increase in aggression. Conversely, the plaintiffs presented Dr. Jeffrey Goldstein and Dr. Dmitri Williams. Addressing the issue of whether minors who play video games experience a decline in brain activity, defendants presented Dr. William Kronenberger while the plaintiffs presented Dr. Howard Nusbaum.

Defendants attempted to prove, by way of Dr. Anderson’s studies, that exposure to video games increases aggressive behavior in

91. 720 ILL. COMP. STAT. 5/12A-10(e) (2005).
92. Blagojevich, 404 F. Supp. 2d at 1058.
93. Id. at 1059 (stating that Dr. Anderson is a psychologist and professor at Iowa State University).
94. Id. at 1062 (stating that Dr. Goldstein is a social psychologist at the University of Utrecht in the Netherlands, and Dr. Williams is an assistant professor of communications at the University of Illinois at Urbana-Champaign).
95. Id. at 1063, 1066 (stating that Dr. Kronenberger is a clinical psychologist at the Indiana University School of Medicine, and Dr. Nusbaum is a cognitive psychologist at the University of Chicago).
Dr. Anderson discussed several studies that he had conducted, one of them being his 2000 study with Dr. Karen Dill. In this study, Dr. Anderson and Dr. Dill surveyed college students regarding exposure to violent video games and aggressive behavior. Dr. Anderson found "a strong positive correlation between video game exposure and aggressive behavior." However, Dr. Anderson made important concessions. He "conceded" that once the results of the survey were adjusted to exclude non-serious behavior, (such as throwing snowballs), "less than ten percent of the participants reported engaging in aggressive behavior." Furthermore, Dr. Anderson noted that "exposure to violent video games only incrementally affected the amount of aggressive behavior they engaged in."

Dr. Anderson also testified about another study where he measured the aggressive behavior of participants who played Wolfenstein 3D, a violent video game in which the aim is to infiltrate a castle and perform an assassination, with the aggressive behavior of participants who played Myst, a nonviolent video game in which the

96. Blagojevich, 404 F. Supp. 2d at 1059 (explaining that Dr. Anderson testified that "it seems clear that exposure to violent video games increases aggressive behavior, aggressive thinking, physiological arousal, aggressive feelings, and is also associated with a decrease in prosocial behavior.").
97. Dr. Anderson's studies on the relationship between media violence and aggression are rooted in his broader research in aggression. His "general aggression model" explains how an individual's experiences, especially with violence, can trigger aggressive thoughts or reactions and make aggressive thoughts or reactions more readily accessible and almost automatic. These experiences, in turn, activate aggressive thoughts, making it more likely that an individual will respond aggressively in particular situations. Id. at 1059; 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. PSYCHOL. 772 (2000).
98. Kendrick, 244 F.3d at 578-79. This study was also the basis for striking down the statute in Kendrick. Regarding this study, the Seventh Circuit stated: "[t]he studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the interactive character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments." Blagojevich, 404 F. Supp. 2d at 1059 n.3.
100. Id.
101. Id.
goal is to solve puzzles and brain teasers. After playing the video games, participants in the experiment were told to compete against a non-identified competitor in a series of time trials. Participants who won the time trials were to punish their competitors by administering noise blasts. Dr. Anderson found that the participants who played the violent video game *Wolfenstein 3D*, among other variables, administered a longer noise blast than the students who played the nonviolent video games. Dr. Anderson concluded that violent video games caused an increase in aggressive behavior. However, the court noted that his findings were contradictory. Furthermore, the court stated it was “skeptical” about his explanation of the contradictory findings and questioned the overall weight of his findings, being that the difference in noise blasts between groups was a “matter of milliseconds,” and both averages “were in the middle of the intensity scale.”

Dr. Anderson further explained that there has been only one reliable longitudinal study conducted that examines the impact of violent video games on aggression in minors. This longitudinal study

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104. Blagojevich, 404 F. Supp. 2d at 1060-61 (explaining that the college students in the study were led to believe that they were competing against someone in an adjoining room in a series of time trials. In the first of two series of time trials, the students were “punished” with a noise blast from a “competitor” when they lost. However, in reality, there were no competitors, and the noise blasts were controlled and administered by a computer. Half of the students received random blasts while the other half received blasts that increased in intensity. In the second series of time trials, the college students administered noise blasts to their competitors if they won the time trial. Dr. Anderson concluded that exposure to violent video games increases an individual’s aggressive behavior because the students who had played the violent video games and received random noise blasts administered more intense noise blasts than all of the students who had played non-violent video games.).

