

WHEN PIXELS SPEAK: WHY VIDEO GAMES DESERVE FREE SPEECH
PROTECTION; WHY VIDEO GAMES WILL NOT RECEIVE FREE SPEECH
PROTECTION

A Dissertation

by

JOSEPH HAROLD BAILEY

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

May 2006

Major Subject: Speech Communication

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Approved by:

Chair of Committee,	James Arnt Aune
Committee Members,	Leroy Dorsey
	Patrick Burkart
	Sarah Gatson
Head of Department,	Richard L. Street, Jr.

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ABSTRACT

When Pixels Speak: Why Video Games Deserve Free Speech Protection; Why Video Games Will Not Receive Free Speech Protection.

(May 2006)

Joseph Harold Bailey, B.B.S., Hardin-Simmons University;

M.A., Abilene Christian University

Chair of Advisory Committee: Dr. James Arnt Aune

This dissertation examines how games have been construed legally and publicly and compares the nature of games to the de facto legal criteria: in order for games to receive free speech protection, games must inform and communicate. In Chapter I, I review the literature surrounding the effects of violent video games. This literature review serves as a foundation for the rhetorical nature of the legal controversy since the controversy has no clear-cut answer to the effects of video games. Instead of a clear “Yes” or “No” answer, game effects researchers can only posit “Maybe” and “No” findings. Game antagonists employed long-shot and shoddy research to argue their case that violent games produce violent people.

The next two chapters lay a foundation for justifying why games have become increasingly controversial to date. In Chapter II, I outline a history of games and argue that games became communicative in the early 1990s. As a response to graphically communicative games and congressional bullying, the video game industry created a self regulatory rating board which should have quelled the public controversy. It did not.

In Chapter III, I argue that Columbine changed the face of the game industry in the eyes of the public, as a matter of public morality. Before 1999, the public viewed games in a positive light, embodying one of America's pastimes and helping the disabled with their motor skills. After the events at Columbine, the public saw the video game industry as an unruly and rogue force.

In Chapter IV, I explain the legal hurdles the game industry faces in becoming protected speech. While video games have become communicative and informative, they likely will not receive free speech protection because of the public scapegoating of the industry during the last two and a half decades. I conclude by discussing the latest *Grand Theft Auto* "Hot Coffee" controversy and how game developers remain gun-shy about the free speech issue.

DEDICATION

To Crista--the bride of my youth and the love of my life. This accomplishment is as much yours as mine.

ACKNOWLEDGEMENTS

Friendship is the greatest of worldly goods. Certainly, to me, it is the chief happiness of life. If I had to give a piece of advice to a young man about a place to live, I think I should say, "Sacrifice almost everything to live where you can be near your friends." I know I am fortunate in that respect.

Clive Staples Lewis

My friendships are chief among the blessings in my life and I am thankful for the kindred souls we have found along the way. The DeVores, the Moffitts, and the Stricklands are the best friends we could ever hope for. I am thankful for the Youngbloods and the Hoes- family can be friends, too? I am also thankful for our Abilene friends—the Burkhalters, the Kirles, the Mitchells, the Smothermons- thanks for listening to me complain. I am grateful for the support from my colleagues and my students at Hardin-Simmons. I am indebted to Jeff for pouring so much effort into me over the last decade. I am appreciative to the guys at Beltway who remind me how much fun music really is—"Throw up the rock fist!" Also, Katy has been a wonderful source of expertise and encouragement. Thanks for reading my dissertation and thanks for your cynical humor. Thanks to the Alfords for adopting us.

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Jeremiah, my political opposite. I suppose politics is a circular continuum and we are closer than we thought. And yes, tumbleweeds are real.

Thanks to Mom and Dad for your prayers and your thoughts. I am grateful for the Schwalks—my unwavering cheerleaders.

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INTRODUCTION:

NOT “YES” AND “NO,” BUT “NO” AND “MAYBE”: VIDEO GAME FINDINGS

YIELD INCONCLUSIVE RESULTS

“I just have one question. Where’d you learn to shoot like that?”

“Seven-Eleven.”

Michael J. Fox in *Back to the Future III*

In early July 2005, a computer game hacker discovered a hidden scene in a video game—but the game was not just any game, and the scene was not as innocuous as most scenes in video games. The European hacker discovered that if he implemented a custom-made modification (called a “mod” for short), he could unlock an interactive sex game contained within the latest installment of *Grand Theft Auto*. Dutch gamer Patrick Wildenborg “insisted that the X-rated code was already in the game and that all his patch does is bypass the game’s censor flags.”¹ The gaming mod, “Hot Coffee,” did not go unnoticed.

The point of controversy was whether the hacker added in a certain segment of the game or if he merely unlocked a portion of the game’s preexisting code. In Australia, the Software Rating Board banned the game from the entire country since they considered *GTA* “more adult than the existing violent, profanity-riddled game play that was on show when the game was first classified.”² Even New York Senator Hillary Clinton got involved in the video game bashing session of mid-2005, holding a press conference on the issue and publishing numerous press releases. Even though the game industry was and still is required to print a game’s rating on the game’s box, Senator

This dissertation follows the style and format of *Rhetoric & Public Affairs*.

Clinton lectured the industry, pointing to manufacturers as the real culprits. She chided, “No wonder these games are falling into the hands of our children and no wonder so many parents feel everyday like they are fighting this battle with their hands tied behind their backs.”³

The controversy did not end with Senator Clinton’s comments. *GTA*’s publisher, Take-Two Interactive Software, damaged the industry financially and publicly, since many gaming critics would not delineate between objectionable and positive game titles. According to *GameSpot.com*’s Curt Feldman, the “Hot Coffee” episode cost the industry \$40-50 million dollars in lost revenue and ratings penalties and cost the publisher at least that amount.⁴ In a 355 to 21 vote, the United States House of Representatives consented to investigate “Hot Coffee” and the overall publication of *Grand Theft Auto: San Andreas* in order “to determine if the publisher intentionally deceived the Entertainment Software Ratings [sic] Board to avoid an ‘Adults Only’ rating.”⁵

While video game pundits cannot overestimate the eventual effects of the infamous “Hot Coffee” mod, the industry is already feeling the stress of Take Two’s curious move. For example, Target and Wal-Mart pulled the game from their shelves based on the revised Electronic Software Rating Board’s “Adults Only” rating.⁶ Some gaming pundits call the “Hot Coffee” move a deft marketing strategy, while other pundits call the mod a blunder for the entire industry.⁷ What is clear, though, is the mounting tension between legislators and the video game industry.

THE VIDEO GAME INDUSTRY FROM 1980 TO 2005

In this dissertation, I attempt to trace the public discussion of video games which cultivated the video game legal controversy. I do not intend to cite every study about video game violence or every objectionable game. Rather, I focus on the public discourse as a bridge to video games' legal woes and illustrate that the gaming industry ultimately has become the scapegoat for society's drab plight. Unless game designers create games that more blatantly express political messages, this status of scapegoat may keep games from receiving their rightful First Amendment protection.

In this introduction, I will outline my dissertation by presenting a synopsis of gaming's history and controversy; in addition, I will provide an overview of critics' arguments, including brief assessments of those arguments.

Anyone who remembers primitive video games remembers the heavily-pixelated forms which game developers intended to be warriors or tennis rackets or aliens. Chapter II begins with a discussion of the controversies, which were largely benign, surrounding these kinds of video games. This lack of serious controversy did not necessarily stem from early games lacking the "questionable" material found in games today. Certainly, in the early 1980s, some game makers attempted to create games with sexual and/or violent themes. However, since games' pixelated likenesses rarely resembled life-like forms, game designers forced players to use their imaginations. This "fictional" aspect of early games kept silent a large portion of the public outcries heard against games today. Even so, the early days of gaming did see some protests against violent and/or sexual games; however, the critics' disapproval failed to garner widespread public momentum, and most

of the debates centered on the addictive nature of games rather than on games' tendency to incite players to violence (Chapter II).

Not until the early 1990s did graphic realism begin to develop pixels into life-like bodies. New video game technology, combined with new, graphically-violent games, invited a kind of scrutiny unknown to the gaming industry before 1992. By 1992 and 1993, such scrutiny led to a few key legislators pressuring the industry to impose a private, self-regulatory system—a system which changed the future of gaming.

Then in 1999, an event occurred which arguably shaped the industry for the worse and served as the segue to intense legal pressure on the video game industry. In the Columbine school shootings, the two students wielding the guns and bombs claimed to have practiced their shooting skills on two video games, *DOOM* and *Duke Nukem*, to have fashioned the entire gruesome day based on these two video games. During the months following Columbine, the public view of video game anecdotes changed from American pastime novelties to an unruly entertainment genre (Chapter III).

After Columbine, public and congressional scrutiny quickly turned on the video game industry. Through local, state, and federal regulations, many legislators attempted to craft laws to penalize retailers for selling games to underage children. Today, some legislators are continuing to make an effort to abridge game content. Quite erroneously, the entire gamut of video game critics has placed undue restrictions upon the industry. As a result, articulated well by Steven Johnson (author of the critically acclaimed book *Everything Bad is Good for You: How Today's Popular Culture is Actually Making Us Smarter*), the industry has become a rhetorical scapegoat. Currently, the courts have struck down virtually every regulation imposed upon the video game industry by

legislators heretofore; however, as scrutiny increases and video games plunge further into their relegated role as scapegoat, critics may succeed in pushing video games out from under First Amendment protection, unless game designers go to extra lengths to show games as speech (Chapter IV).

DEFINITIONS OF KEY TERMS

In this dissertation, I claim that public *narratives* tended to *scapegoat video games*. But before discussing the video game controversy, I should offer a definition of the terms to which I repeatedly return. Any definition of a video game that I offer instantly becomes problematic, particularly since I look at the scope of the genre beginning in the late 1970s and continuing through 2006. However, for the video game scholar, a few key elements arise in the definition of a video game. Mark J. P. Wolf, author of *The Medium of the Video Game*, provides an excellent definition of video games. He begins by examining the words “video” and “game.” At a most basic level, a video game is something projected in a cathode ray tube, television screen, or flat screen computer monitor or “something similar to full-resolution television imagery.”⁸ Wolf also writes:

Elements one would expect to find in a ‘game’ are *conflict* (against an opponent or circumstances), *rules* (determining what can and cannot be done and when), use of some *player ability* (such as skill, strategy, or luck), and some kind of *valued outcome* (such as winning vs. losing, or the attaining of the highest score or fastest time for the completing of a task).⁹

While Wolf’s definition is appropriate, I would add one criterion to his: the element of narrative. In *The Video Game Theory Reader*, the authors write, “the traditional—and most popular—research approach from both the industry and the academy has been to

consider video games as extensions of drama and narrative.”¹⁰ Thus, internal narrative serves to define the parameters of the video game.

This definition of video games lends to its legal gravity. The legal arena often cursorily breezed over games as child’s play. But according to this definition, if games are conflict driven, rules oriented, skills based electronic media, which present valued outcomes in narrative forms, then games deserve a more serious legal treatment. Communication is central to a game’s theme. The game’s designers must communicate a message clearly enough to cultivate interest in the player.

Particularly pertinent to the video game issue is that of the public narrative, especially in Chapter III’s discussion of media anecdotes and narratives. For the purposes of this dissertation, I subscribe to Celeste Condit’s definition of narrative which states, “narratives are constructed of characterizations—universalized depictions of important agents, acts, scenes, purposes, or methods.”¹¹ Useful to the video game debate is Condit’s argument concerning narratives:

Narratives are powerful and important forms in almost all human collectives. When they are repeated frequently, and begin to ground action and other beliefs, we call them myths. Such social myths are not necessarily true or false. Generally, they tell important truths, but they leave out important ingredients and, hence, distort. But even though they do not tell the ‘whole story’—no human language can—they are extremely powerful rhetorical devices.¹²

She posits that these stories begin “to generate concrete social changes. Again, however, narrative units have certain persuasive functions, forms, and limitations, and the shape the role of the narratives in the public argument.”¹³

In the public video game debate, politicians have tended to scapegoat the video game industry. Kenneth Burke contended that scapegoating is: “unification by a foe shared in common.”¹⁴ The public controversy encasing video games personifies video

games by projecting social ills upon this entertainment genre. Thus, video game critics are staging ritual drama like technology scholars have seen before. This type of scapegoating has transpired before in the entertainment genres of movies, television, comic books, music, and other moral panics.¹⁵ Burke wrote the agent, “must be ‘purified’ by ‘projecting’ his conflict upon a scapegoat, by ‘passing the buck,’ by seeking a sacrificial vessel upon which he can vent, as from without, a turmoil that is actually within.”¹⁶ In Chapter I, I discuss the controversy encircling video game effects research which, Burke might have argued, is the search for a cause which “is itself the search for a scapegoat.”¹⁷ The idea of video games as scapegoat is especially apparent in the first three chapters of this dissertation.

MEDIA VIOLENCE LITERATURE

Before beginning the discussion of why games deserve free speech protection, noting what types of research gaming critics rhetorically employ is important. Video game research is a burgeoning field, and its researchers have produced interesting results. In the early days of gaming, researchers looked for clear “yes” or “no” answers to the effects of video game violence. However, now the research indicates an unclear answer that responds to the effects of video game violence with “no” and “maybe.”

Researchers know that television often helps children decipher life’s rules. Accordingly, researchers frequently transfer what they know about the effects of television to their gaming research. In his article, “Metacognition: Thinking About Thoughts in Children’s Comprehension of Television,” Roger Jon Desmond, a communication media scholar, discusses television’s impact on viewers; he suggests,

“The viewer of broadcast or cable television, whether child or adult, is confronted with a moving panorama of events to be interpreted and problems to be solved.”¹⁸ In other words, television viewers play an active role in deducing meaning in television’s construal of everyday life. Desmond also writes that children learn to comprehend television with a set of strategies that helps children make sense of television scenarios. He asserts, “Just as learning to read may involve letter recognition, phonetics, word recognition, and perception of grammatical rules, so the skill of learning television literally involves many different skills.”¹⁹ Likewise, video games seemingly also function to raise the skill levels of children.

Desmond goes on to say that exposing pre-adolescents to persuasive television messages actually increases their cynicism about those messages. Particularly, children grow cynical about persuasive claims provided for the television audience.²⁰ When translated to games, Desmond’s argument about heightened cynicism bolsters the video game industry’s claim that video games never incite violence.

Although Desmond maintains that media help to socialize children by teaching them rules, not everyone agrees. Some research concerning persuasive messages paints a different portrait—one that presents the relationship between media and children as a sender-responder relationship, rather than a sender-absorber relationship. Scholars who promote this view argue that children are pawns of the media in need of media literacy. Elizabeth Thoman, the founder and chair of the Center for Media Literacy, contends that children need programs for “media literacy in U.S. education circles.”²¹ She argues that audiences and critics should not consider popular culture problematic because the burden of appropriateness lies within the receiver (the viewer) rather than the source (the

television industry). Thoman also writes that the previous “hypodermic” rationale of children as blank slates is incorrect, and alternatively, parents and guardians should teach children to receive messages responsibly. In the *Federal Communications Law Journal*, Charles M. Firestone discusses this idea of media literacy and the media receiver:

It [media literacy] allows a viewer to understand, produce, and negotiate meanings in the electronic culture of today. Information literacy is the ability to know when there is a need for information, identify needed information, find, evaluate, organize and use the needed information.²²

Those proposing media literacy claim that the burden of proof lies within the receiver.

What remains unclear is at what point children can distinguish between messages and act as responsible consumers.

What also remains unclear in both Desmond’s and Thoman’s views, as well as in others, is the extent to which television and video games are alike and exactly how they are different. Although television viewing may help children acquire a set of skills, a feature also observed in video games, some critics draw a firm line between television viewing and video gaming. The primary difference between the two is instant gratification. For example, when a television viewer watches a program, that viewer must progress through the program through a narrative process. That process is not the same in video games. The gamer must make choices that develop the process and outcome of the game, rather than simply observe and interpret a preexistent narrative. Television offers “instant gratification” by simply providing the viewer with a predetermined outcome. The gamer, on the other hand, must develop a set of skills before reaching a desirable outcome. In this sense, there is a more interactive communicative relationship between a gamer and the game than between a viewer and the television.

Roger Desmond asks whether “television is a potential source of high arousal or anxiety versus a mechanism for arousal reduction.”²³ However, Desmond does not examine the difference in arousal (or lack thereof) between viewers and gamers. Even though television may arouse or diffuse its viewers—an effect that video games may also produce—television viewing is altogether different than video gaming. The gamer’s emotional and cognitive responses are much different than the television viewer’s because the gamer has an active role in how the game unfolds. He or she has a type of ownership in the game that a viewer cannot have in a television sitcom or drama. For example, when a person plays a video game, the player may at any time murder someone and suddenly alter the story. This difference draws the most disparagement from critics.

Video game critics say that the interactive element separates forms of media like video games from media like movies. A military psychologist, Lieutenant Colonel Dave Grossman, identifies violent video games as “firearms trainers” and “murder simulators.”²⁴ For example, as a recruiting tool, the United States Army developed and distributed a PC game meant to encourage gamers to enlist in the Army. The US Army developed an entire game, *America’s Army*, and provided it as a free download on many mirror sites available on the Internet. The game begins with virtual basic training, which includes passing tests on a firing range, on an obstacle course, and in paratrooper training. As of mid-2002, over one million players completed these tests.²⁵ With the interactive aspect of games like *America’s Army*, seeing why some parents and legislators deem violent games as particularly harmful to children is easy. The distinction they draw between movies and video games is clear—watching a murder on television versus participating in and executing a murder through a video game.

Video game supporters, however, suggest that this distinction does not warrant a stricter reign on the industry, and the industry undoubtedly agrees. Downplaying the connection between interactive virtual violence and actual violence, the video game industry opposes further restrictions. Making a slippery slope argument, many critics of video game restrictions ask, “What’s next?” For example, one opponent of further restriction argues, “Bugs Bunny shooting up Elmer Fudd could conceivably be restricted by the definition included here.”²⁶ The “definition included here” is a congressionally mandated restriction that goes beyond the Electronic Software Rating Board (ESRB) rating.

Again, courts have not been a monolith of opinions concerning what constitutes inciting violence in electronic gaming. One court held that “parties need not present scientific evidence to show a rational relationship between the regulation and the objective of safeguarding children.”²⁷ In other words, cases brought against the electronic gaming industry need not conclusively demonstrate a correlation between the violence in video games and violent acts in real life. However, arguing that violence is a normal part of life, another court held that shielding children from violence could be detrimental to their development.²⁸ Legally, little conclusive evidence exists to prove or disprove the evils of video games, and therefore, no such evidence can point to removing games from under First Amendment protection. Nonetheless, the legal system finds itself in the midst of this heated controversy with both sides strongly divided on the scope of First Amendment protection.

While many sources exist that explore the effects of violence and gaming,²⁹ for the most part, game critics have used two research topoi to argue against video game

violence. Critics' limited scope of research is not due to a limited supply of studies. Scholars have conducted studies on various physiological video game topics, including: hostile cognition and arousal,³⁰ short-term aggression effects of video games,³¹ the cardiovascular response to violent video games,³² the effects of video games on children's sense of benevolence and generosity,³³ video games creating aggression in children and teens,³⁴ as well as the effects of violent gaming on one's self-esteem.³⁵ Most of these studies produced no conclusive results indicating that violence in video games inherently yields violence in real life. Nevertheless, in large numbers video game critics have ignored these studies and instead used only two sources to bolster their arguments.

The majority of critics incorrectly use George Gerbner's Cultivation Theory to argue that video games breed violence in their users based on the amount of time children spend playing games. Many critics also rely on David Grossman's expertise on combat conditioning and killing to argue against the quote-unquote evils of gaming. What is interesting about George Gerbner and David Grossman is that they both found an audience amidst a nationwide panic over technology. Gerbner's work surfaced as people questioned the effects of the media in the late 1960s, while school shootings allowed Grossman's argument about operant conditioning to reverberate with anti-video game audiences. One must wonder if these two studies would have generated the same following if introduced at less crucial moments. Nonetheless, these theories continue to shake the certainty of First Amendment protection for video games.

In order to adequately present these two pillars of anti-video game ideology, a further discussion of Gerbner's and Grossman's theories is necessary. I will begin by

examining how Gerbner's forty-year-old method lends itself to the alleged malevolence of the video game.

CULTIVATION ANALYSIS

This first set of studies argued that television promotes a certain type of worldview among its avid viewers. Developed in the late 1960s in response to the assassinations of Martin Luther King and Robert Kennedy, this study arose when George Gerbner began to examine the effects of television at the behest of the National Commission on the Causes and Prevention of Violence.³⁶ Gerbner devised the Cultivation Theory, which asserts that a heavy television viewer (one who watches four or more hours of television daily) has an exaggerated view of reality. Using a content analysis method to study television content, Gerbner argued that heavy television viewers fear violent acts in public more than light or moderate television viewers. He also speculated about how the oversimplified and predictable plot lines affect viewers. His theory states that "heavy exposure to mass media, namely television, creates and cultivates attitudes more consistent with a media conjured version of reality than with what actual reality is."³⁷ Specifically, the Cultivation Analysis methodology looks at three factors: "the institutional processes underlying the production of media content, images in media content, and relationships between exposure to television's messages and audience beliefs and behaviors."³⁸

Relating Gerbner's Cultivation Analysis to video games is problematic in an academic sense. To ascribe blindly the Cultivation Analysis findings to the video game genre invites academic methodological criticism. However, advocacy groups, politicians,

and media literacy organizations make this empirical leap often, gleaning chosen pieces of Gerbner's studies.³⁹

Additionally, this methodology is significant to the communication discipline since Gerbner is a communication scholar. Gerbner's methodology emphasizes television's ability to "standardize, streamline, amplify, and share common cultural norms,"⁴⁰ which translates into a video game's ability to reduce the world to one environment with a few main characters.

Game critics also make the empirical transfer between television and games by determining how much time a user spends with the respective medium. This method tries to "ascertain if those who spend more time watching television are more likely to perceive the real world in ways that reflect the most common and repetitive messages and lessons of the television world."⁴¹ Certainly game critics use a syllogism such as this one to guess at the effects of playing video games, since studies show 30 percent of children ages 2 to 18 play video games daily. Within that 30 percent, gamers play an average of one hour and four minutes of video games daily.⁴² According to game critics who attempt to apply Gerbner's theory to video games, the number of hours video gamers usually play is important in light of the "repetitive messages" outlined by Gerbner.⁴³

Gerbner's assertions about the types of assumptions that media, television in particular, perpetuate also resound with gaming critics. George Gerbner and Larry Cross write, "Television appears to cultivate assumptions that fit its socially functional myths. Our chief instrument of enculturation and social control" comes in the form of media images.⁴⁴ For game critics, the idea of media messages creating social myths is troubling

in light of games like *Grand Theft Auto: San Andreas* and *Hitman* where players dispose of bodies at their leisure.

Another factor allows Cultivation Analysis to resound with video game critics. This theory contends that “it is possible that younger people are most susceptible to these messages because most of them have never lived without television.”⁴⁵ Gerbner estimates the incredible far-reaching scope of the television, suggesting that “television made an irrevocable difference in people’s lives if they were born after 1950,” because, “television is different from all other media. From cradle to grave it penetrates nearly every home in the land. Unlike newspapers and magazines, television does not require literacy.”⁴⁶

Video game critics present an analogous argument. This argument they present creates a false dichotomy between television and video games. In other words, they claim television and video games are exactly alike, even though the factual answer is more nuanced and complicated than this false dilemma. With the rising popularity of video games, critics propose that games infiltrate our homes and form our social realities in a similar way and therefore are as dangerous as Gerbner claimed television was. Their questions are concurrent with the questions posed of television. In that vein, “the popular press and the government ask, What does television do to us? Parents and teachers wonder whether television makes children more aggressive or if television helps or hinders children.”⁴⁷

These critics’ concerns often stem from a fear of interactivity, which is both the blessing and curse of the video game controversy. In the 1960s, television scared the public because the TV influenced people with moving pictures. Today, video games

scare gaming critics because games exhibit all the qualities of television combined with interaction. Video gamers learn not only *about* something but also *how to do* something. To critics, this instructional value of games is particularly disturbing in light of the murderous acts in some games. Nonetheless, the violence in television that shocked and terrified critics in the 1960s still, over 40 years later, cannot be consistently connected to real acts of violence, and the fear of television violence has somewhat diminished, as evidenced by the ever increasing violence accepted in television today. The likelihood that video games will follow the same path is quite high. However, most critics today are as blind as those in the 1960s and will continue to call unfoundedly for a revoking of First Amendment protection for the video game industry.

VIDEO GAMES AS OPERANT CONDITIONING

In the legislative and legal realms, perhaps no video game critic resounds more with gaming opponents than Lieutenant Colonel David Grossman. A former Army Ranger and paratrooper, Grossman provides work that centers on the effects of killing in combat from a psychological vantage point. Moreover, he explores the human aversion to killing and argues that the military conditions soldiers to do on instinct what a civilian cannot.

Grossman's most chilling observation is that of Michael Carneal—the Paducah, Kentucky high school student who killed eight of his peers and teachers. The killer shot eight times and achieved eight hits, mostly in the vicinity of the shoulders and head.

Grossman argues, “Nowhere in the annals of law enforcement can we find an equivalent

achievement. And this from a boy on his first try.” How was Carneal able to achieve such accuracy without ever firing a pistol? Grossman plainly states, “Simple: practice.”⁴⁸

Interactivity, Grossman contends, is the silver bullet for gaming’s culpability. He states in reference to video games, “You inflict damage rather than watching someone else and hands-on experience is what teaches you best.”⁴⁹ Furthermore, he argues that the games intensify killing because “realism is the Holy Grail of the video game industry.”⁵⁰

Presidents, legislators, and legal decisions have given Grossman’s texts credence. For example, after the events of Columbine, President Bill Clinton gave a speech proposing a forum to examine media violence. In his speech he stated, “Professor David Grossman has said that these games teach young people to kill with all the precision of a military training program.”⁵¹ In a prepared statement before a Congressional Committee, Grossman claimed that Carneal learned to kill by “simply shooting everything that popped up on his ‘screen.’ Just like he had done countless THOUSANDS of times before. As an aside, it is interesting to note that it is not natural to fire at each target only once (the norm is to fire until the target drops).”⁵² Grossman’s anecdotal evidence has carried incredible weight in the last six years.

In his statement before the Congressional Committee, Grossman harkened back to his thesis that operant conditioning trained Carneal to function with deadly accuracy and combat prowess. Grossman’s argument is fairly simple, yet incredibly powerful. He makes the case against video games because games create a type of “operant conditioning.” Stating that people have a natural and potent distaste to killing, he writes, “There is within most men [sic] an intense resistance to killing. A resistance so strong

that, in many circumstances, soldiers on the battlefield will die before they can overcome it.” But with the proper conditioning, “it appears that almost anyone can and will kill.”⁵³ Using operant conditioning, the modern soldier does not fire at a bulls-eye-shaped target. This soldier fires at a man-shaped silhouette which pops up for a brief period, training that soldier to fire at a person, to fire quickly, and to fire accurately.

Accordingly, Grossman’s contention hinges on the parallels between the FBI’s training program and video games. He says that video games are identical to the “shoot-no shoot training program designed by the FBI and used by police agencies around the nation to train and enable officers for firing their weapons.”⁵⁴ According to Grossman’s argument, these programs, which train soldiers to set aside their inhibitions to kill, have “more than quadrupled the firing rate of modern soldiers.”⁵⁵ Yet, Grossman contends, civilians have no inhibitions to kill since they have no command structure like that of the military. In other words, a military superior holds his or her soldiers accountable in combat situations. However, if Grossman’s theory is true, those trained to shoot by video games are rogue agents that are free from this combat accountability.

CONCLUSION

The public debate over video games is likely to be one of the most heated public debates yet. This issue shares many qualities with the public panic over the television technology alarm of the 1960s. However, the video game issue is different because the medium itself attempts to push the boundaries of speech beyond what the public has seen before. The issue is not likely to die with a court ruling. Most legislators’ efforts have been highly rhetorical and have failed to propose any real solution which might withstand

constitutional scrutiny. Nevertheless, this intriguing public controversy speaks to video games-as-speech and to the political climate of the day.

What is also a key issue to the public debate is how the video game responded to legislators' attacks. The industry has held to a defense of free speech expression, doing little to combat the overwhelming legislative rhetorical salvo. Virtually the only rhetorical jabs that the industry has taken against legislative maneuverings have come in the form of public service announcements. In a recent public service announcement, as part of the ESRB's "Check the Rating" campaign, Tiger Woods cheerily said, "When you check the rating, the control is in your hands." Other public service announcements generated by the ESRB include messages by Derek Jeter and Regis Philbin. In Jeter's commercial, he states, "When you check the rating, you know what to expect. You gotta play the game that's right for you." Also, playing up the theme of his "Who Wants to be a Millionaire?" game show, Regis Philbin outlines the content label, as well as the game ratings and their meanings, in another commercial. Interestingly, these commercials attempt to canvas a broad television audience, seeking both younger audiences through sports figures and parental audiences through Philbin.⁵⁶ The video game industry essentially placed all their apologia eggs in one basket. In other words, the industry thought that public service announcements would quell the debate over video game violence. The gaming industry suffered rhetorical blunder after rhetorical blunder.

Important to the public debate were the questions: Do games communicate? If games communicate, at what point did games begin communicating? In the next chapter, I argue that games began communicating (pixels began speaking) in the early 1990s which opened the door to amplified controversy. While this dissertation cannot predict

when this debate will end, it can presume that the debate has not resolved.

Technologically, the industry is closer than ever to proving its case legally and finding First Amendment protection. Politically, the game industry has never been more of a scapegoat.

CHAPTER II

PIXELS' FIRST WORDS: A BRIEF HISTORY OF VIDEO GAMES

Every man and woman should play the noblest games and be of another mind from what they are at present.

Plato

In late December of 1993, Senator Joseph Lieberman spoke out against the great, unregulated giant called video games. Flanked by Senator Herb Kohl and Captain Kangaroo (Bob Keeshan), Lieberman argued that games “glorify violence and teach children to enjoy inflicting the most gruesome forms of cruelty imaginable.” He contended, “Few parents would buy these games for their kids if they really knew what was in them”; he added, “The adult market today wants something more than just playing Pac-Man.”⁵⁷ The proverbial train wreck between the video game industry and concerned legislators was inevitable. Beginning in the early 1980s, video game protestors found games too banal, too mesmerizing, and too violent. But with games lacking little graphic realism, these protestors’ cries for regulation failed to gain a wide audience. Since gaming systems like Atari relied on gamers’ imaginations, game protestors faced a problematic proposition. In short, the games were not clearly graphically offensive. When the graphic realism of video games hit the public eye in the 1990s, widespread public scrutiny finally forced the gaming industry to respond to critics. And while critics’ contentions varied little from that decade to the current one, these arguments gained momentum—so much momentum that two senators, Joseph Lieberman (D-Connecticut) and Herb Kohl (D-Wisconsin), used their political capital to pressure the industry to create and enforce a standardized rating system.

This chapter centers on the regulatory response to games becoming graphically communicative. Before divulging on the importance of the Electronic Software Rating Board and *Grand Theft Auto* as major forces in the game industry, I provide a discussion of the development of video games and of the nature of early games and why they received little scrutiny. I also explain the evolution of the Entertainment Software Rating Board, including Senator Joseph Lieberman's pressure to form it. First, I discuss the early days of video games when press coverage centered on the industry's likeness to car speakers and handheld calculators.

BECOMING GRAPHICALLY COMMUNICATIVE

In the late 1970s, Atari introduced *Pong*, a bare-bones depiction of a tennis match where two players could manipulate their respective paddles. Since then, games have become increasingly more realistic and more violent. For example, in the early 1990s, Midway Entertainment released *Doom*, the game that marked the birth of the first-person shooter genre. The first-person shooter places the player's point of view behind the weapon. This vantage point revolutionized game play because it placed the player in the position of the character. *Doom* caused parents and legislators to rethink their previous notions of video games as a fairly innocent form of entertainment. Consisting of three-dimensional levels, the game provided the player with the chance to plunge "straight into the depths of Hell"⁵⁸ and then to massacre hundreds of monsters and demons. The release of *Doom* demonstrated that software programmers had developed the technical capability to portray graphic violence. The advent of *Doom* and other such games "represents a gigantic leap from *Pac-Man*, *Frogger*, *Donkey Kong*, and *Q*bert*, where the

tasks were as innocuous as eating yellow dots.”⁵⁹ Games such as *Pong* worried protestors very little, because even if a game designer intended to show violence, violence could not be depicted accurately. However, that mindset changed drastically with the onset of *Doom*, and after its introduction, games with even more realistic violence ensued.

Since the inception of video games, people have wondered what effect games have on their minds and their pocketbooks. Described as a “cross between an oscilloscope and a black-and-white television mounted in a stand-up, 6-foot-high console,” the first game, *Pong*, was a simple version of a tennis match. One author described the game as “the thinking man’s plaything,” as opposed to the pinball machines that truck drivers played. While this commentary discusses the possibility of becoming “hooked on electronic amusements,” the first article in the *New York Times* covering games still shed positive light on this arcade game. Nonetheless, in 1974, the jukebox continued to bring in the most money as the electronic diversion of choice.⁶⁰ Interestingly, in this article people naturally presumed that video games might be habit-forming because “playing the blips [of *Pong*] is more satisfying than Barbie dolls, Monopoly[®], checkers and almost every other diversion.” But video games failed to enjoy the moniker of the “thinking man’s plaything” for very much longer. In fact, even early in the 1980s, this entertainment genre aroused questions of taste and class.

In his book, *Media and the American Mind*, Daniel J. Czitrom draws parallels between many forms of new technologies. He finds responses to developments of the telegraph, broadcast radio, and television analogous, and I would add video games into these developments. With each new technological innovation, marketers promise a new

sort of euphoria and utopia. In the last fifteen years, one need look no further than the recent examples of e-mail, the Internet, cellular phone technology, and the ever-shrinking wireless laptop. Initially, the public answered positively to dramatic improvements in communication technologies because they “emphasize[d] the possibilities for strengthening a moral community and celebrated the conquering of those vast social and cultural distances that had traditionally kept the large majority of people isolated.”⁶¹

Czitrom also argues that, since the advent of the telegraph, technology has been something more to humans because the tiny surges of electricity allow a person to become more godlike, being in two places at once.⁶² Perhaps the godlike attributes of new technologies give rise to the sharpest criticism, since “the everywhere-ness, all-at-once-ness, and never-ending-ness of the media are powerful barriers to understanding, or even acknowledging their history.”⁶³

However, as Czitrom asserts, beyond a new technology’s infancy, “most everyone engages in damning the media for glorifying, exaggerating, or even causing some particular odious feature of modern life.”⁶⁴ Video games have not escaped this cultural pattern. Following gaming’s infancy in the 1980s, games entered adolescence in the 1990s, and criticism then blossomed into a full-on assault of video games. Arguably, the 1990s saw two of the biggest constraints to the industry—Congressional pressure on the industry to form a regulatory body for game content and the Columbine killings, which fingered games as its culprit. Indeed, Czitrom explains the dialectical tensions between new technologies’, “utopian possibilities,” and their disposition as “instruments of domination and exploitation.”⁶⁵ Although published before video games existed as a viable entertainment force, this contention applies to gaming because Czitrom’s assertion

of a particular pattern of public response to new technology is evident in video games as well. The recurring pattern of initial public enthusiasm, emerging panic, and finally acceptance of video games is clear beginning in the 1970s and moving through the new millennium.

Despite game antagonists' arguments against games, it is important to return to a more basic tenet of their argument. Either games communicate or they don't. To make the decision either way is problematic, particularly along the span of video game history. However, what is not problematic is a simple yes or no answer based on the industry's games in a particular era. Initially games exhibited no ideas because they were superficial renderings of simple artifacts and a pinball game would have not even rivaled an early video game in terms of communicative qualities.

Important to the free speech issue is how games communicate. First amendment scholar, Frederick Schauer, notes how agents may communicate ideas. He argues:

Communication is a joint enterprise, and only that joint enterprise triggers the principle of free speech. Without communicative intent, a communicated message, and a recipient of the communication there is no complete communicative act, and no occasion to talk about freedom of speech.⁶⁶

This idea of the "joint enterprise" of communication is important when examining games since the early days of the gaming industry relied on the recipient's imagination to discern the message. And since, in those days, the message's sender was inhibited by technology, communication could not transpire. However, when the industry matures and turns a communicative corner in 1990, game designers begin communicating with the game players. Players no longer have to wonder what a digital image is, they no longer use their imagination. Schaeur writes:

A similar conclusion is mandated where pictures are the medium of communication, as with, for example, photographs, drawings, paintings, charts, graphs, or diagrams. Where the intent is to communicate particular ideas, information or relationships, these methods of communication are indistinguishable from linguistic speech.⁶⁷

From the vantage point of free speech and games, the industry could have taken a few legal routes. First, the video game industry could have argued from the SLAPS test. In other words, how do video games qualify as serious, literary, artistic, political or scientific? Presumably, video game designers could have argued that creating artistic games was their First Amendment right. Despite this possibility, designers did not choose this route. Another potential free speech route for games could have been speech-plus. The notion of speech-plus is that the agent conducting a speech act is doing something deserving free speech protection in addition some action *not* deserving free speech protection. Video games opponents could have routed the issue in this direction by arguing that the player is doing something deserving of protection (viewing the game) while conducting action not deserving protection (playing the game). For example, opponents could have argued that in playing the game, the agent essentially moves virtual worlds.

The legal landscape of video games avoided taking either of these two shapes. The industry fortunately argued for expression—that publishers create a political statement consumed by the player. But not until games have the technological wherewithal could the industry take this rhetorical and legal stance. This idea of games becoming graphically communicative serves as my criterion for choosing certain games from the earliest days of gaming and ending with *Grand Theft Auto*.

NO GRAPHICS? NO PROBLEM

As of late, realistic violence in video games is at an unprecedented peak. In late 1997, Eidos Entertainment released a video game entitled *Hitman* in which the player conducts contracted “hits” on various characters within the game. This first-person shooter game allows the player to choose his or her method of killing the victim. For example, the player can choose to strangle the target with a garrote or poison the target with serum. The most disconcerting aspect of the game is its unsurpassed realism. When the player strangles a victim to death, realistic blood spills on the floor. When the player snipes a victim, entrance and exit wounds appear on that character. *Hitman* was among the first games to employ rag doll technology. In other words, when a character dies, it dies like a rag doll, resulting in interesting dying positions and the added possibility of moving a dead character. Furthermore, when a player murders innocent persons (those not marked for the mission), that player is not necessarily penalized. But *Hitman* is not the most gruesome of contemporary video games.

The newest video game platforms, Xbox, PlayStation 2, and GameCube, provide players with unmatched, in-game realism. This realism combined with grisly violence has given rise to parental concern. One electronic gaming company purported to have hired ex-Army officers as consultants to heighten violence realism and weapon realism; the gaming company says of their endeavor, “They [officers and consultants] help make sure things such as an arm being blown off by a high-powered weapon look realistic.”⁶⁸ Such graphic realism now inundates the industry. For example, the game that has cultivated the most controversy, *Grand Theft Auto: Vice City*, provides the player with incredible in-game freedom to rove about a city as he or she pleases; all the while the

game offers superb graphics. Much like accumulating property and hotels in *Monopoly*®, the player's goal is to accumulate as much cash as possible, but the manner by which the player acquires money is not rolling dice and purchasing deeds; rather he or she becomes wealthy by stealing cars and swindling citizens. The most offensive material comes in the portrayal of police officers and women. If players wish, they may steal a police car and murder the officer in the process; in particular, this aspect of the game has produced parental animosity. Also, the player may choose to spend a few moments with a prostitute, and though the game depicts no explicit sexuality, it implies enough for the player to ascertain the act. Thereafter, the player may choose to kill the prostitute and take his or her money from the woman. Though not all recent software is as violent, *Grand Theft Auto* demonstrates where the future of games may lie. This is in stark contrast to the early days of Atari when, due to poor graphic realism, gamers had to rely on their imaginations to see real-life scenarios through heavily pixilated images.

In recent filmmaking and in the last few years of video game design, the ability of designers to create a visually appealing product has increased. The industry refers to this ability as “computer generated images” (CGI or simply CG). Via CGI, game designers use a series of polygons to render images, and the faster a system can render images, the more visually appealing the motion is. When game developers designed early games, they used heavily pixilated images that forced the player to use imagination in order to grasp the gravity of a game's situation. Now, games such as video football look so real that one often has trouble delineating between real football on television and video game football.

In mid-1982, a few protestors decried three prominently offensive games. These three new games, *Custer's Revenge*, *Bachelor Party*, and *Death Race*, pushed the envelope of “pornographic, insulting or otherwise offensive” video game graphics.⁶⁹ First, *Custer's Revenge* featured a digital depiction of General George Armstrong Custer traversing the desert. Fending off hordes of angry Native Americans, the general ends the game by arriving at a helpless Native American woman tied to a post and abandoned in the desert. Instead of being a hero by freeing this woman, the would-be hero drops his pants. Apparently sexually aroused, the general crosses the screen to rape the young woman, thus ending the game. *Custer's Revenge* enraged many groups, including Women Against Pornography, the National Organization for Women, the American Indian Community House, and the descendants of General George Armstrong Custer. *GameSpot.com's* Lauren Gonzales aptly writes that the marketers' release of this game was the first to discover “how controversy alone can sometimes make a game—but not always.”⁷⁰ In other words, some games lack quality but they are so controversial that they create their own hype, goading gamers to buy them. I return to this idea later in this chapter when I discuss *Postal* versus *Grand Theft Auto 3*.

The first game truly to offend audiences in the quote-unquote Golden Age of Gaming was *Death Race*. Designers of this game based game play on a motion picture named *Death Race 2000* that featured the tagline, “In the year 2000, hit and run driving is no longer a felony. It's the national sport!” Accordingly, the game featured a scoring system based on how many people the player hit with a vehicle. Since this game actually preceded *Custer's Revenge*, it offered the player even fewer visual perks; in fact, game designers even presented the game in black and white. When the player killed an

onscreen pedestrian, a tiny cross appeared onscreen to depict a memento for the lost soul. And if the player happened to merely injure a pedestrian, the player could reverse the vehicle and finish off the victim. Initially, the public paid little attention to *Death Race*'s content since the game's publisher reported to have only sold 500 copies in the beginning.

Interestingly, the game's publisher, Exidy, revised its marketing strategy and claimed that the figures depicted onscreen were not people but hostile gremlins. Because the computer graphics illustrated simple, two-hue figures and vehicles, Exidy easily changed the nature of the game. Through players having to use their imaginations and the game's poor visual graphics, Exidy only had to change its marketing strategy and instruction booklet. Exidy altered nothing else. Even so, the game received publicity from the television show *60 Minutes* and Senators Joseph Lieberman and Herb Kohl in their annual Video Game Report Card. While the public initially disparaged the game, when controversy struck Exidy's work, the game's sales rose from 1,000 copies to over 10,000 copies. This spike in product sales in the face of pointed controversy was the first exemplar that any press (even if clearly negative) is good press.⁷¹

Finally, Mystique's *Bachelor Party* aroused concerns over how seductive a game could be. The actual game play proved ridiculous, but what ultimately caused controversy was its cover. The game cartridge read, "Mystique [the game's publisher] presents *Swedish Erotica: Bachelor Party*." With a background of numerous female silhouettes, the cartridge art depicted one young woman embracing a young bachelor with the picture framed by another woman's legs and backside. In fact, the cartridge art evidenced an incredible misnomer since the game play proved so dull. This lackluster

game allowed the player to move toward the “sensuous” bachelorettes and, upon arriving at their location, the bachelor made the females disappear. In fact, *Bachelor Party* was little more than a mix between *Breakout* (where the player used a ball to slowly deteriorate a wall) and *Berzerk* (where the player, chased by aliens, foiled opponents by shooting a laser beam). Again, the technical graphic limitations of the computer systems dictated that the player use his or her imagination, since a “bachelorette” in *Bachelor Party* and an “alien” in *Berzerk* looked incredibly similar.⁷²

The hilarity in all of the protests against these three games is that the player really had to use his or her imagination to glean what he or she was viewing. Unlike today’s games, where a character is comprised of millions upon millions of polygons, these characters were simple arrangements of 55 blocks and three colors. For example, game designers used approximately 55 blocks to design both the Custer character and the Native American woman in *Custer’s Revenge*. While *Custer’s Revenge*, *Death Race*, and *Bachelor Party* conjured controversy, their products failed to gain the momentum that software with more advanced visual graphics might. Compared to current games, screenshots of these older games prove humorous. Their graphical depictions are little more than primitive graphics that force the gamer to use his or her imagination. In fact, marketers of these games usually included a painting on the game’s box and plastic cartridge to entice and inform the buyer about the game’s content. In other words, the designers and marketers had to provide art and an instruction booklet to tell the gamer about the game’s content because the games’ graphics were not lifelike. The game’s instructions essentially stated, “See, this image is General Custer and this other image is a Native American.” Ultimately, the opposition’s contentions failed to stick because the

images were poor and the game's graphics failed to be explicit enough to give the user visual realism.

GAMES' FIRST WORDS: "FINISH HIM!"

Even from as early as the late 1970s, video games have been making their mark. *Entertainment Weekly's* Jeff Jensen aptly points out that games are more than a burgeoning industry; games produce "larger cultural ripples," like icons and crazes.⁷³ Jensen's assertion is correct, as evidenced by the gaming industry's production of icons like Pac-Man, Mario and Luigi (of *Super Mario Brothers*), Sonic the Hedgehog, Lara Croft (*Tomb Raider's* heroine), and the Master Chief (of *Halo: Combat Evolved*). With such icons in mind, in this section I attempt to discuss games that pushed the graphically communicative limits. I intend to trace how new genres pushed graphic and technological thresholds, arriving at their current state, and I attempt to answer the question: "Why does this particular game matter?" Of course, the list I provide is subjective and arguably not the list of the most influential games; rather it is a list of the most controversial ones.

Among the first to realize the magnitude of video games on the small screen was the game publisher Service Games Incorporated (shortened in 1965 to SEGA). As designer and distributor of America's number one arcade game in 1982, the company shelled out \$150,000 in order to create a 30-second commercial. This commercial marked the first-ever video game commercial. In other words, it was "the first commercial urging audience into an arcade to play a game." Paramount Studios backed SEGA in hopes of crafting the company into a major video game brand name. This step

was the first that led to SEGA rivaling the Nintendo Entertainment System by the late 1980s. Both companies would see their rivalry develop over the next twenty years until SEGA cracked early in the twenty-first century.⁷⁴ SEGA communicated on behalf of their video games, but games still could not communicate independent of another medium like television.

Any new console system needs a popular initial game. To launch their popularity adequately and to ensure their success, early systems needed monumental games, just as the latest systems need breakthrough games; for example, the Atari needed *Pac-Man* just as much as the Microsoft Xbox needed *Halo: Combat Evolved*. The Nintendo Entertainment System and the SEGA Genesis were not exceptions to this standard. SEGA released its *Sonic the Hedgehog* title at the same time that Nintendo loosed its immensely popular *Super Mario Brothers*. *Super Mario Brothers*, or *Mario Brothers* for short, was such a huge hit that one Nintendo spokeswoman estimated that its popularity led to 40 percent of American households buying a Nintendo game machine.⁷⁵ Just as *Pac-Man* previously stormed into homes as an iconic windfall, Mario surpassed the power-pellet-eating pie chart in fame and earnings. Game designers originally debuted Mario in 1986 in the *Donkey Kong* games—a video game series that had previously produced substantial success for Nintendo. Donkey Kong gave up his reign to this tiny Italian plumber—the next digital entity that made an indelible mark on its industry.