105. *Id.* at 1060.

106. *Id.* (“Based on this experiment, Dr. Anderson concluded that violent video games caused an increase in aggressive behavior, because participants who played *Myst* [sic] administered a longer noise blast than the participants who played *Wolfenstein 3D* [sic].”).

107. *Id.*

108. *Id.* at 1060-61.

109. *Id.*

110. *Id.* at 1061; Craig A. Anderson et al., *Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 199, 215-24 (2004).

111. *Id.* However, in its 2005 Video Game Research Update report, MediaWise stated that five longitudinal studies and several meta-analysis studies have been conducted as of 2005. Nevertheless, the report cited many flaws with each of the studies and never mentioned whether any study had been peer-reviewed. Walsh, supra note 2; See generally
found that those children with a higher exposure to violent video games were more likely to have been in a fight by the end of the study.\textsuperscript{112} Dr. Anderson concluded that, "what is clear is that regardless of the initial cause, playing violent video games still makes children more aggressive."\textsuperscript{113} However, this longitudinal study is still undergoing peer review at the time of this publication,\textsuperscript{114} and, as the court noted, the total increase in aggressive behavior between the beginning and end of the study was not large: "at most, only four percent of the increase in aggression was associated with exposure to video game violence."\textsuperscript{115}

Dr. Kronenberger testified for the defendants as to whether minors who are exposed to media violence experience a decline in brain activity.\textsuperscript{116} During his testimony, Dr. Kronenberger described one of his studies that attempted to measure how exposure to media violence affects brain activity. In his study, Dr. Kronenberger used functional magnetic resource imaging ("fMRI imaging"), a neuroimaging technique that measures blood flow to certain regions of the brain. He examined the blood flow to the two frontal lobes of the brain that some researchers associate with aggressive or violent behavior.\textsuperscript{117} Dr. Kronenberger found that control subjects with high media violence exposure displayed activation in the same region as subjects with behavior disorders.\textsuperscript{118} Control subjects with low media violence, on the other hand, displayed activation in a different area of

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112. \textit{Blagojevich}, 404 F. Supp. 2d at 1061.

113. \textit{id.}

114. \textit{id.}

115. \textit{id.}

116. \textit{id.} at 1064.

117. \textit{id.} (explaining that the study examined the blood flow to specific parts of the frontal lobes, the anterior cingulated cortex (ACC) and the dorsolateral prefrontal cortex (DLPFC), which is comprised of the middle frontal gyrus (MFG) and the inferior frontal gyrus (IFG). By measuring blood flow to these areas, researchers are able to determine how a specific task affects brain activity. In the experiment, Kronenberger's research team divided adolescents into two different groups, one group consisting of adolescents with a behavior disorder, and the other group being a control group. The groups were then subdivided into smaller groups according to whether the adolescent had a high or low exposure to media violence. Determination of whether the adolescent had a high or low exposure to media violence depended on results to questions during an interview.).

118. \textit{id.} ("[C]ontrol subjects with high media violence exposure had activation in the left MFG, the same region in which subjects with behavior disorders experienced activation, but control subjects with low media violence experienced activation in the ACC and the left IFG.").
\end{itemize}
\end{footnotesize}
the brain. At trial Dr. Kronenberger proceeded to testify to other parts of a larger study about brain activity, the results of which had yet to undergo the process of peer review. However, Dr. Kronenberger “conceded that his studies only demonstrate a correlative, not a causal, relationship between high media violence exposure and children who experience behavior disorders” and decreased and increased brain activity.

Plaintiffs’ experts ultimately agreed with Dr. Anderson’s and Dr. Kronenberger’s findings that there is a “correlation between an exposure to video game violence and [increase] in aggressive cognition and behavior,” but disagreed with Dr. Anderson’s conclusion that the research established a causal link between exposure to violent video games and increased aggressive thinking and behavior. More specifically, Dr. Goldstein and Dr. Williams testified that they were concerned as to the methodology and conclusions drawn by Dr. Anderson. To refute Dr. Kronenberger’s findings about brain activity, the plaintiffs’ expert, Dr. Nusbaum, testified that Dr. Kronenberger had made two incorrect assumptions about brain activity and impulse control, that Dr. Kronenberger’s methodology was wrought with several problems, and that his conclusions were questionable.