Super Mario Brothers marked the advent of scrolling game play where the player moves from left to right to progress through game content. Three years after its release, *Mario Brothers* established itself as the standard both for graphic depictions and for the scrolling perspective. Further, the game featured a series of “worlds,” labeled as such

because each “world” included a different set of enemies and a unique color scheme. Also, the player could manipulate Mario and “warp” him to these different “worlds” through a series of tunnels. *Super Mario Brothers* and its SEGA counterpart, *Sonic the Hedgehog* (released in 1990), have remained icons of the era, versions of interactive digital pop.⁷⁶ The success of the *Mario* series led to the third installment of Mario heroics, *Super Mario Brothers 3*, which marked the best-selling game in video games’ fifteen year history. Standing on the market strength of *Mario*, Nintendo soon overtook Toyota to become Japan’s most successful company, generating over \$1 billion yearly.⁷⁷ Mario marked the beginning of the era when games became graphically communicative. And if Mario left any ambiguity about its communicative merits, *DOOM* removed all doubt.

Juxtaposed to the aforementioned console games, *DOOM* and *Wolfenstein 3-D*⁷⁸ broke from the iconic pop of Mario and Sonic to give gamers a defiant experience. The contrast between Mario jumping on the heads of cartoonish turtles and the hellish scenario called *DOOM* left game protestors with their work cut out for them. *DOOM* marked genre ingenuity because it was the first game to introduce the infamous first-person shooter (FPS) vantage point. Set in the bowels of a Martian toxic waste plant, the main character negotiated his way through alien-ridden halls with an unbelievable, yet incredibly attractive, salvo of weapons ranging from a rocket launcher to a close-combat chainsaw. Writing about the groundbreaking games *DOOM* and its sequel, *DOOM II*, one author claims that “launching *DOOM II* brought a whole new vernacular to the industry, words like ‘deathmatch’ and ‘frag’ and ‘mods.’”⁷⁹ *DOOM* was the first game that allowed PC users to link their computers and play against the most fierce of

opponents—the human opponent. Thus, a “deathmatch” describes a competition between two people on two independent computers, always resulting in one player’s digital death and the other’s victory. Describing a player’s temporary gaming death, a “frag” is when a player dies at the hands of one of his/her opponents. Naturally, this term arose many suspicions about the violent games in which players died and magically resurrected to play another round, a process euphemistically called a “frag.” *DOOM* designers derived this term from a fragmentation grenade because, in the game, the players die when other players “frag” them. Finally, *DOOM* offered the player “mods” or modifications. Available online were sites where a PC user could download game modifications to slightly change the rules of *DOOM*. For example, one mod offered changing the game to display characters and sounds from *The Simpsons* television show. Furthermore, this game marked the point at which games and gamers turned a corner from cartoon renderings of characters to violent, realistic, and (most importantly) communicative game content.

Following *DOOM*’s success in 1993, Acclaim Publishing released the game that drew even more political fire than the first-person shooter. Perhaps because *DOOM* was a PC game, it failed to cultivate the amount of negative attention garnered by *Mortal Kombat*. Released on the SEGA Genesis and the Super Nintendo Entertainment System, the second generation of Sonic’s and Mario’s respective original platforms, *Mortal Kombat* stood as the first violent, realistic game that designers geared more toward home users. In the early 1990s, many people viewed adults as primary PC users and considered children to be console users. So when Acclaim published *Mortal Kombat (MK)*, critics widely referenced it as the quintessential evil game. *MK* was among the first games to let

players control lifelike, digitized human characters. "It was a very large step forward," following games like *Super Mario* and *Sonic*, says Parker Page, president of the Children's Television Resource and Education Center. Thanks to technology, realism in video games can only increase, says Page, an adviser to Interactive Digital Software Association. "I think [*Mortal Kombat*] will be seen in the next two years as very crude, compared to what's going to come."⁸⁰ Perhaps the prospect of further digital communicative realism and communicative violence prompted protestors to demand establishing a rating system. Nevertheless, the game play itself contains its share of violence.

Among games' first words were those uttered by the *Mortal Kombat* narrator: "Finish Him!". The premise of the game is two fighters on opposite sides of the screen dueling in martial arts carnage until one person brutally kills the other. Unique to the *Mortal Kombat* series is a game feature called a "fatality." Just before one player strikes the final blow to the other player, the losing character stands onscreen in a dazed stupor. Then, the winning player enters a unique combination of buttons on the control pad in order to perform a "fatality," thus killing the opponent. The fatality that has received particular attention is the one in which the winning character tears off the head of the other character. When the winning character decapitates the other, the dead fighter's spine emerges attached to the ill-fated character's head. While *MK* programmers made many fatalities available to players, this one undoubtedly received the most negative media attention. And since visual technology had advanced so quickly, games like *DOOM* and *Mortal Kombat* left critics wondering just how bad violent games would become in the next few years.

A few years later in late 1999, one game had the potential to challenge the entire industry. Using both the electronic gaming ability of the Nintendo 64 and the photographic ability of the Nintendo GameBoy, Nintendo developed a game that could take a photograph of an individual's face and place it on a character within the game. If released with this technology, the game, *Perfect Dark*, would have allowed players to play each other in a multiplayer tournament that ultimately would have led to the electronic death of the real-life face. Though the implications for such a game could have been both disastrous and groundbreaking, the developers of *Perfect Dark* claimed that the face-mapping element of the game contained bugs and glitches that caused the company to cancel the unique feature just before the game's release. Much speculation existed about these "glitches" in the game, since the mere mention of fragging a real person's face brought incredible scrutiny to *Perfect Dark*.⁸¹ Such technology has not necessarily gone to the wayside. Though not perfect, the latest installment of *Gretzky NHL 2005* also attempted a face-mapping element. Alex Navarro, a reviewer for *Gamespot.com*, comments on the game:

If you have an EyeToy, you can put your own face on a created player. In the create-a-player mode, you can use the EyeToy to map your own face onto your created player. This is a pretty cool addition, though the generally low-resolution images the EyeToy captures look a little funny. Still, it's a nice bonus.⁸²

Even with the EyeToy, beside a lackluster game play review, *Gretzky NHL 2005* received little scrutiny because it was a sports game. No one "frags out" when playing this hockey game. However, after *Perfect Dark*, no first-person shooter game has attempted such a system because of the incredible legal and public implications.

Since the inception of video games, game designers and Hollywood movie producers have salivated at the prospect of teaming up to create "the game." Eugene F.

Provenzo assessed this relationship as important because these two forces “could immediately tap into an enormously popular cultural and symbolic tradition—thus making its product all the more commercially viable.”⁸³ *Gamespot.com*’s Alex Navarro laments the condition of games in the mid-to-late 1990s because most titles consisted of watered-down renditions of PC games. Just like tapping into well-known movie icons, console publishers consistently reproduced tired interpretations of *DOOM*, *Wolfenstein*, and *Mario Brothers*. But *GoldenEye 007* both broke that trend and tapped into the decades-old James Bond saga. This game changed the nature of the console because it allowed players to participate in a *DOOM*-style deathmatch, fragging well-known characters like Oddjob, Jaws, and, of course, James Bond.

By merging cutting edge video game technology and familiar movie icons, *GoldenEye 007* impacted both the industry and critics significantly. As Alex Navarro suspects, “For its era, *GoldenEye* was a fantastic achievement, and in this era [1997], it stands up as a true classic.”⁸⁴ Before this game’s release, deathmatches and fragging were only PC possibilities. As discussed earlier, game critics viewed PC users as an older audience as opposed to the younger audience of console games. Consequently, extreme PC games like *DOOM* and *Wolfenstein* saw fewer protests because publishers released these games exclusively for PCs. However, *GoldenEye 007* pioneered solid, multiplayer deathmatches on home consoles, thus providing fodder for game protestors. Ultimately, because *GoldenEye* was among the first to distinguish itself as a console multiplayer, it secured its place as both a significant and controversial game.

In 1998, on the heels of James Bond’s introduction to the video game world, an obscure game publisher called RockStar North released a lackluster game that received

mediocre reviews and quickly faded into anonymity. This game, *Grand Theft Auto*, allowed the player to steal cars and drive around a fictitious city; all the while, the player watched the action from a bird's-eye view. While the game's sequels received considerable legal and political scrutiny, this initial game only experienced one lawsuit—one claiming that the game's designers stole the game format.⁸⁵ Had these designers left this conceptual design alone, the game would have faded into obscurity soon after its release.

However, three years later, RockStar Games released the most offensive game in the history of gaming. *Grand Theft Auto III (GTA III)* covered all the proverbial objectionable bases—stealing cars, killing cops, mugging pedestrians, hiring prostitutes, and robbing local merchants. As opposed to *DOOM*, which was a first-person shooter, *GTA III* was a third-person shooter. It allowed the player to wander around the corrupt, fictitious Liberty City, completing missions in a non-linear fashion. I discuss the importance of this game later.

Finally, competing with *GTA III* for the title of the most the pervasive and influential game of the twenty-first century is *Halo: Combat Evolved* (or *Halo* for short). Releasing *Halo* as one of their initial games, Microsoft Xbox developers depended on the game to launch successfully their Fall 2001 console. It worked. *Halo's* game play included two groundbreaking features for a console. First, one could play against up to 16 other players online (a first for console formats) or use the Xbox SystemLink to connect up to four consoles, comprising a competition between 16 people. Second, the game offered a cooperative mission mode where two players progressed through the game together as teammates amidst the ring-shaped planet called Halo. The player

interacted with this planet as a new, mechanized marine fighting alongside fellow marines to save the human race on earth by waging war on Halo. The game's publisher, Bungie, induced a new sense of community among gamers, allowing them to join four systems and four televisions to create a bustling "Halo Party." Interestingly, as one source guesses, "Video gaming now even encourages a social aspect. Consoles and televisions can be linked to allow up to 16 people to play simultaneously in the one game."⁸⁶ These get-togethers involved families, and news of such gatherings became increasingly well-known. Furthermore, *Halo's* game play was not merely about the business of deathmatches and killing. The game's multiplayer element featured capture-the-flag and king-of-the-hill, as well as the traditional deathmatch, called "Slayer" in *Halo*. While not the most violent game, its graphic realism combined with its enticing competitive social aspect placed *Halo* at the forefront of recent game releases.

As mentioned earlier, the video game industry is burgeoning on new partnerships and attracting greater talent. In 1999 Republican Kansas Senator Sam Brownback recognized the magnitude of gaming; he said:

These games are not put out by some obscure company pushing the envelope. Rather, they are produced, marketed and distributed by subsidiaries of some of the largest, most prestigious companies in the world—companies that have lent their corporate support to marketing violence.⁸⁷

For example, one of the most lucrative players since 1995 is best-selling author Tom Clancy. In 1995, he worked with the video game industry to translate his novel *Rainbow Six* into a first-person shooter game based on hostage rescue scenarios. Since then, Clancy's name has appeared on at least ten game titles.

Now the scope and pervasiveness of video games is growing even beyond what gaming experts previously imagined. For example, the new *James Bond 007: Everything*

or Nothing features the likenesses and voices of real actors like Pierce Brosnan, Shannon Elizabeth, Heidi Klum, and Willem Defoe. Also, the magnitude of video games has attracted well-known, in-game voice acting such as that of Michael Ironside (from *Total Recall* and *ER*), Dennis Haysbert (currently in the Fox Network series *24*), and James Earl Jones (previously in *Field of Dreams* and *Star Wars*). What's more, the gaming industry has become a major player in the stock market. Consider CNN's coverage of Electronic Arts' stock as they release new games and compete with different game publishers on the three major consoles. What is clear by all this unexpected growth is that games touch all or even more venues than movies. Their expanding scope has enjoyed a windfall growth—a growth that has drawn increasingly poignant criticism and howls for regulation.

THE ENTERTAINMENT SOFTWARE RATING BOARD—RATED “I” FOR “IRRELEVANT”

To ease concerns over video games, the industry formed a rating system called the Entertainment Software Rating Board in September 1994.⁸⁸ In the early 1990s, with pressure from Congress, the industry formed the ESRB evaluation label to function like the movie rating system, allowing the community, via retailers, to enforce the age-sensitive ratings. The rating system drafters divided their ratings into five categories: “EC” or “Early Childhood” (for children three and over), “E” or “Everyone” (content suitable for children ages six and over), “T” or “Teen” (content suitable for children ages thirteen and older), “M” or “Mature” (content suitable for people ages seventeen and older), and “AO” or “Adults Only” (content suitable only for adults).⁸⁹ The ESRB's

system should have ostensibly calmed parents' and legislators' fears about the aforementioned games. However, as one author states, even though the board did serve a rhetorical utility, it rapidly became extraneous because "children and parents quickly learn[ed] to ignore it."⁹⁰ Thus, it neither solved the problem nor curbed violent game titles.

The current process of the rating system functions in the following way. The industry bases the overall rating published on the game's box on three reviewers' ratings. The game's publisher submits excerpts from the game's content, usually content which contains the most extreme moments. Likely objectionable, in-game material includes large-scale themes like failure and rewards versus penalties. For example, the rating board first examines how success manifests itself in the game, as well as how failure manifests itself. They scrutinize the moment of failure and whether it includes extreme death or childish music mimicking a lighthearted demise. Further, the raters base the rating on other obvious content like violence, profanity, destruction, controlled substances, gambling, sexuality, and weapons.⁹¹ The ESRB extensively trains the individual game raters, who are comprised of 100 people from assorted backgrounds, especially those not altogether acquainted with games, in order to exercise independent opinions. The ESRB describes its rating process:

To get a game certified with an ESRB rating, publishers fill out a detailed questionnaire explaining exactly what's in the game, and submit it to the ESRB along with actual videotaped footage of the game, showing the most extreme content and an accurate representation of the context and product as a whole.⁹²

When the game's publisher submits game content, the ESRB trusts the publisher to present accurate information on the basis that the Board may take action, "including, but

not limited to, revoking the rating, compelling the publisher to resticker the product, or fining the publisher.”⁹³

Currently, the ESRB functions smoothly; however, the rating system experienced a tumultuous inception. The news of a rating system broke in late 1993. Lamenting the lack of information about game content, parents and legislators pressured the industry to change. One journalist documents a parent’s shock about discovering *DOOM*’s content. Apparently, she stormed into an Arlington, Virginia software company and demanded her money back because of the game’s self-proclaimed “mutant-laden, laser saturated, blood-splattered action.”⁹⁴ Nonetheless, the rating system initially illuminated new hope for the industry. Along these lines, John Burgess of the *Washington Post* asserted that in hopes of preempting congressional intervention, a “broad coalition of video game producers and rental shops has reached basic agreement to create a national system to rate the proliferating games for violence, sex and profanity,” a system much like the one employed by the motion picture industry.⁹⁵

The ultimate breaking point for game protestors were two titles, *Mortal Kombat* and *Night Trap*. While *Mortal Kombat (MK)* challenged the boundaries of both technical graphic realism and violence in games, *Night Trap*⁹⁶ was destined for obscurity based on pseudo horror scenes and lackluster game play. Nevertheless, both games proverbially primed the pump to deliver a blow to the gaming industry. As a result of the public outcry against these two games, the California State Attorney General called for both to be withdrawn from sale, as well as for congressional hearings confronting game violence.

In an editorial in the *Washington Post*, game publisher CEO Tom Zito responded to Joseph Lieberman’s concerns. In a piece entitled, “Senate Demagoguery; Leave My

Company's Video Game Alone," Zito defended the industry's practices, arguing that the senators only saw one 30-second clip of the action in *Night Trap*. For example, the senators called the game objectionable on the basis of footage that displayed "three black-suited assailants enter[ing] a bathroom, grab[bing] a young woman wearing a flimsy nightgown, then attack[ing], a long, hooked device to her neck to suck out blood." In fact, Zito claimed, the senators got it all wrong. Zito contended that if Senators Lieberman and Kohl had actually played the game, they would have known that the content centered on a tongue-in-cheek vampire attack. Instead, Zito claimed, the legislators were fed this footage to make it appear more violent. Zito did duly attest to the age appropriateness of the game. He conceded, "Although I believe 'Night Trap' is relatively tame and harmless, I still don't think it's appropriate for children"; he added, "How quickly I was reminded of the theatrical nature of congressional justice."⁹⁷ Despite Zito's apt defense, the game served as the impetus for legislative threats.

The problem facing the gaming industry was not whether it needed a rating system or not—it already had two. Rather, the pressing question was which rating system it would adopt. Fearing restrictive laws, SEGA announced that it would work together with the other industry leaders to create a rating system. Originally, SEGA fashioned its own system in anticipation of an industry crisis like the one that arose in late 1993. SEGA initially created the "Videogame Rating Council," which served as an in-house rating board. According to Senators Joseph Lieberman and Herb, this system was not acceptable because the industry needed a standardized system. Furthermore, under the contention that other platforms (like Nintendo and Saturn) and the PC rating system might acquiesce to SEGA, Lieberman and others expressed concerns that SEGA might

exert influence over the entire rating process. Senator Herb Kohl's admonition came when he advised the industry "to take care of the problems yourself," because "if you don't, we will."⁹⁸ SEGA's mantra throughout the process included Bill White's words, "Games aren't just for kids anymore," as evidenced by the rating system that SEGA already had in place.

The original standardized rating system suffered from two ailments. First, PC game publishers and console publishers failed to express solidarity in their ratings. Today, most people consider PC and consoles as one industry entity, but initially the two units stood independently from one another. Accordingly, the two factions developed their own rating systems in response to congressional pressure. Expressing incredibly little faith in the consumer, Lieberman was pleased to see the rating system enacted, even though "the existence of two rating systems is [was] disappointing because it may [have] confuse[d] consumers."⁹⁹ Those proposing the PC rating system, the SPA (Software Publishers Association), claimed their system followed a careful methodology which was "objective" and "published." Conversely, one example that the ISDA touted was their treatment of *DOOM*. Under the PC rating system, the game received a violence evaluation of 3 out of 4, while the console system ranked *DOOM* as an "M-Mature" game. Those opposed to the PC system purported that although it was clear, it often failed to provide the consumer with a stringent enough rating.¹⁰⁰ Perhaps because of this lenient image, the console rating system ultimately triumphed.

The second ailment arose when the rating system was slow to respond to the ensuing game debuts. Senators Lieberman and Kohl acted out of a sense of urgency, advocating the new rating system before the video game buying season—Christmas.

(Even today, the biggest and best games premier from mid-November to December 25, a strategy seen in the release of *Halo 2* in 2004.) The senators expressed their desires in a letter to the Federal Trade Commission:

With the holiday shopping season in progress, we encourage the commission to take immediate action to halt this false and misleading advertising before more consumers are induced into purchasing violent and inappropriate games for young children.¹⁰¹

Technically, ratings negotiations began in July 1994, and the industry established a system in September of the same year. The primary problem arose in December when the rating board actually rated a few games. *The Washington Post's* account of the rating system lamented, "In a half-dozen other stores around Washington, the new ratings were all but invisible."¹⁰² The ESRB technically only rated those games published from September to December of 1994. And what of the older games? Realizing a formidable backlog, the rating board shifted its task to include returning to previously published games in order to rate them, a process which, as a result of its magnitude, was lengthy and not without ambiguity.

What is clear, though, is that the ESRB's controversial ratings like "M" for Mature and its most extreme rating, "AO" for Adults Only, often had and continue to have unintended consequences. In 1993, the president of the one interactive software association foresaw the situations the video game industry now faces. He speculated that no matter how well-intended any rating system was, "it would set a dangerous precedent and would start us on a path that may have unforeseen consequences and could ultimately, if unintentionally, jeopardize our First Amendment rights."¹⁰³ Perhaps the greatest unintended consequence is the tendency for a game receiving the ESRB's most extreme ratings to garner publicity. For example, *GameSpot.com's* Lauren Gonzalez

posits that a game's rating may conjure publicity. She concludes, however, that ratings do not always equal increased sales. Examining the clamor surrounding *Mortal Kombat*, she writes, "Did the controversy help *Mortal Kombat*'s sales? Not necessarily. *Mortal Kombat* was a good game to start with, not a *Night Trap* or *Custer's Revenge*, destined for obscurity without the controversy to hold it up."¹⁰⁴

Other offensive games, however, *need* the ESRB's objectionable rating. For example, when video game publisher Acclaim released *BMX XXX*—a bicycle game where the player faces acrobatic challenges and plays as a scantily-clad female character—the publisher benefited from an objectionable rating. The game's content made the rating well-warranted. For instance, throughout the course of the game, the player can unlock Easter Eggs¹⁰⁵ that further disrobe the female character until she is completely naked. Nonetheless, as *GameSpot.com*'s Jeff Gerstmann aptly argues, "aside from making the quote-unquote groundbreaking move of featuring a lot of cursing and strippers, *BMX XXX* doesn't do anything particularly well."¹⁰⁶ The game was terrible with nothing to stand it up except controversy. And once the controversy ended, the game faded into obscurity, becoming nothing more than an example of the ESRB actually *helping* an objectionable game.

Because the ESRB arguably aided these games, ten years after its inception, critics still wondered if this rating system worked. Since the rating system's birth in September of 1994, critics have argued that retailers have haphazardly enforced these restrictions. Just like the movie rating system, the ESRB system relies on retail stores to enforce age-appropriate rating concurrent to the purchaser's age. However, many parents see the rating system as a feigned panacea. Other groups assume that the rating system

amounts to the regulation of a game's content. Just like with movies, the rating system merely *describes* game content, rather than prescribing restrictions upon publishers.

With this distinction in mind, one author admonishes parents to investigate game content on their own, because “parents older than 38 [years old] probably haven't had much exposure to video games and, when you've known only Ms. Pac-Man, it's hard to envision Lara Croft.”¹⁰⁷ Perhaps this author's depiction of parental involvement (or lack thereof) in video game purchasing explains why so many young children own copies of *Grand Theft Auto III* and *Grand Theft Auto: Vice City*, games clearly not intended for young children. In 1994, another gaming pundit, Dan Pacheco, made comments pointing toward ratings describing, not prescribing, games. This *Denver Post* writer even speculated that the rating system would legitimize and give way to even more offensive content. Pacheco contended that the ISDA (which eventually would evolve into the ESRB) gave the industry permission to publish distasteful games because the “Mature” or “Adults Only” categories existed for such games. Further, he argued that while stores probably would enforce sales to minors, the ratings probably would not have much effect on buying trends since Nintendo and SEGA had both rated their products independently for the previous year with virtually no negative effects on sales (beginning in 1993 and continuing until the formation of the ESRB in 1994).¹⁰⁸

The ESRB's position concerning objectionable material places the burden of regulation in the hands of parents. Nevertheless, with claims of the objectionable content in video games and loose enforcement by retail establishments, parents and legislators continue to find reason to protest. The entire system relies on parents as gatekeepers, even though the thrust of discontentment with the ESRB centers on retailers. Ten years

after the industry instated the system, game protestors still rehashed the exact issues addressed in the 1990s. For example, in early December of 2003, an industry association published a press release announcing a new initiative to help prevent the sale of mature-rated video games to minors and to increase awareness of the ESRB. The president of the Interactive Entertainment Merchants Association released a statement outlining a national carding system which included such major retailers as Best Buy, Circuit City, Blockbuster, and Target. Further, the ESRB's current president, Patricia Vance, commented in late 2003 that the new carding system should take "the parents' guesswork out of game purchase decisions. Consumers today can learn about a game's content before setting foot in a store, and parents can decide what's right for their children based on their own personal views and values."¹⁰⁹ Consequently, the excuse of parents' ignorance is a poor one since the rating system is neither cryptic nor hidden.

Akin to the ESRB were Tipper Gore's efforts to regulate lyrics which "glorify sex, sadomasochism, Satanism and substance abuse"; such outcries lend themselves to a "circus atmosphere" of legislators and rock and roll protestors.¹¹⁰ The legislative bullying in the mid 1980s was incredibly like the 1993 threats upon the video game industry. Although the ESRB attempted to create a perfect system, the protestors and critics continue to exploit and rehash the system's problems. Since 1994, when Senators Joseph Lieberman and Herb Kohl pressured the industry to form a rating system, the industry has repeated itself and continually blamed retailers. Their course of action closely resembles that of disgruntled legislators—both find blaming parents rhetorically difficult and therefore, leave retailers to bear the brunt of congressional contempt.

GTA—THE EXEMPLAR OF THE GRAPHICALLY COMMUNICATIVE GAME

Within the first decade of objectionable gaming material, spanning from *Custer's Revenge* to *Mortal Kombat*, game developers faced inadequacies in their products. For example, the latter suffered from poor graphics and limited technology, while *MK* fell short with technical graphics. *Grand Theft Auto III* and *Grand Theft Auto: Vice City* marked the *GTA* game as *the* game when game designers got it right. Not only did the game gain momentum from a caustic ESRB rating, *GTA III* contained groundbreaking graphics and an innovative non-linear game play system.

Both preceding and following *GTA III* were games that presented much more objectionable material, but no game succeeded in game play like *GTA III*. Usurping the objectionable material in *GTA III*, the *Postal* game series allows the player to run amuck while completing tasks within a work week. Overall, the game's critics deemed the game irrelevant, gruesome, and a little disturbing on the basis of their claim that "*Postal* is mostly just an excuse to set up a lot of goofy, purposely offensive gages, and some of these can be funny, while many of them fall flat."¹¹¹ In an attempt to be overly abrasive, the game's publisher, Running With Scissors, claim they are the "notorious video game developers despised by Senator Lieberman, the United States Post Office and the Australian legislature (to name but three), for daring to produce the tasteless and insensitive videogames *Postal* and *Postal 2*."¹¹² Despite the controversy, *Postal* is destined for instant obscurity because it does little to advance new game play formats.

Other games have followed *Postal's* 1997 release, some even more offensive, but in different ways. For example, the "MediaWise Video Game Report Card" in 2002 lamented that year's most offensive release: *BMX XXX*. In addition to the description I

provided earlier, this bicycle game allows the player to meander around bike courses earning points for bike tricks. The player can unlock detestable material in the form of a playable topless woman riding a bike; additionally, the player is able to snipe people from the tops of buildings. Of course, firing a rifle in a bicycle game makes little sense, a fact that resulted in the game's developers receiving scrutiny. Another racy game released in late January 2005, was a simulation/strategy called *Playboy: The Mansion*. The game promises a taste of the life of Hugh Hefner, but falls short and received lackluster reviews in all aspects of game play. The publisher's CEO, Joe Milton, tried to distinguish his game from other poor, objectionable games, like *BMX XXX*, by saying, "What they [*BMX XXX*] did was horrendous, nudity can be done very classy, very respectful and done for mature audiences."¹¹³ Though the game attempted to differentiate itself from the stagnating pack of repulsive games, it failed to advance anything new and is destined for obscurity.

In the fall of 2004, the industry released what is perhaps the most genuinely disturbing game. Developed by a British game software company, *JFK Reloaded* allowed the player to embody Lee Harvey Oswald to prove that he indeed solely could assassinate the president. The game opened with two haunting lines: "The weather is fine. . . . You have a rifle." Complete with Kennedy's digital entourage, Dealey Plaza landmarks, slow motion replay, and a post-mortem ballistics report, the game encouraged the player to reproduce Oswald's shot. The player most accurately replicating Oswald's shots won a \$10,000 prize awarded in February 2005.¹¹⁴ The game aroused a moderate amount of controversy for a couple of months, and then faded away like many other objectionable games.¹¹⁵

As a testimony to the sheer magnitude of the game, *Grand Theft Auto: Vice City* sold an inconceivable 1.4 million copies, grossing \$68 million in its first five days alone. Both *GTA III* and *GTA: Vice City* set the game in a stylized, 1980s pop culture backdrop, including the game's "morally ambiguous hero, whom you can manipulate for good or evil."¹¹⁶ One groundbreaking aspect of *GTA III* was its non-linear game play. For example, the previous design rationale based games around a fixed set of possibilities—each possibility fed to the player at a scripted moment. Gamers found Rockstar's hit refreshingly different. *GTA III* allowed the players to wander around the city, either completing missions at their leisure or wreaking havoc among the locals in the sultry Liberty City. While designing the game, the developers asked the conceptual question: "How can we create an experience where a player can do anything he or she wants, within this story, within this environment?" Designers also sought to create characters driven solely with "your [the gamer's] intelligence and your morality behind them."¹¹⁷ A *Miami Vice* stylized city controlled by organized crime inspires the game scenario in which a player is given the latitude to choose for whom he or she will work to earn income.

The actual game play was many games rolled into one—a driving (steal any vehicle), third-person shooter (shoot anyone including police officers and civilians, as well as contracted "hits" on mission characters), and simulation (manage the main character's money, health, and overall lifestyle). Jeff Gerstmann, game reviewer and critic, opines, "Getting the cops on your tail and then trying to run away is insanely fun, and the game gives you a pretty amazing arsenal to make sure the cops stay busy," not to mention that "your first weapon will be a baseball bat, great for robbing citizens by

beating them to death.”¹¹⁸ The game is over-the-top violent, so much so that the violence borders on hilarity. After the player steals a vehicle, he or she may tune in to one of Liberty City’s most popular radio stations, most of which mock and jeer morality. Game critics liken *GTA III* to movies like *Kill Bill* or *Pulp Fiction* in which the violence is so flamboyant that the violent acts may actually say something else, even provide the viewer with some social commentary. Regrettably, *GTA*’s objectionable content often overshadows just how groundbreaking the game was.

Aside from its windfall performance in the videogame market, critics, some of whom are game designers themselves, suggest that *GTA* is not the success it seems to be. One of those designers critical of *GTA* and its contemporaries is *Sims* conceptualist Will Wright. He contends that *GTA* “epitomizes the kind of juvenility that has slowed videogames’ mass-market acceptance,” which may land games in the shadows of widespread public exposure. He argues, “We have to start offering things that appeal to a broader group of people.”¹¹⁹ Wright is correct—numbers for objectionable games continue to wane, a trend evidenced by declining sales. Displaying poor game play or distasteful content, the early 2005 releases tested the theory that sex sells. Two such games, *Playboy: The Mansion* and *The Guy Game*, both failed this test and experienced poor sales.¹²⁰ Unlike the critical game play accolades showered on *GTA*, these games failed the test of solid content and again proved that controversy alone cannot support a game title.

CONCLUSION

Perhaps the abrupt shift from cartoon fantasy characters to ghoulish first-person shooters opened the door to congressional scrutiny in the early 1990s. Within the twenty-year span from 1982 to 2002, the game industry found its position among regulatory forces and secured its place woven into the fibers of American culture. No longer do consumers and critics stash games amidst the periphery of the entertainment industry, particularly since designers produce games as interactive media which attract unmatched scrutiny. Little in the last twenty years has cultivated more inquiry than the video game regulation controversy. However, without technology and discourse working in tandem, it is plausible that the ESRB might not have materialized.

Through political players, namely Senator Joseph Lieberman, the industry received scrutiny both before and after it formed the self-regulating entity called the Electronic Software Rating Board. Interestingly, but not surprisingly, the ESRB failed to quiet video game hecklers. Since the rating board merely describes game content, industry detractors found and continue to find the system inadequate to quell video game violence. Accordingly, the possibility of quieting offended parents and legislators with a stricter enforcement of the preexisting rules is a farfetched notion. What legislators demand is not for the rating system to *describe* a game's content; rather, these people unfairly want the rating board to *prescribe* game content. Unfortunately, the ESRB will seemingly not resolve its perceived inadequacies lest it begin imposing game restrictions upon game content. The time period in which the issue of video game controversy came to head—just after Columbine—reinforces this idea. Consequently, public controversy blended with developing technology to form an issue rife with legal implications that no

rating system or legislature can easily dissolve. I discuss these implications in the next two chapters.

CHAPTER III
FROM MICROPROCESSORS TO MORALITY: COLUMBINE, BILL CLINTON,
AND BRINGING VIDEO GAMES INTO THE DISCUSSION

On April 20, 1999, two students entered a Colorado high school and murdered twelve of their classmates and a teacher. Soon after, they turned the guns on themselves and took their own lives. These tragic events of Columbine High School in Littleton, Colorado both frightened America at the time and eventually came to represent the culmination of national fear. After the Columbine school shootings, investigators discovered that Eric Harris and Dylan Klebold had in their possession violent video games. In his diary, Harris wrote, "It'll be like the L.A. riots, the Oklahoma bombing, WWII, Vietnam, Duke [*Nukem*] and Doom (both video games) all mixed together. I want to leave a lasting impression on the world."¹²¹ Unlike the events of September 11, 2001, Columbine forced America to look *within itself* to find an answer to the catastrophic anomaly that had occurred.

In response to public reaction to Columbine, President Bill Clinton launched an initiative to study media violence. On May 11, 1999, the President held a summit at the White House, which included four hours of closed-door meetings. Less than a month had passed since April 20 and the summit had begun to explore the Columbine shootings. The conference hosted nearly 60 representatives from the entertainment industry, gun manufacturers, law enforcement specialists, school officials, religious leaders, and members of Congress. Among those attending were the chief executive of America Online, Maya Angelou, and singer Gloria Estefan.¹²²

After the summit at a Rose Garden ceremony, President Clinton announced that he had released the Federal Trade Commission (FTC) to conduct a study concerning violent media. Beginning on June 14, 1999 and spanning an 18-month time period, the initiative studied “whether the makers of movies, music and video games are [were] intentionally marketing violent entertainment to children.”¹²³ Throughout the study, the President gave the FTC the power to demand documents from the entertainment industry and testimony before the commission.

While the President’s goals seemed noble, the conclusions that the FTC drew were fairly obvious, allowing the public to question this million-dollar endeavor. The FTC study essentially found that the gaming industry (the brunt of the study) already regulated itself. In this chapter, I discuss the character-types of the President, the Columbine killers, video game publishers, parents, and legislators. Chapter III seeks to examine how the President crafted public morality in his media violence initiative. I argue that the events at Columbine served to whet the public’s palate for public rhetoric concerning video games. Clinton claimed that the problem with the then current situation was the marketing of violence to children; the solution, according to Clinton, was self-regulation. Given the video game industry’s self-regulation since 1994, Clinton’s rhetoric functioned only to challenge the status quo with a new public morality.

After publishing its report, the FTC admitted that its goal was to apply public pressure on the industries of music, television, and video games. Since movie and television violence had existed for a substantial amount of time before Clinton’s initiative, the change in the equation was video games. Members of Clinton’s proposed committee “singled out video games such as *Doom* as being too violent for children and

claimed such games inspired the killings at Littleton.”¹²⁴ Gloria DeGaetano and Lieutenant Colonel Dave Grossman, authors of *Stop Teaching Our Kids to Kill: A Call to Action Against TV, Movie, and Video Game Violence* and advocates of heavily regulating video games, argue, “If you run down all the possible factors, the myriad of explanations, you will come to rest at one thing: the video games that our kids are spending inordinate amounts of their time with. If you ask what’s really changed, that’s it—and we all know it.”¹²⁵ These advocates’ notion aligned closely with that of President Clinton. Indeed, Clinton’s rhetoric in those weeks indicated that video games were the new culprit in the media violence equation, and the public was ready for change.

PIXELS DEVELOP INTO A PUBLIC MORALITY ISSUE

Between the early 1970s and the mid-1990s, the story of video games changed. Initially, this industry saw narratives that classified video games in the same genus as car speakers and simple calculators. Thereafter, people used rhetoric to wrestle with the tension between video games as a potential evil or as a benign entertainment source. The mid-1990s experienced video games emerging to rival the film industry in revenue, as well as surpassing the movie industry in controversy.

Celeste Condit, a rhetoric scholar who has studied the effects of rhetoric on the public’s opinion of abortion, argues that rhetoric, public rhetoric in particular, often crafts public morality out of individuals’ and groups’ quests for a common response to a moral crisis. Condit writes, “It is precisely the practice of public rhetoric that converts individual desires into something more—something carrying *moral* import, which can anchor the will of the community.”¹²⁶ While Condit’s assertion is a difficult one to

quantify, she convincingly contends that public rhetoric translates into public morality because individuals must speak “a public language that includes *linguistic* [emphasis hers] commitments shared by all who are constituents of a community.”¹²⁷ Using the term “community” broadly, the search for the “will of the community” through “linguistic commitments” serves as a good criterion for the moral crisis that the public faced with electronic gaming.

Concerning methodology, I also borrow from Condit’s scheme that uses periodical literature to analyze the public vernacular about gaming. She suggests that the rhetorical scholar take three “units of discourse” to analyze public controversy. First, the rhetorical scholar must consider those “ultimate terms” that articulate the community values and then use those terms to depict the differing sides of the controversy. At gaming’s inception, these terms were “business” and “novelty.” Today, public morality defines games as “operant conditioning” and “controversial.” Second, narratives and anecdotes illustrate where the controversy goes, as chronicled through the controversy’s life. Narratives represent beliefs and goad the public to mobilize. The video game narrative shifts from a light-hearted novelty to a gravity-laden situation. Finally, rhetors supply public controversies with characterizations or character-types that drive and embody the controversy.¹²⁸

Condit specifies that the community’s search for morality in regard to public controversies usually includes the collective language of shared social narratives and characterizations. Concerning video games, the public’s shared narratives shifted after the events at Columbine; previously, video game anecdotes included only innocuous characterizations like nostalgic recollections of buying *Pong* at Sears. Along these lines,

the United States Postal Service conducted an online survey that allowed the public to cast a vote expressing which icons best encapsulated the 1980s. One of the most popular selections was video games, and, just one week before the events at Columbine, the USPS planned to release these stamps as collectors' items. After Columbine, however, the shared social stories surrounding video games moved toward training killers to kill and the indiscriminant violence within games.

Condit also writes that social discourse goes beyond the boundaries of individual interests because of shared linguistic commitments that “prescribe what each person as a member of a collectivity is obligated to do within the collectivity.”¹²⁹ Public rhetoric finds its importance in the construction of public meanings through pertinent persons and events. Throughout the history of the United States, certain crucial issues have found their places in public morality through concerted disputes. For example, Condit cites historic case genres like farmers vs. industrialists, importers vs. exporters, slave owners vs. employers of free labor, and the high-tech industry vs. the service industry. Video games compete for the dueling forces of free speech vs. heightened regulation.

April 1999 marked the moral rhetorical shift in describing video games. Only after Columbine did the public find violent video games unpalatable, because “only when a policy can be presented as bearing greater goods will it be endorsed.” Condit argues that people are unlike special interests groups in society that compete for the good of those special interests. Unlike competition between special interest groups, individuals seek the fruit of the greater goods. Thus, after Columbine, President Bill Clinton called a closed-door conference at the White House. The moral of his comments concluded: “I think we, and the members of the Cabinet and the administration who are here—like all

Americans—were profoundly affected by the events in Littleton, Colorado,” and consequently, “we determined to see what we could do to bring the American people together—and to move forward on something really big that can make a difference.”¹³⁰

During this conference, attendees reached conclusions through a process concurrent with Condit’s conclusion that “public rhetoric can be viewed as a process in which basic human desires are transformed into shared moral codes.”¹³¹

PRE-COLUMBINE ANECDOTES: NOVELTY, REHAB, AND BUSINESS

In the immediate years before the events at Columbine, violent video games existed, and their antagonists were plentiful. Video games did not go unnoticed, but accounts and metanarratives concerning games took a different turn after Columbine, as evidenced by the gentler media accounts of gaming pre-Columbine. Illustrating the importance of public moral rhetoric, Celeste Condit argues that the rhetorical critic may draw lessons from public anecdotes. She asserts that rhetors construct public rhetoric from the confines of the shared collective language, which includes “social myths and characterizations.”¹³² In the months before April 1999 in Columbine, these “myths” and “characterizations” clearly began with games being a benign novelty (at most, a nuisance); only afterwards did they transform into games as a public moral issue, replete with dangerous content.

Prior to Columbine and the shifting of shared social myths and characterizations of video games, gaming criticism existed, but not extensively. Joseph Lieberman’s criticism rose to the top. Most pointed was the senator’s “Video Game Report Card.” In Lieberman’s explanation, the report warned of the sinister face of the latest video games:

Some of the more ultra-violent ‘games’ might be more accurately called ‘murder simulations,’ quoting advertising slogans from the games themselves. These [gaming advertisements] include, ‘More fun than shooting your neighbour’s [sic] cat,’ and ‘Happiness is a warm cranium’.¹³³

Although Joseph Lieberman led the charge against the evils of video games, these anecdotes of gaming rarely found root in the public arena. Video games only garnered a handful of other critics, whose claims relied only on a few games. For example, those presenting the outcry for further video game regulation cited offensive games like *Duke Nukem*, a point-and-shoot violent and suggestive game. One article recognized that *Nukem* was not the most offensive or dangerous game, but that even so it was “good to be proactive because the next generation of video games is [was] going to be even closer to virtual reality.”¹³⁴ This article also cited legislators’ intentions to insulate minors from the “distribution of video games containing ‘graphic violence.’” According to this article, legislators’ intentions were not necessarily to change the world but rather to raise awareness about the next generation of games.

Interestingly, one month before Columbine the ten top-selling games sales were as follows: the number one selling game was *NWO Thunder* (a game based on professional wrestling), second was *Zelda: Ocarina of Time* (a mystical, medieval adolescent game including minimal graphic violence), then *Frogger* (the Atari car-dodging frog classic with a three-dimensional twist), *Castlevania* (a medieval vampire killing game), *Mario Party* (a Nintendo version of a whimsical board game), *Pokemon Blue* (a role-playing game based on the anime card game), *GoldenEye 007* (a James Bond first-person shooter), *Gran Turismo Racing* (a simple racing/driving game), *Metal Gear Solid* (a third-person military sneaker/shooter game), and number ten in sales was *South Park* (an oft-inappropriate satire based on the popular television show).¹³⁵ While this

survey of top ten games may prove troubling now (considering that half of the titles contain explicit graphic violence and/or graphic depictions of death), before the dawn of *Columbine*, the public seemed unaffected by the violence. Even with these violent titles at the top, video games enjoyed narratives depicting them as quirky novelties, devoid of any substantive societal threat. In fact, just before public myths and characterizations shifted following *Columbine*, stories typically fell into one of three categories (game criticism notwithstanding).¹³⁶ Media coverage centered on video games as novelties, as aides of hand-eye coordination, and as business deals, including gaming's mergence with Hollywood forces. While these accounts of games did suggest some negativity, overall they reflected a positive sentiment of gaming.

The anecdote of video games as novelty began early. As early as 1981, parents expressed their concerns over video games, but in an altogether different manner than what the twenty-first century has seen. Still, in the industry's infancy, video game protestors objected to the captivating power that games exhibited over children and youth. While the protest regarding arcade sites concerned gambling and breeding aggressive behavior, protests against in-home gaming centered around games corrupting their young audiences. One psychiatrist warned, "The chief danger signs for parents to be aware of are children who spend an inordinate amount of time or money on the games," because "they can be narcotizing—they can blunt pain. And they can be the focus of ritualized or obsessive behavior."¹³⁷ One parent opined, "These games are corrupting our youth. They mesmerize our children; they addict them and force them to play mindlessly," resulting in "anti-social behavior."¹³⁸ Concurrently, another article

forcefully argued that games were “cultivating a generation of mindless, ill-tempered adolescents.”¹³⁹

Other accounts of video games cast gaming in a slightly negative light, sidestepping the violence issue and focusing on the manner by which games consume time. One editorial forum in Cleveland’s *Plain Dealer* blamed Ohio’s declining elementary school reading tests on video games and television’s consumption of time.¹⁴⁰ In sports news in 1999, Miami Dolphins running back, John Avery, blamed his inability to perform well during his rookie season on video games. In a humorous account of his shortcomings, Avery cited video games when asked about his incapacity to remain awake during team meetings and to perform during games. Miami’s first-round draft pick asked of the reporter: “I think they have some program for dealing with it [his so-called video game addiction], don’t they?”¹⁴¹ This light-hearted account portrays video games as benign when juxtaposed to other more pressing social woes.

Surprisingly, the late 1970s and early 1980s were not without their major offenders, but the negative aforementioned narratives failed to stick or resonate. For example, two publishers produced games targeting adult audiences, enraging concerned parents. In one arcade game, *Death Race*, published by Exidy, the object was to run over as many “gremlins” as possible. Exidy originally called those whom the player would target humans, but pressure from legal opposition goaded them otherwise. The humorous aspect of *Death Race* was the fact that arcade graphics were so primitive that these beings could have been anything. *GameSpot.com* contains a screenshot of *Death Race* and amusingly comments, “Yes, *this* caused a national outcry.”¹⁴² Following *Death Race*, perhaps the most offensive game to date was *Custer’s Revenge*. Published by Mystique

for the Atari 2600 platform, *Custer's Revenge* featured the main character, a comic copy of General George Armstrong Custer, on his quest to journey across the desert to meet a bound and gagged Native American woman. Then, the naked and erect general would commence to raping the woman for game points, thus ending his quest and the game.¹⁴³

The novelty anecdote began at video games' inception and continued through the weeks before Columbine. As I mentioned at the beginning of this chapter, one interesting commentary on video games was the United States Postal Service's release of a video game postage stamp chosen by an online vote. While this online vote certainly was not a scientific survey, it represented the sentiment of the novelty of video games before Columbine. In a nationwide survey, the Postal Service requested that voters choose icons that represented the 1980s. Topping the list was video games with over 250 thousand votes, but as significant as video games' quote-unquote winning the nomination, equally important were its fellow nominees. Perhaps the other nominees inform rhetorical scholarship concerning crafting public morality.

Included in this list of 1980s representative icons were: the tearing down of the Berlin Wall; the Washington Vietnam Veterans Memorial; the motion picture, *E.T.*; and the popular dolls, Cabbage Patch Kids. Also included in the list were: personal computers, compact discs, figure skating, *The Cosby Show*, cable television, the National Football League's San Francisco 49ers, American hostages freed in Iran, and the space shuttle program. From the list, a few categories emerge. For example, using this list, one can ascertain that these icons included important political events like the freed American hostages and the Vietnam Memorial. But also in this list are American novelties like *The Cosby Show*, Cabbage Patch Kids, and *E.T.*¹⁴⁴ These categories are important because

they represent topics not altogether frivolous and certainly positive in nature. What is difficult to answer is this question: “If the Postal Service would have conducted this online survey just four months later (because the USPS gathered its information in January), would video games have been the most popular selection?” Moreover, after April 20th, 1999, could online voters still group video games in such a positive light? As an entity, undoubtedly cable television failed to carry with it a strictly positive light, but video games topped the list for innovation and an overall positive novelty. The stamp itself depicts two children, a boy and a girl who are presumably siblings, sitting before a television playing what looks like an Atari console game. The stamp appears as dream-like as an air-brushed type painting.¹⁴⁵ Also interesting, while no direct relationship may exist, media coverage of the stamp virtually disappeared after Columbine.