Siding with the plaintiffs’ experts, the court stated that there was no evidence that playing violent video games significantly affects aggressive thoughts or behavior. The court stated that Dr. Anderson merely “hypothesizes that frequently and intensely playing violent video games will have a lasting effect on young players,” yet he does not cite any data to support his hypothesis. Furthermore, the court was skeptical that the Illinois General Assembly made “reasonable inferences” from the scientific literature because the legislative record did not include any of the articles cited by Dr.

119. Id.
120. Id.
121. Id. at 1065.
122. Id. at 1062.
123. Id. at 1066-67.
124. Id. at 1065-67 (testifying that Dr. Kronenberger incorrectly assumed that “there was a one-to-one relationship” between various parts of the brain and particular behaviors, that Dr. Kronenberger problematically used composite fMRI images of all the individuals in the study, and that Dr. Kronenberger had not considered alternative reasons to show decreased brain activity).
125. Id. at 1063 (emphasis added).
126. Id.
127. Id. (citing Turner Broad. Sys. v. FCC, 512 U.S. 622, 665 (1994)).
Goldstein or Dr. Williams that were critical of Dr. Anderson’s research.\textsuperscript{128} Although the court did not give specific reasons for agreeing with plaintiffs’ expert Dr. Nusbaum, the court concluded that Dr. Kronenberger’s testimony was “unpersuasive.”\textsuperscript{129} It further stated that his studies “cannot support the weight he attempts to put on them via his conclusions.”\textsuperscript{130}

C. Analysis of the District Court’s Decision

The plaintiffs ultimately won this battle of experts. The court, presided over by U.S. District Judge Matthew Kennelly, concluded that the research did not support the conclusions that the defendants’ experts attempted to draw. The court found in favor of the plaintiffs and permanently enjoined the enforcement of the VVGL.\textsuperscript{131} Notably, the defendants’ experts made important concessions that undermined the impact of their studies and their testimony. The court stated that the defendants had not offered any basis to permit a “reasonable conclusion that, as the legislature found, minors who play violent video games are more likely to ‘experience a reduction of activity in the frontal lobes of the brain which is responsible for controlling behavior.’”\textsuperscript{132} Furthermore, Dr. Anderson’s research did not support “such a stark and sweeping conclusion” as was presented in his testimony.\textsuperscript{133}

The court’s evaluation of the expert testimony was essential to its analysis of the First Amendment issues and its application of the \textit{Brandenburg} test. The court initially dispensed with the defendants’ first two arguments, Eleventh Amendment immunity and standing.\textsuperscript{134} The court then addressed the First Amendment issues and concluded that the research expounded in the expert testimony did not offer enough support to satisfy the \textit{Brandenburg} test.\textsuperscript{135} As video games are

\begin{itemize}
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{Id.} at 1067.
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} The court also permanently enjoined the enforcement of the SEVL, the Sexually Explicit Video Games Law of the Act. \textit{Id.} at 1083. \textit{See generally} Adriana Colindres, \textit{Video Game Restrictions Blocked; Judge Throws Out Law Curbing Sales, Rentals to Youths}, \textit{THE STATE JOURNAL-REGISTER} (Dec. 3, 2005) at 1.
  \item \textsuperscript{132} \textit{Blagojevich}, 404 F. Supp. 2d at 1067.
  \item \textsuperscript{133} \textit{Id.} at 1059.
  \item \textsuperscript{134} The court concluded that the defendants did not have Eleventh Amendment immunity because the suit was to enjoin the enforcement of an unconstitutional statute and the plaintiffs did have standing to sue. \textit{Id.} at 1070-71.
  \item \textsuperscript{135} \textit{Id.} at 1073.
\end{itemize}
afforded First Amendment protection, all parties agreed that the VVGL was a content-based regulation subject to the strictest scrutiny. Thus, the state could only impose the restriction if it had a compelling interest and it had chosen the least restrictive means to further its interest. Defendants argued that the state had five compelling interests in regulating violent video games, including preventing violent, aggressive, and asocial behavior; assisting parents in protecting their children from such games; and facilitating the maturation of Illinois' children into law-abiding adults. The interests defendants cited were drawn from the Illinois General Assembly's following findings about the effect of playing violent video games: that children who play violent video games are more likely to 1) exhibit violent or aggressive behavior; 2) feel aggression; and 3) experience a reduction of activity in the frontal lobes of the brain, which are responsible for controlling behavior.