After Columbine, popular anecdotes concerning video games centered on gaming being operant conditioning for violence. Cited widely was Army psychologist Lieutenant Colonel David Grossman, who stated that video games essentially taught the same methods used in the military to condition soldiers to lose their inhibitions to kill. After Columbine, Grossman’s admonition seemed more plausible. Even President Clinton gave weight to Grossman’s claim, referencing him in a radio address three weeks after Columbine. Said Clinton, “Professor David Grossman has said that these games teach young people to kill with all the precision of a military training program” devoid of the hierarchical restraints afforded soldiers.¹⁴⁶

Before Columbine, however, media anecdotes contextualized games as light forms of physical therapy, as well as novelties. One article in Denver’s *Rocky Mountain News* highlights the ability for video games to allow children to manage diabetes.

Researchers at Stanford University Medical Center and Kaiser Permanente found that in the children who played an educational video game, *Packy and Marion*, diabetes-related emergency room visits decreased by 77 percent. These researchers warned that many games were “a little scary when you consider some of today’s blood-soaked game offerings,” because “there’s power in video games. Kids like ‘em, and engineered correctly, games give players the chance to practice new skills and understand the consequences of their choices.”¹⁴⁷ Accounts of the *Packy and Marlon* game spanned almost three years preceding Columbine. Beginning in July of 1995 and continuing until just fourteen days before Columbine (April 6, 1999), this anecdote of light-hearted asthma relief, smoking prevention, and diabetes reprieve circulated widely in such publications as *The Irish Times*, *The New York Times*, Denver’s *Rocky Mountain News*, *The Chicago Sun-Times*, *The Boston Globe*, and Cleveland’s *Plain Dealer*. The educational game featured Packy and Marlon, two diabetic elephants, and Bronkie, an asthma-suffering dinosaur, who led children through the basics of these two ailments. Compared to gaming as a whole, this game represented the exception to the rule. That newspapers picked up this story is a testament to the pre-Columbine rationale that games were docile and tame.

The last major anecdote about video games depicted them in the market. Spanning from technological advancement to Hollywood’s integration into games to game piracy, these narratives told of an industry bound for profit. As of early 2006, video game designers finance their projects much like movie producers or television show producers—they rely upon advertisers. For example, today’s games feature NBA players wearing name-brand Adidas® shoes, in-game tennis tournaments endorsed by

real-life sponsors, and golf games containing brand-name clubs.¹⁴⁸ However, in the months before *Columbine*, advertisers were just beginning to tap into this new audience. Prior to the late 1990s, advertisers resisted displaying their products in the electronic format for the gamer. Before the graphics that the Nintendo 64 and Sony PlayStation were able to produce, game developers often had to plead for well-known companies to place their products in games. In late 1997, these conditions changed. A few games featured corporate logos, like the PlayStation game *Jet Moto*, which contained backgrounds with Mountain Dew® and Butterfinger® billboards and banners.¹⁴⁹ With the advent of this new technology, game graphics engineers could faithfully reproduce corporate logos with visual integrity. One writer suggests that since males ages 12 to 35 typically play games and since they may shield themselves from traditional media, the corporate logos in games reach a niche market. For example, in an *X-Files* PC game, agents Scully and Mulder shadow aliens using the latest Nokia cell phone.¹⁵⁰

Within the games-as-business anecdotes, much of gaming's coverage centered on its profitability. The week before *Columbine*, Ubisoft announced that it had chosen Montreal to be its home city, which meant that the software development company would bring the city prestige and profitability. In fact, the now hugely famous, 1,200 person software team fashioned revolutionary games like Tom Clancy's *Splinter Cell* and Tom Clancy's *Ghost Recon*. Press coverage of the Montreal studio promoted a business narrative because "specialized colleges are [were] also churning out hundreds of fresh-faced programming and design graduates," whom Ubisoft planned to employ.¹⁵¹

Along with this profitability narrative came the technology narrative. Many reports described both the good and ill aspects of pushing the proverbial graphics

technology envelope, all the while expressing gaming's business advances. For example, one article pointed out that the new PlayStation would hook up to televisions yet function like a PC, "blast[ing] out of the gate with a blazing 128-bit, 300 MHz processor and a DVD-ROM drive."¹⁵²

The final anecdote found in popular media coverage before Columbine was the narrative of gaming's convergence with Hollywood. Video game scholars like Steven Poole found the prospect of gaming and Hollywood's integration implausible. Poole notes, "Plot and character are things videogames find very difficult to deal with" because games omit the rhythm and tension of dramatic effects that matter. Poole argues that this much hyped convergence may never materialize.¹⁵³ Nevertheless, Hollywood and video games early on sought a symbiotic relationship. In the mid-1980s, different Atari publishers experimented with slapping Hollywood labels on Atari console games. The two most notable examples were the *Star Wars* game, an overnight Atari success, and *ET: Extra Terrestrial*, a nightmarishly abysmal Atari flop. Interestingly, according to Poole, most of the six-million copies of Atari's *ET* wound up in a New Mexico landfill because the game was so terrible. Much like its predecessors of the early 1980s, a month before Columbine, some media coverage centered on *Wing Commander*, a game-turned-movie starring teen hit Freddie Prinze Jr. In early 1999, games-turned-movies were in the works for Hollywood feature films like the iconic Lara Croft's *Tomb Raider*, the gory *Resident Evil*, and the shooter/action title *Duke Nukem*.¹⁵⁴ The events of Columbine changed everything.

POST-COLUMBINE ANECDOTES—“WE TOLD YOU SO”

Noting that video games' anecdotes and narratives matured and grew up after the events at Columbine is plausible. Gaming moved from its infancy to its adolescence. No longer would the media and the public turn a blind eye to the industry's foibles. The video game industry transformed from a seemingly docile novelty into Dave Grossman's assertion of gaming as “operant conditioning.” Those in the video game industry also claimed that they told the public about the dangers of children playing violent video games. Three weeks after Columbine, the video game industry converged to hold its annual E3 conference where they participated in defiant apologia. Defending the industry against the whelming flood of media criticism, the president of the Interactive Digital Software Association, Douglas Lowenstein, rebutted such criticism. He offered little by way of mea culpa and challenged critics by saying that the industry “has no reason to run and hide.” He continued, “The evidence does not support a link between playing violent video games and community mass murder. Video games don't teach people to hate. Video games don't teach people to become Nazis.”¹⁵⁵ Lowenstein also lamented the fact that “since Littleton, this industry has been scrutinized like never before, resulting in a portrayal that has not been accurate at all times.”¹⁵⁶ The scrutiny went as follows.

Although the video game industry began its self-regulation years before, critics decried this regulation. On the other side of the issue, three weeks after the attack at Columbine, senators Joseph Lieberman and John McCain released an editorial in the *New York Times*. In their editorial, they addressed violence and “the toxic mix that is turning too many of our kids into killers.” The senators declared that the entertainment industries

“found many imaginative ways to say no” to President Clinton’s requests for greater regulation. Despite the ESRB’s outlining industry ratings in 1994, Lieberman and McCain claimed that “for video games, there is not even a stated industry policy; most retail and rental outlets will provide kids with access to the most perverse and grotesquely violent games on the market.” They concluded by contending that parents knew little of preventative safeguards like the V-chip in televisions and media ratings systems.¹⁵⁷

Indeed, after Columbine video game narratives shifted onto the game publishers. In the spirit of playing Monday morning quarterback, many critics prophesized that they saw Columbine’s events coming. During these weeks, video game anecdotes unfolded, referring to gaming as an industry that churns out “ultra-violent games that poison the minds of young people.”¹⁵⁸ One writer opined, “Even before the Columbine tragedy, researchers in several disciplines have been hunting for the seeds of an upswing in youth violence, nearly always with boys or young men pulling the triggers.”¹⁵⁹ Another story claimed that in the United States’ culture of violence “Colorado’s carnage is [was] inevitable.” According to the writer, John Ellis, “Tuesday’s massacre at Columbine High School was not an aberration.” Ellis further alleged that “American society is [was] sitting on that bomb, waiting for it to explode” because of “this diet of carnage and violence.”¹⁶⁰ Even President Clinton named specific titles when he said, “Now, video games like ‘Mortal Kombat,’ ‘Killer Instinct,’ and ‘Doom’—the very games played obsessively by the two young men who ended so many lives in Littleton—make our children more active participants in simulated violence.”¹⁶¹

Many media stories also included Dave Grossman’s argument about gaming being operant conditioning to kill.¹⁶² Although his presence and opposition to video

games were always at hand, after Columbine his claims received more credence. He contends that games draw on the same training that the military uses to condition soldiers to lay aside their aversions to kill.¹⁶³ But according to Grossman, gaming offers two important differences; first, games are more realistic than military simulators, and second, gamers have no higher authority to command them either to kill or stand down.

Another prominent video game anecdote was that of games creating the outsider. The killers at Columbine embodied a loner guise allegedly developed, at least partly, by playing video games. Eerily puzzling about the Columbine killers was their cliquish behavior established in their disturbing fraternity. Interestingly, this characterization shifted between the 1980s and the late 1990s as a result of critics observing the manner by which games could captivate their participants. This anecdote transformed into one of games drawing their subjects away from the crowd so intensely that they are reticent to interact in social settings. One expert, Lee Geraghty, deprecated video games by stating, “After Littleton, we’re hearing a larger voice than we’ve ever heard beginning to talk about the need for a total culture change in this country around youth.” Geraghty explained that schools and parents need to reexamine how young people treat one another, since so much of the social structure in schools tends to alienate students.¹⁶⁴ In Lee Harvey Oswald-type accounts of Columbine, many narratives depicted games as both the killers’ training and solace.

“ADVANCING AN AGENDA TO ADDRESS YOUTH VIOLENCE”

As the rhetorical dust settled in the months after April 1999, America faced a new predicament. Gaming had presented the public with little more than a fringe nuisance

until that time. The public, who had largely turned the other cheek to gaming's defiant advertising, now found video games troubling. President Clinton stepped in to offer conciliatory rhetoric to those involved in the tragedy and public moral rhetoric for the rest of the nation.

After Columbine, Bill Clinton addressed the public in three congruous messages. During Clinton's summit on media violence, within his speech after the events at Columbine and in his press release, he sought to answer two questions. First, "Do the video game, music, and television industries 'promote products they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience?'" And second, "Are these advertisements intended to attract children and teenagers?" To answer these questions, President Clinton held a summit at the White House, gave a speech before the Columbine High School student body, and released a statement to the press (May 11, 21, and June 1 respectively).¹⁶⁵ Each of these three rhetorical acts provided a justification for further investigation into violence in the media.

Though media industry executives were visibly apprehensive to comply with the public scrutiny proposed by Clinton, virtually everyone else cheered the President's efforts. His statement claimed that "this effort will involve community and religious leaders, the gun and entertainment industries, educators, parents, and young people" working together to implement "a national campaign on youth violence to comprehensively address the causes."¹⁶⁶ In fact, twelve media education organizations endorsed a letter to House Speaker Dennis Hastert and Senate Majority Leader Trent Lott, urging them to give the FTC more latitude and to go further to "protect children

against advertising that may harm them.”¹⁶⁷ Connecticut Senator and vice-presidential candidate, Joseph Lieberman, praised Clinton’s action, declaring, “If the entertainment industry fails to act and if they market adult-rated products to kids in violation of their own standards, then I believe they must be held accountable.”¹⁶⁸ Joining Clinton’s mantra, many unlikely faces, like Republican Kansas Senator Sam Brownback and children’s advocate Lynn Cheney, showed up to blame violent media. Applauding Clinton’s efforts, Cheney contended, “The proper stance here is for outraged citizens, policy makers included of course, to take it as a duty to speak out about these people responsible for them, to shame them.”¹⁶⁹ In a rare moment of praise from the opposition, Republican operative and House Speaker Dennis Hastert applauded Clinton for holding the meeting and urged more discussions to “figure out what’s ailing our society and how we can correct it.”¹⁷⁰ An ostensible army of legislators and special interest groups unified to “shame” violent media, thus placing blame on the industries that produce violent images.

A CALL FOR MEDIA ACCOUNTABILITY: “HELPING PARENTS MAKE THE RIGHT CHOICE”

President Clinton’s message was seemingly a straightforward attempt both to comfort the nation and to redirect its attention after Columbine. Shawn and Trevor Parry-Giles posit that Clinton frequently likened the time of his administration to that of the Progressive Era.¹⁷¹ They claim that during the time of Clinton’s leadership, the country turned to national leaders for help in solving America’s problems. The President affirmed the notion of America’s leadership rendering aid to national problems, asserting

that “today [during his presidency] it takes national leadership to frame the issues, point the way, and mobilize people to work to resolve them.”¹⁷² Concurrent with Condit’s notion of public morality, Clinton’s rhetoric functioned to craft the issues in a public light. Following the initial conference held at the White House, the president implored his audience to stop buying violent video games. Parry-Giles write that Clinton often referenced examples that voters knew through history and narrative, and this factor “allowed Clinton to shape his rendition of that time for political purposes.” He also “borrowed the crusading ethos of the hero of San Juan Hill, fighting big industry to help consumers, working to preserve America’s natural heritage.”¹⁷³ Clinton’s appearance of protecting America from big business was apparent in these three messages after Columbine. Playing on the famous *Field of Dreams* movie line, he said, “If no one consumes these products, people will stop producing them. They will not build it if you don’t come.” He also declared, “We are not here to place blame”—a claim he made on the basis of the strategy session’s alleged goal to help “shoulder responsibility.”¹⁷⁴

In all three messages, the President shifted the burden of the violence away from parents and retailers and onto the video game industry. The press release frames the issue stating, “Numerous studies have shown that violent programming increases children’s aggression toward others and desensitizes them to violence.” And “to the extent that, the video game, movie, and recording industries market to children violent and other materials that are rated for adults,” they “undermine ratings systems.” These factors, according to Clinton, “make it harder for parents to control the movies, music and games their children see, and would increase the likelihood of children being exposed to inappropriate materials.”¹⁷⁵ Media violence studies like the ones Clinton referenced

are highly controversial since no scholarship can show a causal relationship with video games and violence.

Part of the problem is that portions of the video game industry have been particularly defiant. Although Clinton urged Congress to "join in this campaign by passing the legislation necessary to keep guns out of the hands of children," Namco Ltd. had quite another idea. Their advertisement for the then upcoming game *Time Crisis* read this way:

Time Crisis uses the revolutionary Guncon, the most advanced light gun ever made for any home system. The Guncon connects to the video output of the PlayStation and it actually stores the screen image in the gun button so players can duck and reload. . . . It's time we got the handguns off the streets and back where they belong—in the hands of America's youth.¹⁷⁶

In the same rebellious vein, the game *Carmaggedon* provided virtual motorists the opportunity to earn points by running down pedestrians, a task which the company claimed was "as easy as killing babies with axes."¹⁷⁷ Certainly, brash defiance such as this failed to remedy the situation, particularly in light of the controversy surrounding video games.

In his speech before Columbine High School, the magnitude of the situation allowed President Clinton to assert, "When America looks at Jefferson County, many of us see a community not very different from our own. We know if this can happen here, it can happen anywhere." Accordingly, he reminded them of what was at stake if the country offered a haphazard response to the terrible situation. Clinton called upon two of Columbine's survivors to remind the audience of the magnitude of inaction saying, "Two of them [the survivors], Patrick Ireland and Sean Graves, are here today. And they left the hospital to be here." Clinton also stated, "I know there are other people here who are

also still injured who have come. I thank all of you for coming,” and comforting his audience he said, “This has been a long, hard month for all of you, and as Hillary said, it’s been a hard month for America.” The sheer scope of Clinton’s initiative warranted that “we cannot do what we need to do in America unless every person is committed to doing something better and different in every walk of life.”¹⁷⁸

CLINTON’S CALL FOR SELF-REGULATION

The thrust of the President’s announcement came as a response to the Columbine tragedy. He sought to place the burden of proof on the shoulders of the entertainment industry, removing the burden of proof from parental control. Instead of blatantly framing the issue as blaming violent media, his speech act framed the issue as one of public interest. Parents needed information, and Bill Clinton was the one to encourage the industry to provide it to them. The report concluded, “Rather than restrict competition in the market, a well-designed rating or labeling system can enhance the functioning of the market by enabling consumers to make useful comparisons and purchase decisions with minimal search costs.” It further stated, “The function of such systems is informational,” a function that Clinton claimed would “reduce consumer confusion and increase consumer confidence.”¹⁷⁹ The problem, Clinton said, was whether or not violent media advertises to young audiences. The solution, according to Clinton, was greater self-regulation.

In the midst of the commission enacted by Clinton, the pundits and legislators agreed that greater self-regulation of these industries was the clear solution. Inquiring into the nature of the industry, Arizona senator, commission member, and presidential

hopeful John McCain began with questions and concluded with insults. Said McCain, “They [media executives] have all been invited to testify. But by some uncanny coincidence, every single executive was either out of the country or unavailable.” McCain’s closing comments added insult; “I can only conclude the industry was too ashamed of or unable to defend their marketing practices. Their hubris is stunning.”¹⁸⁰

The interesting missing link in the aforementioned accusations is that the video game industry already highly regulated itself. Nonetheless, the increased regulation claim was bolstered by President Clinton, Senator John McCain, Senator Joseph Lieberman, FTC commission chair Robert Pitofsky, and a host of legislators and pundits. Pitofsky concurred with the President’s assertion that parents need more information. Pitofsky said, “Parents want this information. They say they use this information.”¹⁸¹ Soon after the summit at the White House, both Clinton and Vice-president Al Gore praised industry leaders, including America OnLine, ABC, and CBS, for taking voluntary steps to allow parents to regulate the kinds of materials that children could view.¹⁸² Again, the problem with statements like these is that the video game industry already heavily regulated itself. Thus, used for rhetorical ends, regulation became a type of public morality.

ACCOUNTABILITY DESPITE SELF-REGULATION

Despite the ESRB’s stringent regulation of video games, Clinton called for video game accountability. The ESRB’s ratings go so far as to designate the rating and include a content indicator. For example, a particular game could be rated “M” (Mature: the

video game equivalent of an “R” rating in film) for violence and suggestive themes.

Accordingly, the initial report concludes:

The electronic game industry’s self-regulatory system is the most comprehensive of the three industry systems studied by the Commission. It is widely used by industry members and has been revised repeatedly to address new challenges, developments, and concerns regarding the practices of its members.¹⁸³

Nevertheless, Clinton’s announcement goaded the commission to examine “whether ads for M-rated games continued to be shown during certain television programs popular with teens.” They reviewed eight top teen cable and network cable programs within a seven-week stretch, and the review “did not reveal a single instance of an ad for an M-rated game appearing during these broadcasts.” They reported that while “these findings are encouraging,” the commission attributed the absence of objectionable advertising to the small sample set of television programming.¹⁸⁴

In an article concerning video game violence and public policy, a scholar in the field, David Walsh, questions Clinton’s use of the FTC to pressure the video game industry. Walsh challenges Clinton’s initiative:

The Federal Trade Commission has no authority to enforce the ratings, there is no legal issue at stake. The Congressional hearings and the presidential admonition resulting from the report were part of the “bully pulpit” influence that our elected officials are expected to exert.¹⁸⁵

From this vantage point, the rhetorical scholar may ascertain that a grander issue was at work. Just as the FTC’s authority in this situation is clear, so is the responsibility of parents. Walsh asserts that both the authority and responsibility to raise children belongs to the parents’. Affirmed by the Supreme Court, the legal authority of parents is to control, supervise, and guide their children toward constructive and beneficial activities and away from harmful ones. Given the legal impotence of the FTC and the legal

proWess of parents, the rhetorical critic must presume that Clinton's message functions rhetorically rather than legally or legislatively.

PRESIDENT CLINTON'S RHETORIC OF COMMUNITY

Attempting to build on the notion of public morality, the FTC report essentially echoed Clinton's message in the spring of 1999. The thrust of his messages was community. With the reports and news coverage of Columbine fresh on America's mind, the million-dollar enterprise served rhetorical purposes to reframe the issue and to allow Clinton to shape public morality. He initially argued that the nation needed "to help us rebuild the frayed bonds of community, to give children nonviolent ways to resolve their frustration."¹⁸⁶ Alluding to Hillary Clinton's concept of the village, Bill Clinton painted portraits of communities endowed with the "responsibility to make sure that there is a village that supports all its children."¹⁸⁷ Repeatedly, the president used terms like "we" and "us" and "everyone" to conjure images of a national community concerned with this burgeoning moral dilemma. About the closed door meeting he held with industry and community leaders, Clinton remarked, "This was exactly the kind of session I had hoped for, where *everyone* was talking about the problems and opportunities; *everyone* was talking about what could be done to accept responsibility. No one was pointing the finger of blame."¹⁸⁸ And since the problem was a community one, Clinton said, "We know that there is more for each of us to do at home and at school, in Hollywood and in the heartland and here in Washington. Every parent, every teacher, every leader has something to do."¹⁸⁹ Additionally, he commented, "It's also time [in addition to mourning for the families in Littleton] for all Americans to ask what we can do—as

individuals and as a nation—to turn more young people from the path of violence; how we can take responsibility, each and every one of us, for the future of our children.”¹⁹⁰

The President’s comments clearly indicated that he had public morality in mind.

CONCLUSION

While it is problematic to reduce the vast nuanced issue of video games into a monolithic challenge, *Columbine* functioned to focus the national constitution on this concern. Accordingly, Celeste Condit admittedly advises her readers, “The set [of periodicals] is highly impure because it has been intrusively edited by the reporters, and it contains stories of activists who know they are telling such stories for rhetorical purposes. Nonetheless, it gives us some indicators and guides.”¹⁹¹ Concurrently, I admit that the said method is “highly impure” methodologically. The “indicators and guides,” nevertheless, give the reader an interesting and important depiction of the video game issue, particularly when these accounts, before and after *Columbine*, are contrasted against each other.

From a rhetorical vantage point, what do these accounts tell the rhetorical scholar about the video game dilemma? Primarily these anecdotes and accounts of gaming are telling in the manner in which they are framed. Evidenced by the two competing types of narratives, accounts of video games changed remarkably after *Columbine*. The most compelling example of pre-*Columbine* accounts of video games was the United States Postal Service video game stamp. Released in the weeks before *Columbine*, this stamp and media coverage of the stamp represented a tame and docile version of video games. The stamp embodied the novelty of video games and of what was palatable and

unpalatable. The second type of anecdote present after Columbine was one of games as an unruly, imminent brute. But before Columbine, video games as an issue ostensibly received a pass from the media.

The result of Columbine was a public rhetoric redefinition of the issue. Beginning in late April of 1999, media accounts transformed games into a mature, unruly, and untamed behemoth worthy of national attention. After Columbine, games were solace for social outcasts and misfits. The public began to view games as an indecent operant conditioning machine for those interested in learning to kill.

Perhaps the imminence of the tragedy at the local high school conjured tragic images in virtually every American's mind. Who did not/does not know or remember the loner in school? Thus, President Bill Clinton's call for community reinforced the notion of video games becoming a public rhetoric issue. His addresses in those months focused on how everyone should help to resolve the problem, giving credence to Condit's theory concerning public moral argument.

What was ultimately and vastly important about the video game discussion was that it primed public rhetoric for further discussion. Incrementally, video game coverage, in media accounts as well as in President Clinton's summit, became the vehicle for closer examination of the issue. Columbine served as an impetus for a more stringent discussion as the undecided juggernaut issue.

It was after Columbine and the heightened scrutiny that Clinton's remarks drew that the video game industry reached maturity. As a sort of technological rite of passage, the industry's proponents and opponents negotiated the video game's place in America. And, after Columbine, the industry should have learned how to stand on its own and

avoid public blunders. The undue attention after Columbine should have tempered the industry to fight the daunting free speech battle that lay ahead of it.

CHAPTER IV

ATARI, ALL GROWN UP: PUSHING THE BOUNDARIES OF GAMES AS SPEECH

In October 2003, video game developer Ubisoft released a commercial advertising their new game *Rainbow Six 3*, which exhibited the signs of thought-provoking political speech. The commercial begins with audio of a pre-adolescent girl singing, “My Country ‘Tis of Thee.” As the girl continues to sing, the television spot illustrates a black-clad, anti-terrorist squad wielding semi-automatic rifles. The commercial provides the viewers with names of some of the team members, as well as an emblem beside their names—the words “Rainbow Six” (the game’s title) set on a United Nations crest of a globe surrounded by olive branches. As the commercial progresses, it displays this team exhibiting deadly force upon the terrorists. When the commercial reaches its halfway point, the video footage of real people segues to the digital depictions of characters within the game. As the girl concludes the patriotic song, one character uses his sniper rifle to zoom in on a terrorist and focus the reticule on his head. Then, the video suddenly fades to black and the viewer hears a gunshot. Before giving the viewer the game’s title, the girl concludes the song, “...of thee I sing,” and the commercial states, “Freedom Isn’t Free.” The commercial’s producers show this final message in hints of red, white, and blue within the text, thus concluding the commercial.¹⁹²

The new millennium is now seeing the tension between video games and free speech come to a head. Despite the clear meaning of this Tom Clancy game and other games, those opposing games as speech allegedly see no communicative or informative value to games. In the *Interactive Digital Software Association v. St. Louis County*

ruling, Judge Stephen Limbaugh (Rush Limbaugh's uncle) "found no conveyance of ideas, expression, or anything else that could possibly amount to speech." Judge Limbaugh argued that the nature of games is more akin to conduct rather than to speech. He crafted his opinion to say that games are like pinball machines and baseball games and that the industry failed to meet the burden of proof for likening games to speech.¹⁹³ Concurrently, a Massachusetts Supreme Court decision held that any ideas that a video game might communicate are strictly "inconsequential."¹⁹⁴

In light of such accusations, I begin by discussing the general legal landscape concerning games and their legal standing. Then, I review the chronology of cases, which is important to note since the courts established a rationale about games. Next, I argue that the legal scholars and the courts have blurred the lines between arcade games and video games. People play arcade games in public, as opposed to video games which people play in private, an important distinction in discerning obscenity standards. I also argue that the community relies on retailers to enforce game ratings just like the community relies on movie theaters. Then, I discuss publishers' culpability in the video game violence equation. And finally, I argue that the nature of games has changed. Games have become communicative and informative and even political in the last decade, thus deserving First Amendment protection like their movie and television counterparts. The video game industry has reached a critical mass—a future where it may see the liberty of being grouped with books and film or a future relegated to the likeness of pinball machines. I begin by detailing the industry and its legal climate.

YES OR NO? JUST GIVE US A RULING

Since the video game controversy arose over twenty years ago, court decisions have seemingly been a puzzle of inconsistency. Some legal scholars argue that each of these rulings functions to create a myriad of contradictory messages, while others argue that these messages are coherent. Even so, those on both sides of the issue agree that the courts should decide something rather than allow the issue to progress without any legal orthodoxy. While problems of content and objectionable material arose previously, today's problem arises when legislators attempt to create an ordinance only to find themselves admonished by the courts about the ordinance's unconstitutionality.

Those factions for protected video game speech and those against it both suggest that new technologies deserve constitutional scrutiny. Legal scholar Scott Pyle argues that the manner in which the courts handle the video game issue "sets the mold for future cases that must deal with even newer technologies and even more unexpected forms of entertainment."¹⁹⁵ He worries that the courts will grant an automatic protected speech status to all new forms of technology, thus rendering protected speech meaningless through "an endless process of dilution." As evidenced by the incredible onslaught of technology in the past fifteen years, this proverbial technology explosion threatens to "eventually smother the more traditional forms of political speech." Legal scholar Patrick M. Garry concurs; he wonders, "Is it not time during the Entertainment Age and a time of media abundance, that the courts finally define the types of speech most deserving of First Amendment protection?"¹⁹⁶

Even game publishers are desirous of a ruling so they do not have to question the protected status of a game. As a rule in the game industry, to assume that every video

game creator intends to push the boundaries of decency in games is a misnomer.

Francois Laramee, author of *Secrets of the Game Business*, laments the direction of highly objectionable games because they fail to advance the stability of gaming's future. Laramee references game titles outside the mainstream like *Ethnic Cleansing*, a game where the player may "run through the ghetto blasting away various blacks and spics in an attempt to gain entrance to the subway system, where the jews [sic] have hidden to avoid the carnage. Then, if you're lucky . . . you can blow away jews as they scream 'Oy Vey!', on your way to their command center."¹⁹⁷ Laramee grieves these titles found in the periphery of the industry because they allow a player to inhabit the role of a suicide bomber, skinhead gang member, or Ku Klux Klan member. Laramee disdains these games on the grounds that they "smear us all [in the game industry] with an aura of sleaze and, well, stupidity."¹⁹⁸

While the rating system empowers parents with knowledge concerning a game's content, beyond ratings, game creators have recognized another de facto private regulation. Francois Laramee aptly observes that a game's content wields power, not only to create controversy, but to doom the game. He warns game developers:

Take into account the full ramifications that game ratings, the threat of government regulation, and retail sensitivities have on the ultimate success (or failure) of a game. It is not uncommon for large retailers to reject your game because of questionable content—never mind an entire country banning it, which has happened in Australia and Germany.¹⁹⁹

For example, any of the national retailers may decline on carrying an objectionable game. If retailers like Wal-Mart, Target, Best Buy, Toys-R-Us, Electronics Boutique, and Babbage's fail to sell a game, both the sales and the reputation of a game suffer. And the

legal rulings have failed to aid game developers tip-toeing around the volatile free speech issue.

This First Amendment issue has seen eight federal trials, some of which definitively pigeonholed video games as speech. The courts have, in a roundabout manner, extended a test to games. While the Supreme Court has said virtually nothing about this issue and granted certiorari to no cases, the lower courts argue “that in order for entertainment to be afforded protection it must be designed to communicate or inform.”²⁰⁰ Even Judge Limbaugh’s opinion conceded these two criteria. Nevertheless, one author calls the courts’ rulings merely “cursory,” since they recently reversed the previous status of games as not protected.²⁰¹ Patrick M. Garry concurs with these rulings as cursory, since “instead of trying to address or determine this elusive line [of games as protected speech . . .], the courts have simply fallen back upon a presumption of protected speech. They have not articulated a coherent theory or any set of factors that might ever justify not extending constitutional protection.” And consequently, “we have been left with the rule that practically any form of entertainment will be viewed as protected speech.”²⁰² While Garry’s assertion is interesting, few burgeoning forms of media have the colossal magnitude that video games have. Perhaps digital music is the new watershed technology, but digital music is still the established genre of music. Games communicate and inform and carry unprecedented iconic cultural force with them.

Despite video games’ precarious nature, legal scholars argue that the courts must present an explicit test or ruling on gaming. Particularly as the amount of speech increases in our society, Garry argues that “the job of clarifying the parameters and characteristics of the kind of speech protected by the First Amendment is a job that needs

to be done,” regardless of the difficulty of the task.²⁰³ He also contends that the courts have granted video games constitutional coverage based on the novelty of the medium. However, as I argued in my previous chapter, *Columbine* changed the video games-as-novelty paradigm.

In the early 1980s, courts ruled uniformly that games were not speech. Much like media anecdotes, in the early days of legal controversy, courts denied First Amendment protection to games. Also, much like media anecdotes, the courts likened video games to “mechanical entertainment devices, such as pinball machines, and recreational pastimes, such as chess and baseball.”²⁰⁴ But interestingly, early in games’ legal controversy, courts established a sort of test used to identify protected media—a test to prove that media meets the protected speech requirement of the originator intending to communicate and inform his or her audience. Clearly, such elementary titles as *Pong* failed to communicate or inform, so this issue was cut-and-dried in video games’ infancy. But as games progressed, the New York court’s line became difficult to hold. Legal scholar James D. Ivory argues that while some video games are like digitized pinball machines, others are “analytically indistinguishable from other protected media such as motion pictures or books, which convey information or evoke emotions by imagery.” He claims the issue has evolved, as evidenced by the fact that “the label ‘video game’ is not talismanic, automatically making the object to which it is applied either speech or not speech.”²⁰⁵ Indeed, every genre of protected speech has its anomalies that fail to meet the criteria of expression.

While video games have breached their reputation of being mere pinball machines, legislators rhetorically employ this old characterization to achieve political ends. For example, Clay Calvert and Robert D. Richards claim:

One of the most important and popular strategies of legislators who want to curtail minors' access to violent video games is to suggest that legislation is decidedly pro-parent, and that is all about helping parents be better parents, not about infringing on anyone's First Amendment rights. Disseminating this position to the public in newspapers supposedly wins public-read, parental-support and re-election.²⁰⁶

In one case, which I discuss in greater detail later in this chapter, the court moved closer to defining games as speech by likening this entertainment genre with a classic entertainment genre. In *Interactive Digital Software Association v. St. Louis County*, the opinion likened video games to works of classic literature which induce great imagination in the minds of their readers. Much to legislators' chagrin, this decision "made numerous presumptions about the speech qualities of games." Instead of parsing out games from traditional forms of protected entertainment, "the court decided that the interactivity of video games actually made them more akin to literature."²⁰⁷

CHRONOLOGY OF CASES

From the outset of games becoming a legal issue, courts only commented peripherally on the issue of free speech and games. In the early 1980s and into the mid-1990s, courts primarily addressed issues in light of arcade games and zoning laws or violent images on rental materials. Initially, opinions delivered by courts addressed free speech in a roundabout way, giving some passing comment in their decision. This twenty-year span following the first video game case brought the contention closer to the actual issue of whether or not games equal speech. Courts have ruled on eight federal

cases since the inception of video game controversy: *America's Best Family Showplace Corp. v. City of New York*; *Malden Amusement Co., Inc. v. City of Malden*; *Rothner v. Chicago*; *American Amusement v. Kendrick*; *Sanders v. Acclaim Entertainment, Inc.*, *Wilson v. Midway Games, Inc.*; and *James v. Meow Media, Inc.* Not until late 2002 did the case concerning games and the First Amendment arise, one where the court's opinion directly addressed whether or not games are speech.²⁰⁸ The following section tracks how the courts framing their opinions as free speech became a greater, more imminent issue.

America's Best Family Showplace Corp. v. City of New York, 1982

In 1982, one entrepreneur planned to open a family restaurant on Woodhaven Boulevard in Queens, New York. However, the restaurant's format violated certain Queens zoning laws; specifically, the establishment included an arcade video game machine at each table of the business. The owner designed the dining experience to include both family dining and digital entertainment to attract family customers to the site. While the city expressed no problems with the actual presence of the arcade machines, it did protest the quantity of machines in the establishment. Located in a largely residential community, the city only permitted four or fewer game machines in such an establishment. The Queens Borough Superintendent wrote in bold letters across a letter from the architect's desired plan for the site, "No more than 4 devices permitted." Thus, the plaintiff argued that the city's ordinance violated his First and Fourteenth Amendment rights. While the court agreed with the city that "the plaintiff's restaurant, if operated in accord with its plan, would, by definition, become an arcade,"²⁰⁹ the court still tinkered with the notion of video arcade games and free speech.

Delivering the opinion, Justice McLaughlin wrote, “[A] threshold question is whether video games are speech or expression protected by the First Amendment. If they are not, the likelihood of plaintiff’s success on the merits at trial are minimal.”²¹⁰ Nevertheless, in a dialectical tenor, the court tinkered with the criteria which a video game must meet before becoming free speech. Justice McLaughlin wrote, “It seems clear that before entertainment is accorded First Amendment protection there must be some element of information or some idea being communicated.”²¹¹ The court argued, “In no sense can it be said that video games are meant to inform.” Instead, Justice McLaughlin’s opinion likened a video game to a pinball game or a game of chess or a baseball game because these games are “pure entertainment with no informational element.” As evidenced by later games’ content, this criterion for games becoming free speech becomes increasingly problematic. Nevertheless, the plaintiff lost the case because games (in 1982) lacked the missing element of intertwining entertainment and information. This decision, however, does not preclude the idea of games as protected speech; certainly, “everyone is familiar with instances of propaganda through fiction. What is one man’s amusement teaches another’s doctrine.”²¹² The opinion concludes by granting that the question of games as protected expression is a serious one. But the morale to this opinion was that the city’s ordinance was specific, and games did not yet warrant free speech provision. This rationale would stand for the next fifteen years.

Rothner v. City of Chicago, 1990

Eight years after the restaurant case, the courts only addressed free speech and video games in a roundabout way, continuing to comment on arcade games rather than

home gaming consoles. The *Rothner v. City of Chicago* case dealt with whether or not youths were at liberty to play video games during school hours. The plaintiff claimed that the city's ordinance forbidding adolescents to play arcade games, at any time, was infringing upon their free speech rights. Deciding from the prudential argument of discouraging truancy, the court denied Rothner's request.

Relying on the lower court's decision, the Seventh Circuit Court of Appeals reasoned that "the [city] ordinance regulated noncommunicative conduct; video games provided pure entertainment with virtually no informative value or communication of substantive ideas."²¹³ On the continuum of speech versus action, Circuit Judge Ripple delivered the decision saying that games lacked the informative element protected under the First Amendment. Echoing the previous decision in *America's Best Family Showplace Corp. v. City of New York*, Ripple concluded that games were not the type of expression outlet deserving constitutional protection.

The members of this court reasoned from the free speech test of time, place, and manner of protected speech. Since "the ordinance simply prohibited any minor under seventeen years of age from playing video [arcade] games during school hours," minors were free to play games at any other time, thus not abridging their free speech rights. Furthermore, Ripple asserted, "Government has few interests more compelling than its interest in ensuring that children receive an adequate education."²¹⁴ Just as in the previous case, the opinion delivered by the court primarily used the rationale of the city ordinance to make its decision. Only secondarily did the judges provide commentary on video games and free speech.

Video Software Dealers Association v. Webster, 1992

Coming closer to directly applying a free speech ruling to games, the Eighth Circuit Court of Appeals heard a case challenging another regulation. The plaintiffs challenged a Missouri statute that restricted rental or sale of videocassettes or other video devices depicting any type of violence to minors. Forcing retailers to “display and maintain the videos in a separate area within their stores,” the state’s two-pronged statute aimed at sheltering adolescents from harmful materials.²¹⁵ Secondly, the state planned on regulating rental to minors regarding violent material.

The court ruled that the Missouri statute was overly broad, since it attempted to regulate two varied features of movie and game retail establishments. The opinion supplied three reasons why the court found the statute unconstitutional: first, Missouri legislators failed to narrowly tailor the rule to promote a compelling state interest; second, the statute was vague; and third, the statute imposed strict liability. The state reasoned by using a series of extensive tests, one of which was the SLAPS test. In other words, the statute set, as one of its criterion that, “taken as a whole, it [any given entertainment title] lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen.” The statute also addressed issues of retailers displaying videos in another section of a retail store, community standards of violence and offensiveness, the bad tendency, and rental guidelines.

This case moved the game issue away from arcade games and closer to home console gaming systems. Nevertheless, this case is problematic in that it lumps movies and games together, commenting generally on all rentals rather than separating them out individually. If the court ruled that games are like movies, the issue would be closer to

being quote-unquote solved. For example, the opinion given by the court argues that the state indeed has an interest in regulating “communicative materials,” which contradicts the *Rothner* decision. In the *Rothner* decision, the court argued that games contained no communicative material, thus disqualifying them from First Amendment protection. However, the court made no such move as to combine the entertainment genres since the thrust of the decision was the state statute’s inherent vagueness, not the nature of game content.

Eclipse Enterprises v. Gulotta, 1997

Another opinion peripherally addressing video games and free speech was *Eclipse Enterprises v. Gulotta*. In this case, a comic book store both displayed and sold trading cards featuring infamous criminals known for violent acts of robbery and murder. For example, the trading cards depicted such criminals as Al Capone in a glamorous light. Believing minors might seek similar criminal actions, Nassau County, New York officials argued that the retail store owner was guilty of disseminating indecent material to minors when he sold “to a minor for monetary consideration any trading card which depicts a heinous crime, an element of a heinous crime, or a heinous criminal which is harmful to minors.”²¹⁶ Conversely, the court argued that the Nassau County law regulated protected speech. Citing such cases as *Miller v. California* and *Ginsberg v. New York*, the court opined that they found no support to regulate non-obscene speech, like this category of speech, since Nassau County’s law would fail the strict scrutiny of First Amendment tests.

Circuitously applicable to the video game issue, the court also argued “there has been no showing why trading cards should be singled out for regulation in preference to other material that is less noxious”; material in books could be just as offensive as these cards. Just as the previous rulings did, this case returned to the two issues of Nassau County’s rule neither being narrowly tailored nor displaying a compelling state interest for protecting minors from these trading cards. In their conclusion, the judges wondered if any properly tailored restriction “can ever pass the strict scrutiny test.”²¹⁷

American Amusement Association v. Kendrick, 2001

The two most recent cases yield a better understanding of the direction of the issue. And though they both advance the controversy of video games as free speech, they fail to address home gaming systems. These two cases continue to address arcade games, an issue again arising in retail establishments. An Indianapolis ordinance ordered arcade operators to keep certain types of games ten feet away from non-violent games, separated by a curtain. If violated, the city would assess the transgressor with a \$200 fine each day for each violation. Teri Kendrick challenged the city’s rule, even though the city had not yet enacted it. Initially, the district court agreed with the ordinance, stating that the city crafted the rule “with a close eye on first amendment issues and the prospect of a challenge like this one.” However, the city found video games outside of the purview of protected expression when crafting the ordinance. While the district court upheld the city ordinance, it still disagreed with the city, saying that “at least some video games are expression entitled to the first amendment.”²¹⁸

Upon appeal, the Seventh Circuit Court of Appeals saw the issue differently. Chief Justice Richard Posner narrowed the issue to two criteria. He disagreed with the city's ordinance because the city should have addressed two concerns. First, the city of Indianapolis might have addressed "the concern with the potential psychological harm to children of being exposed to violent images." Further, the city should have addressed the "subtler concern with the consequences for the child incited or predisposed to commit violent acts by exposure to violent images." Posner ultimately was concerned with whether or not a work was offensive, knowing that "a work is classified as obscene not upon proof that it is likely to affect anyone's conduct, but upon proof that it violates community norms regarding the permissible scope of depictions of sex and sex-related activity." Arguing against the ordinance, Posner stated, "The grounds must be compelling and not merely plausible."²¹⁹

Justice Posner argued well concerning the nature of games, and in his opinion, he correctly construed the scope of games. He recognized the sheer magnitude of the entertainment genre by writing, "Although it seems unlikely, some of these games, perhaps including some that are as violent as those in the record, will become cultural icons." As I discuss in Chapter II, video games present the entertainment industry with forceful iconic gravity.

Justice Posner began a discussion, which judges in *IDS v. St. Louis County* continued, concerning the compelling parallel between games and literature. Posner argued that classic literary works contain indelible violence which the city, in the case of video games, sought to censor. Posner cited violent objections which go unnoticed today like Homer's *The Odyssey*, Dante's *The Divine Comedy*, Tolstoy's *War and Peace*, Mary

Shelley's *Frankenstein*, and Bram Stoker's *Dracula*. Arguing the importance of discussions addressing violence, Posner asserted:

Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age. To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.²²⁰

Posner challenged the lower court's decision, saying these stories (video games and literature) fail to pose danger to "healthy character formation or peaceable, law-abiding behavior" since games are only a tiny fraction of the media violence problem.

Concluding his statement, Justice Posner presented a problematic conditional statement. He wrote that a "more narrowly drawn ordinance" might survive a constitutional challenge if games used "actors and simulated real death and mutilation convincingly" or "if the games lacked any story line" and "were merely shooting galleries." As I discuss in Chapter II, graphic realism in games presents the player with ever-increasing convincing textures and in-game physics rivaling some movies. Further, the realistic nature of some sports games makes them virtually indistinguishable from real-life games. Consequently, if Posner prescribes these criteria to form an ordinance worthy of constitutional scrutiny, the criteria are problematic and insurmountable.

Interactive Digital Software Association v. St. Louis County, 2003

St. Louis County enacted an ordinance which required retail arcade establishments "to place video games which they know to be harmful to minors separate and apart from other video games, and shall designate such areas as 'Restricted-17.'" Furthermore, the ordinance made it unlawful to "knowingly sell or rent a video game

which is harmful to a minor unless that minor is accompanied by a parent or guardian who consents to the purchase or sale.”²²¹ While the *American Amusement v. Kendrick* decision addressed the issue somewhat, the *IDS* decision addressed the issue head-on. The court sought to “determine whether the County has [had] advanced a constitutional justification for the ordinance’s restrictions on speech.”

The court’s decision crafted a compelling case for protecting video games as speech. Despite previous comparisons of video games to gambling and other seemingly frivolous endeavors, the decision drew a parallel between video games and books. Indeed, they argued that games may be like “attending a Saturday matinee,” but with video games “the story lines are incidental and players may skip the expressive parts of the game and proceed straight to the player-controlled action”; furthermore, “any viewer with a videocassette or DVD player could simply skip to and isolate the action sequences.” The thrust of their argument came as a parallel between games and books. They emphasized that “literature is most successful when it draws the reader into the story, makes him [sic] identify with the characters, invites him to judge them and quarrel with them, to experience the joys and sufferings as the reader’s own.” The court cited the choose-your-own adventure adolescent books, claiming that “they can be every bit as interactive as video games.”²²²

Consequently, the court argued that whether or not games derive any societal value is irrelevant. Rather, they wrote: “Guided by the first amendment, we are obliged to recognize that [games] are as much entitled to the protection of free speech as the best of literature.” In my first chapter, I point out how problematic video game effects research is. The court noted the problematic nature of restricting video games, pointing

out the county's failure to demonstrate that harms are real, not conjectural, and that regulation will alleviate these harms in a "direct material way." Claiming they wanted more than anecdote and supposition, the court argued that ordinances such as the one in St. Louis County must provide some empirical support for their claims of harms.

In a refutative move, the court affirmed the creation of the ESRB as a private entity. They contended, "Nowhere in *Ginsberg* (or any other case that we can find, for that matter) does the Supreme Court suggest that the government's role in helping parents to be the guardians of their children's well-being is an unbridled license for governments to regulate what minors read and view."²²³ In a roundabout way, this ruling gives credence to the existence of the ESRB as a private entity since "government cannot silence protected speech by wrapping itself in the cloak of parental authority."²²⁴

ANALYSIS

Before analyzing these cases, it is important to note the types of arguments gaming antagonists employed. Of the four types of unprotected speech, opponents of video game First Amendment protection generally argue that games fit into at least one of three categories. The four types of unprotected speech are obscenity, fighting words, incitement, and child pornography.²²⁵ Child pornography notwithstanding, opponents of games have tried to place video games into each category of unprotected speech. For example, in *Kendrick v. American Amusement Association*, gaming opponents attempted to make arcade games an issue of public obscenity. In the case of *Haitian American Coalition of Palm Beach County v. Take-Two Interactive*, the plaintiffs attempted to create a situation construing games as fighting words, claiming that one game in question

goaded the player to “Kill the Haitians.”²²⁶ The thrust of gaming’s opponents’ allegations arose in the form of incitement. Anecdotally with the Columbine incident, and in the legal case of *James v. Meow Media*, challengers of gaming claimed games (both video games and arcade games) incite people to commit unsavory acts against people.

Games and Obscenity

One problematic factor concerning these cases is the attempt to create an anti-obscenity law to cover video games. Typically, courts refer to obscenity when they speak to issues that have the potential of corrupting minds, especially in public. Kevin Saunders describes obscenity in terms of etymological roots. He explains the word as “ab scaena,” or off stage to imply some act that potentially is unsavory to a general audience.²²⁷ In light of the legal nature of the obscene, legal scholars, legislators, and even the courts have misconstrued the nature of certain types of games. Arcade games are not video games. Games designers construct arcade games as noisy monikers of shopping mall ambiance. These designers build the game play to attract a customer to insert a couple of dollars; no designer constructs an arcade game with the intention of the player playing the game for more than a few minutes. The game structure is simple since the customer must instantly learn the controls and rules of the game. Since people play arcade games in public, if legislators sought to place an obscenity law on arcade games, the legal category would be more plausible.