As the court stated, defendants came "nowhere near making the necessary showing" to satisfy the Brandenburg test. In addition to mentioning that video games are designed to entertain and not to produce "imminent" violence, the court relied heavily on the expert testimony in concluding that defendants failed to present substantial evidence to show that playing violent video games causes aggression in minors. The court noted the difficulty in establishing a causal link between video games and aggression and stated that there is "barely any evidence at all, let alone substantial evidence" that establishes a reduction in brain activity. The court stated that the Illinois legislature exhibited flawed reasoning and was "simply incorrect" in concluding that there was a one-to-one relationship between the frontal lobes and the ability to control behavior. Moreover, the court reiterated that the state cannot ban protected speech "on the ground that it affects the listener's or observer's thoughts and attitudes." Because a state may only regulate expression that meets

136. Interactive Digital, 329 F.3d at 957-58.
137. Blagojevich, 404 F. Supp. 2d at 1072 (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989)).
138. Id. at 1072.
139. Id. at 1073.
140. Id.
141. Id. at 1074.
142. Id.
143. Id. at 1071 (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002)).
the requirements of Brandenburg, Illinois had not met its burden of showing that the speech would incite imminent lawless action.\textsuperscript{144}

In addition to not establishing a compelling interest and not satisfying the Brandenburg test, defendants did not show that the VVGL was narrowly tailored to serve its purpose.\textsuperscript{145} In arguing that the statute was narrowly tailored because it did not inhibit adults' rights to buy the video games for themselves or for their children, the defendants incorrectly cited Ginsberg as controlling. However, the court made clear that Ginsberg was not controlling because it referred to minors' access to obscene materials, and "violence and obscenity are distinct categories of objectionable depiction," subject to different levels of scrutiny.\textsuperscript{146} Like the preceding cases, the court refused to apply the Miller obscenity standard to violent language and imagery.

Furthermore, the court found the definition of "violent video games" unconstitutionally vague, and the vagueness made it "highly probable that game makers and sellers will self-censor or otherwise restrict access to games that have any hint of violence, thus impairing the First Amendment rights of both adults and minors."\textsuperscript{147} VVGL defines "violent video games" as those that "include . . . depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human."\textsuperscript{148} Specifically, the court had problems with what constituted "human" and what constituted "serious physical harm."\textsuperscript{149} It reasoned that many games use characters such as "zombies, mutants, or gods" that might act humanlike; however, because of their super powers, they would survive attacks that would be fatal to human characters. Because of the "fanciful medium" of video games, the definition might leave "video game creators, manufacturers, and retailers guessing about whether their speech is subject to criminal sanctions," and thereby chill expression. Furthermore, law enforcement officers might apply the law in an arbitrary and discriminatory way due to the subjective nature of the terms.\textsuperscript{150} Citing Grayned v. City of Rockford,

\begin{itemize}
\item \textsuperscript{144} Id. at 1073-74.
\item \textsuperscript{145} Id. at 1076.
\item \textsuperscript{146} Id. at 1076 (citing Kendrick, 244 F.3d at 574); Ginsberg v. New York, 390 U.S. 629 (1968) (allowing New York to restrict minors' access to material with nudity or sexual content and applying a less stringent standard than strict scrutiny for sexually-explicit material).
\item \textsuperscript{147} Blagojevich, 404 F. Supp. 2d at 1076.
\item \textsuperscript{148} Id. at 1077; 720 ILL. COMP. STAT. 5/12A-10(e) (2005).
\item \textsuperscript{149} Blagojevich, 404 F. Supp. 2d at 1077.
\item \textsuperscript{150} Id.
\end{itemize}
the court noted, "[t]hough 'we can never expect mathematical certainty from our language,' the Supreme Court nonetheless requires precision in prohibiting conduct that 'abuts upon sensitive areas of First Amendment freedoms.'\(^{151}\)

In addressing the provisions of the VVGL that require retailers to post "18" stickers on violent video games as well as post signs and hand out brochures about the video games, the court concluded that the provisions should be considered compelled speech subject to strict scrutiny.\(^{152}\) The court did not accept the defendant's argument that the "18" stickers and signs should be subject to the lower "commercial speech" rational basis review under Zauderer because the labels do not disclose any factual information; rather, they merely convey the retailer's subjective interpretation as to whether the game is violent or only suitable for someone over eighteen years of age.\(^{153}\) Furthermore, the court stated that the defendants produced no evidence to show that the "18" signage, labeling, and brochure system was necessary because of confusion or deception of parents or children about the ESRB rating system.\(^{154}\) The court seemed to implicitly acknowledge that the ESRB rating system was an effective means for alerting parents and children to the content of video games.