Conversely, video games are quite a different sort. Video games consist of complicated in-game rules and typically train the player about the game controls through

an extended tutorial. D. Christopher Goodman, a contributor to *Videotopia*, a traveling electronic game museum, contrasts the two genres, stating that video games “can encompass long, complex games that arcade games cannot. Strategy games and RPG’s [role playing games] are certainly not viable in the arcades.”²²⁸ Further, video games comprise most of the game sales in America. In fact, arcade games see no press coverage, and gamers do not patiently await an arcade title’s release (like *Halo 2*, which sold 1.5 million copies in its first 24 hours). Contrast the most popular arcade games to the most popular video games, and arcade games fail to garner the magnitude of their in-home counterparts.

For example, legal scholar Kevin W. Saunders improperly mixes genres when he proposes stricter obscenity laws. He writes, “Children should not have a constitutionally protected right to obtain whatever materials they may find attractive. Furthermore, the free expression rights of adults should not include the right to reach an audience of other people’s children.”²²⁹ Also, Scott A. Pyle suspects that “in the current media environment, with the explosion of graphics fantasy and imagery and simulated reality, it may make sense to take a fresh look at what kinds of ‘entertainment’ should receive constitutional protection” and at that “which should be given a lesser degree of constitutional status.”²³⁰ But his statements are doubtful since he construes both video games and arcade games together by writing, “It may be time to consider whether the narrow pigeonhole exception of obscenity should be modified to include other things like video game violence aimed at children.”²³¹ But characterizing video games as reaching other people’s children, the way Saunders and Pyle refer to arcade games, is problematic. The obscenity rules function much better in light of regulating arcade games. But if cities

drew ordinances to regulate arcade games, few people would care. Now, arcades are irrelevant to the free speech issue.

The 1982 case, *America's Best Family Showplace Corp. v. City of New York*, was different. While arcade games experienced scrutiny, the gaming landscape was different 25 years ago since the best games premiered in arcades. After a welcoming premier in an arcade, often a game would find its way to Atari and the home market. Today, arcades are not conducive to meeting the need for a venue for cultivating new game titles.

Video games opponents have taken obscenity a step further to include the manner in which an onscreen character is treated. They claim that the courts should base the offensiveness of a game on the manner in which a game treats a body. In other words, how have game designers constructed game rules to depict people dying? Is the game a mere shooting gallery? Some legal scholars reference Catharine A. MacKinnon's work on sexual obscenity to make games analogous to pornography. MacKinnon argues that situations "when a woman is destroyed in order to say it [some message]" should not be protected speech.²³² Concurrently, some gaming opponents argue, "Under this insightful approach [MacKinnon's obscenity paradigm], it is not the focus on sex that can make a depiction obscene; it is the treatment of human beings in a purely physical manner."²³³ Kevin Saunders claims that obscenity should include anything that should be inherently private, like sex acts and excretory actions and "anything that focuses solely on the physical side of human existence," because "sufficient violence for its own sake should be considered as obscene as explicit sexual depiction for their own sake."²³⁴ Misconstruing these two genres, legal scholar Elizabeth Previte argues that the courts should condemn games based on the standards of obscenity. However, she draws on

examples of home video games like *DOOM* (PC game), *Quake II* (PC game), *Mortal Kombat*²³⁵ (home console game), *Grand Theft Auto III* (PlayStation 2 game), and *Hitman 2* (home console and PC game).²³⁶ But MacKinnon, Saunders, and Previte's arguments are a mischaracterization of video games; video games are not "spoken" in public. They are private activities meant for the home, a fact that changes the nature of these legal scholars' charges.

When video game opponents decry games as obscenity, they hijack the issue and take it in an improper direction. At the core of the First Amendment is political speech. Accordingly, as a means of addressing games' potential political importance, courts should first test whether games communicate and inform.

Video Games—The Contemporary Public Scapegoat

While the direction of video game jurisprudence is somewhat unclear, the rhetorical scapegoating used by video game opponents is clear. For example, game protestors disparage marketing media violence to children and use figures to suggest that "up to 60% of the video game audience" are children. Based on this same study, these critics condemn the game industry because children between ages eleven and sixteen cited at least one M-rated game when asked about their favorite video games.²³⁷ In reality, these opponents should question *how* these children got the games. Analogous to this issue would be parents buying R-rated movie tickets for their adolescent children. But critics fail to point the finger at a lack of parental responsibility. Instead, legislators complain about movies' violent nature, parents complain about the sexual nature of entertainment in general, and both parties agree that they should draft laws to punish the

retailer. What makes this misplacing of blame even more atrocious is critics' knowledge of parents' involvement in their children owning violent video games. Larry Copeland of *USA Today* writes that those opposed to bans, especially those in the industry, agree that most objectionable materials are "purchased by parents or with their consent. What you have is government trying to step in and take control of what is a parental responsibility."²³⁸ Furthermore, the President of the Video Software Dealers Association argues, "We don't ever get complaints from parents that the rating system is broken," since the system specifically points out the contents of a game's objectionable content.

It is also interesting that any law a state or municipality attempts to draft will have trouble meeting constitutional muster. For example, Washington state legislators attempted to make selling violent video games to minors illegal. Slated to go into effect on July 27, 2003, retailers would face a \$500 fine each time they sold objectionable games to children under seventeen. US District Judge Robert Lasnik stated, "Banning the games would raise broader free-speech concerns."²³⁹ Lasnik agreed with previous rulings by arguing that games deserve protected status because, just like other types of media, games convey detailed plot themes and detailed artwork. Parallel to the Washington case was the *IDS v. St. Louis County* case where the judge argued that "the government cannot silence protected speech by wrapping itself in the cloak of parental authority." He continued, "To accept [this county's] broadly-drawn interest as a compelling one would be to invite legislatures to undermine the First Amendment rights of minors willy-nilly under the guise of promoting parental authority."²⁴⁰ In fact, Calvert and Richards write, "2003 was not kind to the foes of video games that depict violent

images.” The tide is mounting against legislators being able to create a law which passes constitutional muster.²⁴¹ So why do legislators press the issue?

Perhaps the most intriguing aspect of this controversy is the tension between legislators repeatedly attempting to regulate games and judges finding informative and communicative value to games. Amidst the controversy, I cannot overstate the rhetorical means by which this issue functions. Legislators undoubtedly see the decades of legal precedent, yet they continue to create bills that fail. Pyle points out, “Unless the means chosen are the only effective means by which the government’s interest can be effectively achieved, the government will be forced to choose a plausible, less restrictive alternative.”²⁴² Plainly, the “plausible, less restrictive alternative” is the rating system already established with the Electronic Software Rating Board (ESRB), a system that already informs parents and gives them the tools they need to decide on content-appropriate games.

Amid threats for the federal government to regulate games, the ESRB already answered that question a decade ago. The video game industry acquiesced to congressional bullying ten years prior forming their own regulatory board.. One legal scholar observes that as courts and legislators search for a scapegoat for schoolyard shootings, they face the opportunity to infringe on First Amendment rights.²⁴³ Despite the whelming avalanche of video game scrutiny, the video game industry created the ESRB to provide consumers with information about the exact content of games. Further, minors wishing to purchase an M-rated game need a parent to purchase the game title. While legislators haphazardly blame retailers for illicitly selling M-rated titles to underage gamers, a recent Federal Trade Commission report found that “adults are

involved in 83% of video game sales for children,” and “of the people under eighteen years of age who purchase video games, 84% obtained parental permission before the purchase.”²⁴⁴ This FTC report also examined community standards for allowing underage persons into R-rated movies. Movies and video games stand analogous to each other in the sense that the community relies on local retailers to enforce ratings. However, video game regulation is unlike movie regulation in an important way. A minor may attend a movie and have no tangible record of the prohibited visit other than a ticket stub. Video game disks are tangible things which parents can and should monitor in the home. Despite the industry’s best attempts at regulation, parents are still responsible for those activities in which their adolescents participate.

Nevertheless, the politically expedient position belittles media violence as a means for votes. Calvert and Richards argue that telling parents *they* are the ones responsible for their children’s behavior “would surely be political suicide.” One has difficulty imagining any legislator openly declaring, “I support violence in video games. I support a culture of violence.”²⁴⁵ Most of those against gaming violence, like St. Louis city councilman Jeff Wagener, purportedly express the desire “not to ban violent video or arcade games, but to give parents control.”²⁴⁶ Despite forthright rulings by courts concerning games and the First Amendment, “it appears that no matter how the courts rule on this issue, regulators will continue to target certain video games.”²⁴⁷ The *Interactive Digital Software Association v. St. Louis County* ruling made clear that legislators may not shroud themselves in parental interests while trampling the First Amendment.²⁴⁸ Since parental authority and information is present, legislators move beyond informing parents, rhetorically mobilizing the issue.

Publishers are Inculpable

Courts have not been clear about the extent to which games receive First Amendment protection; however, the courts have argued clearly about publisher liability. This legal precedent arises from book, motion picture, board game, and video game publisher cases. Four test cases examined publishers' culpability in light of one of their customer's actions: *Rice v. Paladin Enterprises, Inc.*; *Watters v. TSR, Inc.*; *Wilson v. Midway*; and *Joe v. Meow Media*.²⁴⁹

The test case, reaffirmed by later court decisions, was *Rice v. Paladin Enterprises, Inc.* where a man claimed he used a how-to hit man book to assassinate someone. The book, *Hit Man: A Technical Manual for Independent Contractors—an instructive guide for preparing, executing, and covering up contract killing*, coached its readers concerning how to successfully carry out a “hit.”²⁵⁰ James Edward Perry bought the book and used the information in it to kill three people: one woman, her eight-year-old disabled son, and the son's nurse. Perry shot the two women between the eyes and unplugged the boy's respirator.²⁵¹ Legal scholar Adrianna D. Kastanek writes that the issue in this case concerned “when they [publishers] could be held liable for the effects of their publications.”²⁵² Legal scholar William Li also argues that this decision drew a distinction between “instructional speech and advocacy,” which becomes important in light of video game speech.²⁵³ Regarding video games, this issue is pivotal. For example, a player who engages in a game about World War II most likely kills Nazi soldiers. However, the game is not advocating killing; instead the game is informing its players about WWII.

The other following cases relied on this rationale to dismiss publisher responsibility. In fact, the courts avoided comment on the protected nature of an entertainment genre insofar as they began with the assumption that the speech was protected. For example, in *Watters v. TSR, Inc.*, “the court held that regardless of whether *Dungeons and Dragons* was characterized as literature or merely a game, it nonetheless fell within the category of protected speech.”²⁵⁴ Thus, liability is marginal to the issue of free speech protection, particularly since the court grouped the hit man book (protected speech) and the *Midway* and *Meow* cases (video games, Internet, and motion pictures) with *Watters v. TSR, Inc.* (a board game). The courts have agreed that board games, pinball machines, and sports are not speech, but action, since a participant does something. Publisher legal accountability is a settled point, and video game publishers should fear little in the form of incitement liability.

“Let Freedom Ring”: The Criteria for Protecting Video Games as Speech

Games have the potential to inform and communicate through a very powerful interactive medium. The issue is grander than relegating games to the M-ratings of “strong sexual content” or “graphic violence.” For example, Electronic Arts’ *Medal of Honor: Frontline* teaches its players about the battles and geography of World War II conflicts, even though the ESRB rated the game T-teen for violence. In fact, the opening mission of the game seats the player in a boat just before the landing at Normandy Beach on D-Day where the player strategically must defeat enemy forces in order to take the beach. This opening scene exactly mirrors the opening scenes of the motion picture *Saving Private Ryan*. The *Rice v. Paladin Press* decision referred to this informative

element when it delineated between advocacy and instructional speech. Certainly, the game's designers wish not for the player to storm a beach, but by providing an interactive scenario, the game's designers seek to teach the players through "instructional speech."

Those grouping games as nonspeech also allege that games cultivate action among their users through the open use of advocacy, an idea scorned by the *Rice* decision. Concurrently, Army psychologist David Grossman disputes games-as-speech along the lines that interactive digital media conditions its users much like a firing range.²⁵⁵ Another legal scholar, Elizabeth Previde, claims that city ordinances restricting games are valid "because it is impossible to conclude that aggressive tendencies and behavior are not rationally related to violence," because "children who continually play them [violent video games] will not be able to contain their aggression every time." But Elizabeth Previde's statements are difficult since the courts (in *Joe v. Meow Media*) established that publishers are not responsible for the actions their buyers might take. Furthermore, legislative entities have failed to prove a compelling state interest in regulating games, as in the case of *Video Software v. Webster*.

Embracing the guise of artistic expression, opponents of protecting games as speech also craft a straw person argument against games. Legal scholar Patrick M. Garry improperly construes game cases, saying that they "seem to rely on the realism that the games are able to convey"; however, "if simulating reality is a component of First Amendment coverage, then shouldn't the sets and targets in a realistic shooting range qualify for constitutional protection?"²⁵⁶ Although games exhibit an incredible amount of artistic ingenuity, the game industry must not allow game opponents to reduce important communicative messages deserving constitutional protection into "artistic

creativity.”²⁵⁷ Because the heart of the First Amendment is protecting political speech, the game industry should avoid seeking protection for artistic creativity. The opponents of protecting games cannot reduce the issue merely to art because deeper issues exist within gaming messages.

One consummate example of games-as-speech is Tom Clancy’s *Splinter Cell*. Released at the same time Microsoft released Xbox in November of 2002, this title carried gravity with it that could have greatly aided or damaged the Xbox release. The game was an overnight success and established the game genre of third-person sneaker, which the game developers called a new “light-and-shadow, hide-and-sneak concept”²⁵⁸ Besides game play and computer-generated image innovation, the game carried with it certain political statements. As the game opens, the designers offer the player a trailer featuring the voice of the main character describing his role as a para-military force. The character, Sam Fisher (narrated by Michael Ironside), by referencing a famous Franklin Delano Roosevelt speech, opines:

You have the right to freedom of speech. You have the right to freedom of worship. You have the right to freedom from want. And you have the right to freedom from fear.

I alone have the fifth freedom. The right to do whatever it takes to make sure your four freedoms are protected and preserved.

I alone have full authority to spy, steal, destroy, assassinate in order to protect America and her freedoms. I alone may go above the law to protect the law. And commit brutality to prevent brutality. And kill to protect the lives of many.

I seek not to derive pleasure by inflicting violence on others, but rather, to dissuade enemies of our nation.²⁵⁹

The message here is a politically conservative one. In other words, the game implies that negotiations and diplomatic tactics rarely work; hence the National Security Agency via Sam Fisher allows secret doings below the political radar. The game’s message is not

one of pacifism. The actual game play is also full of political themes, as are the subsequent installations of the game, *Splinter Cell: Pandora Tomorrow* and *Splinter Cell: Chaos Theory*. In the latest version, the game goes even further to politicize events within the game. For example, if the player kills a civilian or a political dignitary, the mission automatically ends. In the first mission of the game, the main character overhears two guards, one of whom laments how Americans killed his family. Comments like these allude to American imperialism and America as the world's police force. Legal scholar Colleen Carey remarks that games such as these "can be said to have value for minors in teaching them about United States history or the workings of the military," even though "these games also contain what would be characterized as graphic violence by the legislation."²⁶⁰ Undoubtedly, these games serve an entertainment purpose, but they also exhibit deeply-seeded political themes worthy of protection.

Splinter Cell: Chaos Theory is also an example of a game that turns the digital enemy into characters with emotions and rationale. One complaint that gaming opponents cite is MacKinnon's claim that pornography twists people into things—it takes personhood and reduces it into an object. Antagonists of video games sometimes make a transfer and allege that games, too, objectify their subjects. However, the *Splinter Cell* designers crafted the game to present the player with decisions about how to treat other in-game characters. For example, the player may sneak up on any of the game's hundreds of characters. From there, the player might choose to interrogate the character or instantly to kill him ("him" since the game contains no female characters). Interestingly, after interrogating a character, the subsequent conversation invokes compassion for that character. The player feels compelled not to kill the digital rendering

of a person. One game reviewer calls the action of sparing an enemy character's life the "morally rewarding" action. (The player may use lethal force with a knife or non-lethal force by knocking out the enemy.) Further, after the player completes a mission, the game rates the player based on stealth attacks versus lethal attacks. Instead of rewarding death, the game actually rewards the gamer for not killing their digital counterparts. Nonetheless, lethal kills always stand as an option, building a situation where the video gamer decides. Video game detractors often attempt to reduce video games to a fallacious all-or-nothing choice while the gaming genre deserves a much closer, nuanced consideration.

The agency a game places in players' hands is not a proclivity toward political action (as opposed to speech). *Splinter Cell* teaches its players about the rules of espionage, given Sam Fisher's account of the nature of his tasks. Fisher coolly articulates, "I'm a soldier. I served my country for 20 years. But if I'm captured or killed no one will come to rescue me. I won't even get a funeral because the nation I protect can never admit that I exist."²⁶¹ The game interactively teaches its players about the rules of engagement and the political situation surrounding an environment. Consequently, this interactive learning model aids political speech and profoundly meets the criteria of being informative and communicative.

While primitive games twenty years ago had little to offer in the way of informing or communicating, today's games arguably exceed movies and books in terms of potential political speech. In particular, two additional games instruct their users and move beyond entertainment (though entertainment is still a key factor). First, the United States Army developed *America's Army*—a depiction, not simulation, of boot camp and

paratrooper training—and made it completely free to download and play online. Rather than recruiting potential Army roughnecks, the US Army sought to recruit techies and gamers. After the game’s instant success, the Army even set up gaming parties with recruiters waiting at the door to greet gamers. Surpassing all recruiting expectations, the game recruited more teenagers than the famous “Be all that you can be” slogan.²⁶²

Another game developed by the Army, *Full Spectrum Warrior*, gave officers a chance to train electronically before attempting real combat. While *America’s Army* attempted to garner military favor among gamers, the army originally intended *FSW* to serve as a pre-combat simulation. The game trains players in MOUT (Military Operations on Urban Terrain) tactics to give the player a sense of combat in a Middle Eastern country. Rather than composing a fast-paced first-person shooter, the game’s creators, Pandemic Studios, attempted to make a game that forced the player to use strategic military tactics. The game’s designers call it “a squad-based, real-time combat game that allows players to experience the intensity and gritty realism of urban warfare.”

The squad leader:

take[s] command and coordinate[s] the actions of two infantry squads. An intuitive control scheme allows you to control up to eight soldiers in real-time as you outthink, outmaneuver and outgun enemies. Featuring advanced AI [artificial intelligence], your squad will perform like a highly trained infantry unit reactively responding to situations based on combat situations.²⁶³

Game designers claim, “The soldiers you command are programmed to respond the way a real soldier would. There are no magic weapons to bail you out. All you have going for you is the real world.”²⁶⁴ Again, this game’s expensive \$5 million development is curious, given some courts’ assumption that games are capable of neither communication nor information.

If games neither communicate nor inform, one contemporary aspect of video games is additionally curious. According to a CNN story, advertisers spent approximately \$30 million dollars on in-game product placement and advertising. The article states, “If you are the sponsor, you’ve captured the attention of hundreds of thousands of people who’ve spent the last six months living and breathing your brand. The promise of in-game advertising is it’s going to be very, very big.”²⁶⁵ In some sports games, the advertisements are as blatant as a Mountain Dew billboard placed beside a tennis court. In other games, the advertisers place their products in the form of cell phones or indiscreet name brands on products. Moreover, game developers sometimes produce entire games based on some product. For example, DaimlerChrysler’s *Jeep Mountain Madness* allows the user to maneuver a Jeep through mountainous terrain. Jeep’s Jeff Bell purports ten percent of the company’s advertising dollars go to video game ads. Bell calls video games a “serious medium to bring both entertainment and information forward to both the American and to the international marketplace.” He also touts his video game campaign as resulting in the sales of over 7,000 Jeeps.²⁶⁶ Analogous to movies and television, video game advertisers see the potential audience waiting to be tapped behind the console. But if, as some video game opponents claim, video games cannot inform or communicate, then advertisers are wasting their money on a medium which cannot deliver eventual customers.

Video game creators fear legislators will force them to sanitize games like other forms of entertainment. For example, President Bush recently signed a bill to allow new technology to filter movies to a viewer’s tastes.²⁶⁷ As opposed to this technology, the game industry should push the proverbial envelope into more blatant forms of political

speech. Game developer and author Francois Laramee grieves the *Grand Theft Auto*-esque game genres known for killing police officers and prostitutes.²⁶⁸ Indeed, the game industry should avoid pushing the limits of M-rated labels of “intense violence” and “strong sexuality.” Instead, the industry should find its voice among politically informative messages in order to challenge those peripheries of the industry producing intellectually reviling material meant only to offend. Perhaps the industry could find its Michael Moore or Rush Limbaugh, a digital, contender, a persona producing messages challenging the status quo which forces the courts’ hand. The industry should conjure some game titles to directly meet the courts’ criteria of being communicative and informative, as well as meeting the criteria of being serious, literary, artistic, political, or scientific.

As evidenced by the aforementioned games, contemporary video games undoubtedly pass First Amendment scrutiny of informing and communicating ideas. Although some judges and legislators characterize games as pinball machines, their depictions are errant concerning the deeply communicative nature of games. These authorities have failed to realize that interactive digital media has the potential to teach its players. Even beyond what a book, television show, or motion picture could express, games allow players to learn intricate political messages, as well as engage in simulations rife with consequential feedback.

CONCLUSION

While the judicial opinions initially appear to be a cacophony of jumbled noise, looking through the lens of video game development over time, these opinions agree with

one another. The very nature of video games has changed and evolved tremendously since the late 1970s. The gaming industry has progressed from semblances of pinball machines to consoles which function like super PCs able to craft intricate stories. Since the game industry is able to shape electronic messages into stories, undoubtedly games both communicate ideas and inform their users. The legal presumption that this new form of entertainment should be protected should stand since the courts have tested games and found them meeting the criteria.

Legal opinions concerning games explicitly outline the criteria by which protected speech falls under First Amendment protection. For speech to receive protection, it must communicate to and inform its audience. I have argued that games meet these criteria since they rely upon serious themes to inform the player and to persuade him or her with a particular viewpoint. Certainly, no entertainment form meets these criteria on every front. For example, not every movie or television show is desirous of First Amendment protection because not every entertainment format meets communicative and informative standards. But if these criteria are the test, games meet the criteria and deserve First Amendment protection.

The video game genre deserves free speech protection. As evidenced by the eight federal cases I have discussed, the issue of video games as free speech is not untested. Rhetorically, however, the issue serves as an impetus for politicians gaining votes and goading their constituents to respond amid cries of heightened media violence. Indeed, the video game industry serves as the contemporary scapegoat, just as music and television and cinema have previously.

CHAPTER V

CONCLUSION

A New York woman's story does well at summarizing the video game issue. After Florence Cohen, an 85-year-old grandmother, heard of the new "Hot Coffee" modification contained within *Grand Theft Auto: San Andreas*, she filed a lawsuit against Take Two Interactive, *GTA*'s publisher. Cohen claimed that Take Two engaged in "false, misleading and deceptive practices."²⁶⁹ What is curious about Cohen's claim is that when she bought the game for her 14-year-old grandson, she handled the game's box, which bears the game's ratings conspicuously in two places. Apparently the "tons of guns and bazookas and knives and disposable chicks and viciously corrupt cops and piles of blatant racism and drive-by shootings and pipe beatings and low-rider cars" did not offend Cohen.²⁷⁰ And unless Cohen's grandson owned the PC version of the game, her grandson could not modify the code for the Xbox or PlayStation 2, thus negating her claim about "Hot Coffee."²⁷¹

The last fifteen years in video game controversy have seen gaming critics begrudgingly accepting the new technology contained within games. In the early 1990s, senators threatened the industry with government regulation unless they imposed private self-regulation. Once the industry put the Electronic Software Rating Board into place, gaming critics became even louder, e.g. Senator Joseph Lieberman. Particularly in light of the Columbine shootings, gaming critics have increased, rather than decreased, scrutiny toward the industry. Even after the industry instituted the ESRB, Lieberman continuously bemoaned the nature of the industry. As recently as July 2005, Lieberman lamented the ESRB by stating, "The integrity of the self-regulatory system has clearly

been challenged by Rockstar's actions," and by wondering if "all content available in game discs are fully disclosed to the ESRB and to the wider community."²⁷²

Lieberman's comments are curious since he helped create the ESRB, but the greater lesson for rhetorical scholars is how politically expedient the video game issue is.