D. The Appeal

Although quite a blow to Governor Rod Blagojevich, who proposed the Safe Games Illinois Act, Governor Blagojevich pledged to appeal the ruling, saying in a press release, "[t]his battle is not over."\(^{155}\) A reversal is unlikely, however, as the appeal would proceed to the Seventh Circuit U.S. Court of Appeals, which enjoined the 2001 Indianapolis ordinance that regulated violent video games in Kendrick.\(^{156}\)

151. Id. at 1075.
152. Id. at 1081.
153. Id. (citing Zauderer v. Office of Disciplinary Counsel of the S. Ct. of Ohio, 471 U.S. 626, 651-52 (1985)). Zauderer held that "state mandated commercial disclosures are subject to rational basis review where they provide 'purely factual and uncontroversial information' intended to 'dissipate the possibility of consumer confusion or deception.'" However, if the requirements are "unjustified" or "unduly burdensome" in a way that would chill "protected commercial speech," the requirements would be found unconstitutional. Here, the court concluded that the stickers and signage are also unduly burdensome on retailers. Id. at 1082 n.12.
154. Id. at 1081-1082.
155. Colindres, supra note 131.
156. Kendrick, 244 F.3d at 572.
III. In the Afterglow of Blagojevich: First Amendment Video Game Software Dealers Association v. Schwarzenegger

What does this case mean for future violent video game legislation proposed in other jurisdictions? Are legislatures doomed to “rinse, lather, repeat”? Or, can California learn from the mistakes of its Midwestern cohorts? Although no precedent exists for California’s own violent video game legislation, California’s AB 1179 is doomed to face similar, if not identical, obstacles and failures.

A. The Facts

California’s violent video game legislation, AB 1179, sponsored by California Assembly Speaker pro tem Leland Yee of San Francisco, was to become effective on January 1, 2006 as new California Civil Code §§ 1746-1746.5. Governor Arnold Schwarzenegger signed the law on October 7, 2005, and stated, “California’s new law will ensure parental involvement in determining which video games are appropriate for their children.”

In proposing this legislation, Yee explained that he was addressing parents’ concerns that children could easily access video games that the “medical community” had “overwhelmingly deemed harmful to mental health.” Comparing violent video games to alcohol, tobacco, and pornography, Yee argued that regulating violent video games is no different than regulating these items when it comes to minors.

Before Governor Schwarzenegger signed AB 1179, retailers only had a voluntary obligation to restrict the sales of ESRB mature-rated (“M” games recommended for ages 17 and up) or adult-only rated (“AO” games recommended for those 18 and up) video games. With AB 1179, retailers have an obligation to prohibit the sale of violent video games to minors. California’s AB 1179 defines violent video games as those games

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158. Schwarzenegger, 401 F. Supp. at 1038; Video Game Industry Sues California, supra note 22.
159. Video Game Industry Sues California, supra note 22.
160. Id.
in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following: (A) Comes within all of the following descriptions: (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors. (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors. (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors. (B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.164

The act subjects retailers to fines up to $1000 for each time they are caught selling a violent video game to a minor, with an affirmative defense being proof that the defendant reasonably relied upon evidence that the purchaser was not a minor.165 Additionally, a retailer is not subject to any fines if the retailer sells or rents a violent video game to the minor’s parent, grandparent, aunt, uncle, or legal guardian.166 The act requires that each violent video game imported into or distributed in California for sale be labeled with a white sticker that designates the game is for adult sale only. The sticker would be two inches by two inches and would depict the number “18” outlined in black. This label would be bigger and more visible than the ESRB ratings on game packaging.167

B. The Preliminary Injunction

After the VSDA and the ESA (two of the same plaintiffs in Entertainment Software Association v. Blagojevich) filed suit on October 17, 2005,168 U.S. District Court Judge Ronald Whyte temporarily enjoined AB 1179 on December 21, 2005.169 In his ruling, Judge Whyte stressed his concerns about the causal link between video games and violent behavior and the First Amendment limitations on controlling speech:

165. See id. § 1746.1 (a).
166. See id. § 1746.1 (c).
167. Id. § 1746.2; Mortal Combat: Lawmakers and Gamers Battle Tough New Video Game Law, supra note 162.
[t]he plaintiffs have shown at least that serious questions are raised concerning the States' ability to restrict minors' First Amendment rights in connection with exposure to violent video games, including the question of whether there is a causal connection between access to such games and psychological or other harm to children.170

Contrary to Judge Kennelly in Blagojevich, Judge Whyte did not find the law unconstitutionally vague.171 The court applied the standard to some games, such as Postal II,172 and found that the bill's definition of "especially heinous, cruel, or depraved" was sufficient.173 Judge Whyte, however, was most concerned with the First Amendment argument, noting that it is not clear that the state can regulate this type of speech even if research proved a causal connection between playing video games and violence.174

C. Analysis

As Judge Whyte suggested,175 California will face problems similar to that which Illinois faced in proving that the legislature made reasonable inferences based on substantial evidence. Underlying the enactment of AB 1179 are the legislature's three justifications: 1) that exposing minors to depictions of violence makes minors more likely to experience feelings of aggression and to experience a reduction of activity in the frontal lobes of the brain; 2) that minors suffer psychological harm from prolonged exposure to violent games; and 3) that the state has a compelling interest in preventing violent, antisocial behavior and harm to minors.176 California, like Illinois, will not likely be able to prove its justifications.

First, the preeminent experts in violent video game research and media violence that testified in Blagojevich were not able to persuade the court that exposing minors to depictions of violence increases aggression and causes minors to experience a reduction of activity in the frontal lobes of the brain. The same experts are likely to testify in

170. Id. at 1041-42.
171. Id. at 1042.
172. Id. "[Postal II] involves a character who has apparently 'gone postal' and decided to kill everyone he encounters . . . [school girls] attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them."
173. For example, Judge Whyte concluded that a game such as Postal II would fall under the law, whereas a game such as Full Spectrum Warrior, which involves the U.S. Army fighting in an environment similar to Afghanistan, would not fall under the law. Id.
174. Id. at 1046.
175. Id.
the California case. Regarding this expert testimony, Judge Kennelly stated that there is "barely any evidence at all, let alone substantial evidence" that shows a reduction in brain activity.\textsuperscript{177} Second, the Illinois court addressed the California legislature's justification that minors suffer psychological harm from prolonged exposure to video games and noted that Dr. Anderson merely hypothesized that "frequently and intensely playing violent video games will have a lasting effect on young players."\textsuperscript{178} As only one reliable longitudinal study had been conducted that examines the impact of violent video games on aggression in minors, and as that longitudinal study is still undergoing peer review, Dr. Anderson could not cite any data to back up his hypothesis.\textsuperscript{179} Third, the Illinois court also addressed California's compelling interest in preventing violent, antisocial behavior and harm to minors,\textsuperscript{180} and stated that the defendants came "nowhere near making the necessary showing" to satisfy the prevailing \textit{Brandenburg} standard of inciting imminent lawless action.\textsuperscript{181}

\textbf{IV. Proposal}

It is improbable that current social science research on violent video games and media violence will be able to prove the causal connections necessary to satisfy the \textit{Brandenburg} standard for controlling speech. Although as a society we need to be concerned about our children's activities, when it comes to violent video games, the best approach at this time is to leave the monitoring in the hands of parents and the regulating in the hands of the ESRB.

Fortunately, technology will enable parents to have more control over their children's access to video games. On November 28, 2005, the ESA confirmed that the next generation video consoles released in 2005-2006 will include parental controls.\textsuperscript{182} Specifically, Microsoft, Sony, and Nintendo all pledged to include parental controls in their newest consoles. Parental controls will be similar in concept to the V-Chip, a device used in televisions that allows parents to control the

\begin{itemize}
  \item \textsuperscript{177} Blagojevich, 404 F. Supp. 2d at 1074.
  \item \textsuperscript{178} Id. at 1063.
  \item \textsuperscript{179} Id. at 1061-1062.
  \item \textsuperscript{180} Id. at 1072.
  \item \textsuperscript{181} Id. at 1073.
\end{itemize}
programs their children watch.\textsuperscript{183} For example, Nintendo’s newest console will be controlled by a password.\textsuperscript{184} Parents will be able to choose a password, and then, using the ESRB ratings, designate which games their children will be able to access without the password.\textsuperscript{185} ESRB ratings will be encoded into the game software that the hardware will read and recognize.\textsuperscript{186} Several video game makers already have parental controls on some of their newest machines, such as Microsoft’s Xbox 360 and Sony’s PSP (Playstation Portable).\textsuperscript{187}

Furthermore, the ESRB has begun working with major retailers of video games such as Wal-Mart Stores, Target, Best Buy, and Circuit City, and U.S. Sens. Rick Santorum, George Allen, and Mark Pryor to launch the “Commitment to Parents” initiative.\textsuperscript{188} This initiative aims to improve compliance with the video game rating system by including a more prominent display of game ratings, improving the training of salespeople, and secretly auditing retailers.\textsuperscript{189}

With major manufacturers voluntarily including parental controls on their video game consoles and with the ESRB taking an active role to improve compliance with the ratings system, the focus now should be on educating parents about parental controls and ensuring that parental controls are effective. In order for parental controls to be effective, the ratings encoded into the game software must be accurate. Thus, the ESRB will need to guarantee the accuracy of each rating in order to avoid “Hot Coffee” spills. To do so, the ESRB will, of course, need to continue to check each game to ensure that creators and manufacturers fully disclose contents. Furthermore, the ESRB will need to address concerns regarding the disclosure of “nonplayable” content.

Additionally, the ESRB will need to invoke a punishment scheme that is severe enough to actually hurt video game manufacturers and to deter noncompliance. Any punishment needs to

\textsuperscript{183} Id.
\textsuperscript{185} Physorg.com, supra note 184.
\textsuperscript{186} Id.
\textsuperscript{188} Korey Clark, \textit{States Scoring Points in Battle Against Violent Video Games}, XIV \textsc{ST. NET CAPITOL J.} 23 (2006).
\textsuperscript{189} Id.
be enforced quickly and publicly when infractions are found. As $50 million might be a mere “slap on the wrist” for some video game manufacturers, a stricter punishment might indeed be game designer Greg Costikyan’s approach. He suggests that the ESRB punish game manufacturers who do not give full disclosure by refusing to give any of their products a rating for two years. Since many stores refuse to sell games with no ratings (for example, Target, Best Buy, and Wal-Mart), this may hurt sales enough to make the manufacturers change their ways. Actively publicizing this punishment, both in the media and in stores where video games are sold, will further reprove the game manufacturers and will alert parents to their past dishonesty. Parents might even think twice before buying games from those manufacturers.

With parental controls and the ESRB’s active role in improving compliance with the ratings system, violent video game legislation is unnecessary. Instead of proclaiming that the ESRB is “beyond repair,” legislators should allow the ESRB the opportunity to correct itself and focus on educating parents about parental controls instead of passing clearly unconstitutional legislation. Parental controls on the latest video game consoles, coupled with an adequate punishment scheme administered by the ESRB and accurate video game ratings, would quell societal concerns and avoid running afoul of the First Amendment.

V. Conclusion

Although many legislators and members of the public call for the state to step in and regulate the sales of violent video games to minors, violent video game legislation seems destined to fail. California will be the next state to lather its courts’ dockets with litigation on violent video game legislation, legislation that will be held unconstititutional if the same expert testimony and arguments are presented as in Illinois’s Blagojevich. Because of the lack of scientific research, in particular a lack of reliable longitudinal studies that establish a causal connection between playing violent video games and aggression, and because of the inability to satisfy the

190. President of the ESRB, Patricia Vance, states that “[t]he ESRB has very strict rules... Game companies must fully disclose every game feature that might affect the kind of rating it should get. Sexually explicit scenes fit that description.” Bray, supra note 1.
192. Id.
193. Id.
*Brandenburg* imminence requirement, violent video game legislation will not stand up in the courts.

While well-intentioned, legislators should stop focusing on passing violent video game legislation and instead focus on educating parents about parental controls. Additionally, the ESRB must guarantee that video game ratings are accurate. Not only must the ESRB ensure the content of each game, but it must address concerns of “nonplayable” content, and it must adequately punish video game manufacturers who do not fully disclose the contents of their games. By allowing the ESRB the opportunity to correct itself, legislators can cease passing unconstitutional bills and can forever break the cycle of “[r]inse, lather, repeat.”

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