Senator Lieberman does not stand alone as the sole rhetorical button-pusher, since many of his colleagues participate in the same types of rhetorical maneuvering concerning the gaming issue.

Recently, opponents of the ESRB claim that "the board's guidance is toothless and does little to help parents trying to protect impressionable children from questionable content."²⁷³ However, the ESRB aids the industry in dissuading game publishers from producing overly-violent and sexual games. After the discovery of the "Hot Coffee" modification, ESRB president Patricia Vance found herself blindsided by the media because the ESRB failed to catch the objectionable content in *GTA*. In one interview defending the rating board's position, she aptly said:

We apply the AO [adults only] rating often. Publishers then have the ability to resubmit product after it's been edited to avoid the AO rating. It's not because we don't assign it. The publisher is always responsible for disclosing all the content on the disc; that responsibility has got to lie with the publisher.

When asked about whether "this proves the industry can regulate itself," Vance retorted, "I think it's a very strong statement about the self-regulatory system and how independent it is."²⁷⁴

The incentive against a publisher releasing an AO-rated game is pungent. Major retailers like Wal-Mart and Target refuse to stock AO games on their shelves, potentially decimating a video game's sale. Retailers are the final step in the game development equation. They negotiate with publishers based on a title's potential earnings, and they

place copies of game titles on the shelf, tasks that require careful consideration. If a game is too objectionable, the retailer will shy away from carrying the title. One way a publisher can avoid turning off a retailer is by looking to *the* superpower retailer, Wal-Mart. According to gaming attorney Ashley Salisbury, Wal-Mart sells approximately one-quarter of all game titles in the United States,²⁷⁵ which makes the retailer a significant force when publishers begin to court other retailers. The sheer number of games that Wal-Mart sells in the industry has established a de facto “Wal-Mart Test” that requires publishers and other retailers to gain Wal-Mart’s approval in order to market a game title. Securing this approval (or the approval of other retailers) is not always easy; publishers and console manufacturers must make judgment calls, and sometimes they gravely misjudge retailers. For example, *Leisure Suit Larry: Magna Cum Laude* sparked controversy because the game title included nudity, drunkenness, and streaking (not to mention hundreds of phallic jokes and symbols). Even though the game’s publisher, VU Games, and the consoles XBox and PlayStation backed the game, Wal-Mart pulled the game from its shelves.²⁷⁶ The issue at hand is not whether the ESRB can regulate the industry, but how long it can withstand the congressional lynching.

FUTURE IMPLICATIONS FOR THE VIDEO GAME INDUSTRY

Given the abysmal state of video game regulation law, lawmakers may never craft video game parameters that pass constitutional muster. But as video game litigation illustrates, legislators’ efforts to regulate games are far more rhetorical than legally substantiated. Industry critics have proposed city ordinances, as well as federal regulatory threats, that have resulted in very few actual regulations.

A stasis in technology may actually aid crystallizing video games' First Amendment protection. The next generation of consoles has little more to offer in light of groundbreaking gaming technology than slight upgrades to the current system.²⁷⁷ Unlike the technology panic of 1993, today's panic has less to do with increased realism and more to do with violent and sexual images. Thus, the industry will not move radically in a new direction in the realm of graphics improvements. Perhaps the industry can use the technological stagnation to regroup and establish a unified voice which would not be afraid to go on the offensive.

The video game industry, as a whole, offers little in terms of apologia maybe because offensive games undermine positive efforts made by the industry. One gaming author and developer, Francois Laramee, describes his sentiment about the legal system's refusal to accept games as free speech. Perhaps he speaks for the whole of the industry when he writes:

While covering an ever-wider variety of themes in our games would be healthy for many reasons, censorship of violent games is not a solution to the ills of society, and we must not tolerate it. It was not so long ago that Senator Joseph Lieberman, the perennial critic of our industry who came within a hair's breadth of becoming vice president of the United States in 2000, sponsored a proposed constitutional amendment banning violent video games so that children would be protected from *Mortal Kombat* and similar material.²⁷⁸

I find the trend of the industry as whipping boy troubling since games deserve protection and have a rhetorical salvo of reasons indicating how they inform and communicate. As the industry continues to lose the public morality and public controversy battle, that rhetorical salvo lays dormant.

Conceivably the rhetorical losses from which the game industry suffers comes at the hands of a few publishers seeking short term financial gains while the remainder of

the industry suffers long term losses. Controversial games like *Playboy: The Mansion*, *Leisure Suit Larry*, *The Guy Game*, and *BMX: XXX* belie the gaming industry because they artificially conjure temporary attention for games. Games such as the aforementioned titles are problematic for the industry for two reasons. First, the game titles are not particularly good. These games present bland versions of better uncontroversial games, smattered with controversial subjects, which one reviewer called being made “For eighth graders, by eighth graders.”²⁷⁹ The second reason poor controversial titles beset the industry is that they are the monikers by which the public knows the industry. Also, the said titles initially create some attention for gaming, but yield poor terminal results. In other words, the industry is winning the battle but losing the war. Again, Francois Laramee addresses well the short-term gains and long-term losses the industry currently faces. He argues that the industry finds itself in a sense of public relations myopia since:

Many developers do not take into account the full ramifications that game ratings, the threat of government regulation, and retail sensitivities have on the ultimate success (or failure) of their game. It is not uncommon for large retailers to reject a game because of questionable content—never mind an entire country banning it, which has happened in Australia and Germany, for example.

Yes, but what about our creative freedom? True, this is a nascent art form, but we still have to sell our games. While we are pushing boundaries on many fronts, it is still important that we play by the rules. The last thing we need is for our games to be sold from the back room wrapped in brown paper.²⁸⁰

These controversial games detract from the goal of games becoming protected speech. Along these lines, the game industry should move toward disciplining the deviant actors in the industry to create continuity throughout the genre and proactively dissuade dissidents. The ESRB gets at the issue of disciplining its members but, beyond the rating system, there exists little to prevent a game publisher from releasing controversial titles.

One possibility of the industry disciplining deviant behavior might arise in the progression of a game. In a game's development phase, one of the final entities a game title sees is the console manufacturer. Currently, the three main consoles are: Microsoft XBox, Sony PlayStation 2, and Nintendo Game Cube.²⁸¹ Upon first thought, console manufacturers seem like a small factor to a game title's equation. However, console manufacturers are the gatekeepers who hold incredible power over a title—power that extends as far as canceling a game in production if they see fit. Therefore, game publishers court the console manufacturers with a few dynamics in mind. First, publishers assure the manufacturer that the developers plan to exploit the features of their console. Each console has certain attributes that are superior to competitors', attributes which game developers must utilize. For example, no other console manufacturer has cultivated an online gaming presence like Microsoft's Xbox, the only console which allows players to compete against one another worldwide. Second, the publishers must convince the manufacturer that their game is unique to the console. After convincing the console manufacturer of these factors, the manufacturer will grant a license to the game. Each console code (i.e. its technical computer language) is different; therefore, the developers must become licensed as they work on a title. Finally, the console manufacturers are responsible for printing the game's compact discs and artwork before the game ships. Consequently, as a result of a licensing fee placed on the publisher, a console manufacturer receives royalties from every game copy printed.²⁸² If the console manufacturer used its gate keeping power to regulate games, the industry could possibly escape some of the shortsightedness from which it has suffered as of late.

In the near future, video gamers will be able to download game content in its entirety. Currently, game publishers post their game demonstrations online for players to download as a preview of upcoming game content. Gaming sites like *FileShack.com* and *FilePlanet.com* allow the individual to download portions of a game. Soon the ESRB may become obsolete, particularly for home PC systems, because of downloadable content. Consider the idea that games already exist which bypass the system, games like *JFK Reloaded* located on an international server to sidestep certain American scrutiny available for complete and free download over the internet. In order for a gamer to compete against others, the gamer would have to pay a fee, but, competition notwithstanding, the game itself is free. Another example of downloadable full-length games is one available through German publisher CDV called *Lula*. This game ostensibly bypasses all regulatory forces since it goes directly to the consumer, constrained only by bandwidth speeds and the user's credit card.

The unintended consequence of legislators' scapegoating of the video game industry, and video game regulation in particular, could materialize in a strong online retail presence for game distributors. In the summer of 2005, game publisher Bungie offered new maps to their XBox hit, *Halo 2*, available for free download. This example is but one of the many which bypass retail regulation.

For legislators, downloadable content should beg the question: Is a credit card an acceptable form of regulatory gate keeping? In other words, most downloadable content requires the use of a credit card to purchase the content and minors do not possess credit cards. The trend toward downloadable content would seem to place an even greater burden of proof on the shoulders of parents since parents are generally the keepers or

credit cards. Games will no longer be on shelves for parents to preview and to handle, causing a considerable change in the current rating system and in games' legal status. Since this trend will likely continue, will this trend heighten or mitigate legislative scrutiny? As technology noses its way forward in the video game industry, this area of study merits further research.

CONCLUSION

For a legislator or judge to say that games fail the test of “informing” and “communicating” means that he or she has failed to examine seriously the depth and breadth of the video game. Games tell stories and teach players lessons more effectively than any classroom. Yet the controversy surrounding the industry creates a fearful ambiance, leaving developers and publishers wondering where the gaming boundaries are. Consequently, the power of the video game has yet to be unleashed fully.

One can imagine how a World War II game would inform and communicate. But legal scholar Patrick M. Garry wonders how removing video game violence could stifle speech. He writes:

The video game industry argues that unless it receives full constitutional protection, it may have to "sanitize" its games. But even if such "sanitization" occurs, will an idea or opinion be smothered? Is somehow the spirit of the First Amendment violated if video games have a little less blood and gore and mayhem? Is graphic, sensationalized violence that essential to any useful idea? Are sophisticated, intelligent games not possible without blood-curdling violence? If video games cannot survive without the use of such manipulative violence, what does that say about video games or about the direction of our society?²⁸³

A game like Electronic Arts' *Medal of Honor* teaches its players about the geographical locations in France, as well as machinery and weaponry of the day. One could imagine the richness with which Electronic Arts could tell the story; much of the story relying on

violence and killing. However, devoid of the realistic violent elements of the game, the informative element loses its potency. This aspect of gaming is what the gaming public loses if the video game industry does not receive free speech protection. In other words, gamers lose the rich aspect of virtual worlds. They lose the potential to roam about in a world with few boundaries.

But on a grander scale, by losing an entertainment genre which should receive free speech protection, society loses an important element of free speech. Particularly in the manner by which the video game and the movie industries are tied, for courts and legislators to suppress free speech in this arena is for courts and legislators to suppress free speech in other arenas. John Stuart Mill argued well against denying free speech rights to ill-favored factions of society. Mill advanced the argument for free speech by arguing:

We can never be sure that the opinion we are trying to stifle is a false opinion; and even if we were sure, stifling it would still be an evil. The opinion the authority attempts to suppress may possibly be true. To refuse a hearing to an opinion because they are sure that it is false is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility.²⁸⁴

By silencing the discussion about the video game genre, legislators incorrectly quell the debate which should be occurring. In *Whitney v. California*, 1927, Justice Louis D. Brandeis argued well about the nature of political debates such as the one surrounding video games. Brandeis challenged the tendency to silence political dissidents by writing, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech.”

To say that legislators alone have suppressed the debate about video games as speech would be a misnomer. The industry itself has failed to engage their opposition.

Consequently, both factions of the potential debate find culpability in the seemingly never-ending strand of rhetorical blunders. Both factions have approached the debate with incredible rhetorical naiveté. Ideally, legislators would “silence” the industry. Conversely, the industry ideally would wave the First Amendment magic wand to receive protection. Neither side engages in the debate as they should.

To force the hand of legislators and the legal system, I propose that developers push the envelope in the direction of political speech. Video game sex and violence is a tired subject that usually ends with the industry losing face at the hands of legislators’ rhetorical maneuverings. But political speech could open the door for carte blanche First Amendment protection by America’s legal system. The video game industry needs to find its voice with a digital type of Michael Moore or Rush Limbaugh whose presence undeniably will be political.²⁸⁵ One political candidate, Jesse Ventura, almost gave the industry a jewel of a legal test—a truly political gaming message. When deciding whether to run for reelection as governor, he contemplated distributing a video game to break through if “they’re younger voters or unaffiliated voters.”²⁸⁶ To craft games into speech there could be almost no greater test than what Ventura proposed but, in the end, the governor decided to decline a bid for reelection. The industry needs a compelling test like this one.

As a whole, the video game industry is in a precarious double bind. In 1993, Congress goaded the industry to impose self regulation and disclose exactly what was in game content. However, when game publishers disclosed games’ contents, virtually no one was happy with the discovery of what is actually in games. And despite massive public service announcements by well-known personalities, whether or not parents read

these labels is still unclear. The industry is also dealing with the growing pains that television and movies have endured, mainly that not all games are for children. In television's infancy, perhaps children could have viewed the entire gamut of programming without adult supervision. But today, television audiences know that broadcast programming contains objectionable material. And so it should be with video games. Perhaps in the next decade the legal system will protect the video game industry by affirming that games pass the legal test of "informing" and "communicating."

NOTES

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¹⁰⁷ Mary Meehan, "The Ratings Game: Parents are Learning that They Can't Always Trust the System for Rating Video Games: Lax Oversight by Regulators is One Problem," *The Wichita Eagle*, February 2, 2004, 3.

¹⁰⁸ Dan Pacheco, "Rating the Games Labels to Help Parents Choose," *The Denver Post*, October 29, 1994, E-12.

¹⁰⁹ The IEMA is defined as "a non-profit organization that ensures the well being of its members and is the only trade association dedicated exclusively to the needs of this retail sector." See <www.iema.org>.

¹¹⁰ Richard Harrington, "The Capitol Hill Rock War; Emotions Run High as Musicians Confront Parents' Group at Hearing," *The Washington Post*, September 20, 1985, B1.

¹¹¹ Greg Kasavin, "Postal 2: Share the Pain Review," *GameSpot.com*, December 17, 2003, <<http://www.gamespot.com/pc/action/postal2multiplayer/review.html>>.

¹¹² Complete with personified, caricatured testicles and photographs of Gary Coleman with scantily clad women, the site attempts overtly offensive material. “Who We Are,” *Running With Scissors* <<http://www.gopostal.com/company/index.php>>.

¹¹³ Chris Morris, “Playboy: The Video Game—Virtual Hef and His Digital Playmates Invite You Into the Mansion Next Fall,” *CNN.com*, May 13, 2003, <http://money.cnn.com/2003/05/12/commentary/game_over/e3_playboy>.

¹¹⁴ Even the site is disturbing to peruse. For example, it contains real audio from news reports and officials announcing “the president died 35 minutes ago.” Furthermore, it goads the gamer to shoot because “only YOU can prove whether Oswald had the means and the opportunity to perform this horrific crime.” *JFK Reloaded*, “Did LEE HARVEY OSWALD Assassinate JOHN F. KENNEDY?”, <<http://www.jfkreloaded.com/>>.

¹¹⁵ *JFK: Reloaded* falls into the genre of a documentary game. These games allow the player to reenact a historic scene. For example, Electronic Arts’ *Medal of Honor Frontline* allows the player to experience the beach landing on D-Day. Much like the opening scene of *Saving Private Ryan*, through a mix of tactical prowess and sheer luck, the player must survive the beach at Normandy. In *Medal of Honor*, the player learns the specific names of German tanks and artillery, as well as geographical locations of famous battles. The learning potential for players of documentary games is incredible since the game immerses the player in the era and location of a historical setting. Much like other game genres, publishers produce many documentary games (Civil War games, Roman Praetorian Guard games, and medieval battle games, to name a few) but few provide the player with such solid game play as *Medal of Honor*.

¹¹⁶ Jeff Jensen, “These are Your Father’s [And Your Grandma’s] Videogames. America’s \$6.35 Billion Obsession has Hollywood Salivating,” *Entertainment Weekly*, December 6, 2002, 25.

¹¹⁷ Jensen, “These are Your Father’s [And Your Grandma’s] Videogames,” *Entertainment Weekly*, 25.

¹¹⁸ Jeff Gerstmann, “Grand Theft Auto III—Review,” *GameSpot.com*, October 22, 2001, <<http://www.gamespot.com/ps2/action/grandtheftauto3/review-2.html>>.

¹¹⁹ Jensen, “These are Your Father’s [And Your Grandma’s] Videogames,” *Entertainment Weekly*, 25.

¹²⁰ Chris Morris, “Sex and Sequels: 2004 Was a Turning Year for Video Games—But What’s Next?” *CNN.com*, December 22, 2004, <http://money.cnn.com/2004/12/17/commentary/game_over/column_gaming/index.htm>

- ¹¹¹ “Diary of a Massacre Plot,” *Toronto Star Newspapers*, December 6, 2001, A01. Also see the recent Washington D.C. sniper case, Tom Jackman, “Disclosures May Help Malvo Team,” *Washington Post*, July 24, 2003, B01. Cases such as these point to video games helping to train murderers to carry out killings.
- ¹¹² “Clinton Slams Violent Images,” *RockyMountainNews.com*, May 11, 1999, <<http://denver.rockymountainnews.com/shooting/0511task1.shtml>>.
- ¹¹³ “President Asks FTC to Study Marketing of Violent Programming,” *News Media Update*, June 6, 1999, <<http://www.rcfp.org/news/1999/0614b.html>>.
- ¹¹⁴ “President, Congress Discuss Media Violence In Wake Of Shootings,” *The Reporters Committee for Freedom of the Press*, May 17, 1999, <<http://www.rcfp.org/news/1999/0517b.html>>.
- ¹¹⁵ Gloria Degaetano and Lieutenant Colonel Dave Grossman, *Stop Teaching Our Kids to Kill: A Call to Action Against TV, Movie, and Video Game Violence*, (New York: Crown Publishing, 1999), 21.
- ¹²⁶ Celeste Condit, *Decoding Abortion Rhetoric: Communicating Social Change*, (Chicago: University of Illinois Press, 1990), 309.
- ¹²⁷ Condit, *Decoding Abortion Rhetoric*, 309.
- ¹²⁸ Condit, *Decoding Abortion Rhetoric*, 12-15.
- ¹²⁹ Condit, *Decoding Abortion Rhetoric*, 309.
- ¹³⁰ Bill Clinton, “Opening Remarks by the President in White House Strategy Meeting on Children, Violence and Responsibility,” *Weekly Compilation of Presidential Documents*, May 10, 1999.
- ¹³¹ Condit, *Decoding Abortion Rhetoric*, 311.
- ¹³² Condit, *Decoding Abortion Rhetoric*, 309.
- ¹³³ “Video-game Horrors I,” *The Independent*, December 6, 1998, 2.
- ¹³⁴ Conrad deFiebre, “Legislators Urge Crackdown on Violent Video Games,” *Star Tribune*, April 2, 1999, 3B.
- ¹³⁵ “Top Video Games,” *USA Today*, March 12, 1999, 5E.

¹³⁶ I do not argue that game antagonists were completely absent. But before the events at Columbine, the thrust of media coverage failed to wholly criticize games, which was the case following April 20, 1999. For example, the deFiebre article cites that legislators were “prompted in part by a recent rash of schoolyard shootings, some of which were committed by young video-game aficionados, at least four other states are considering similar measures.” Conrad deFiebre, “Legislators Urge Crackdown on Violent Video Games,” *Star Tribune*, April 2, 1999, 3B.

¹³⁷ Glenn Collins, “Children's Video Games: Who Wins (Or Loses)?” *The New York Times*, August 31, 1981, B4.

¹³⁸ “The Battle For America's Youth,” *The New York Times*, January 5, 1982, 2B.

¹³⁹ “Video Games For The 'Basest Instincts Of Man',” *The New York Times*, January 28, 1982, 22A.

¹⁴⁰ Mary K. Spratt, “Proficiency Pointers; Fourth-Graders Preparing for the Reading Test Say Too Much Time with TV and Video Games Contributes to Failure,” *Plain Dealer*, February 7, 1999, 4D.

¹⁴¹ “Avery: Video Games Hindered Rookie Season,” *The Tampa Tribune*, January 17, 1999, 13.

¹⁴² Emphasis theirs. See Lauren Gonzales, “Major Offenders,” *GameSpot.com*, <<http://www.gamespot.com/features/6090892/p-2.html>>.

¹⁴³ Lauren Gonzales, “When Two Tribes Go to War: A History of Video Game Controversy,” *GameSpot.com*, <<http://www.gamespot.com/features/6090892/index.html>>.

¹⁴⁴ “Video Game Stamp Wins By a Lick,” *Chicago Sun-Times*, April 14, 1999, 27.

¹⁴⁵ For the graphic of the stamp, reference: “Celebrating the Century—80's,” <<http://www.virtualstampclub.com/century9.html>>.

¹⁴⁶ Bill Clinton, “Radio Address of the President to the Nation,” *White House Education Press Releases and Statements*, April 24, 1999, <<http://www.ed.gov/PressReleases/04-1999/wh-0424.html>>.

¹⁴⁷ Dana Coffield, “Video Game Helps Kids Cope,” *Rocky Mountain News*, December 28, 1998, 2B.

¹⁴⁸ These games stand as exemplars of corporate endorsement. Games like *ESPN NBA 2K5* and the best-selling tennis and golf games, respectively, *TopSpin* and *Links 2004*.

- ¹⁴⁹ James Glave, “Your Logo Here: It’s a Fact of Life in the Movie, But Is Product Placement Inevitable on the Small Screen, too?” *GameSpot.com*, May 9, 1997, <http://www.gamespot.com/news/1997/05/09/news_2466404.html>.
- ¹⁵⁰ Benny Evangelista, “Advertisers Now Getting Into Video Games; Companies starting to pay for product placements,” *The San Francisco Chronicle*, January 18, 1999, E1.
- ¹⁵¹ Andy Riga, “Montreal’s in the Game: These are heady days for the burgeoning video-game industry,” *The Ottawa Citizen*, April 13, 1999, C3.
- ¹⁵² Kenneth Li, “PlayStation 2 Debut: Sony’s New Video Game System Hot on Graphics,” *Daily News*, March 3, 1999, 31.
- ¹⁵³ Steven Poole, *Trigger Happy: The Inner Life of Videogames* (London: Fourth Estate, 2000), 79.
- ¹⁵⁴ Recall that Harris and Klebold claimed to have trained on *Duke Nukem* and *Doom*—both first-person shooters.
- ¹⁵⁵ Andrew Pollack, “Video Games Under Fire: Makers Defend Violence,” *The Gazette*, May 15, 1999, D14. Notice that the title intimates that these game makers defended violence. What Lowenstein and others actually argued was that the ESRB should safeguard against children partaking of such gaming violence.
- ¹⁵⁶ “US Game Industry Hits Out at Critics,” *Hobart Mercury* (Australia), May 15, 1999, 7.
- ¹⁵⁷ Joseph I. Lieberman and John McCain, “The No-Show Summit,” *The New York Times*, May 12, 1999, 25.
- ¹⁵⁸ Andy Riga, “Games Don’t Kill People, Makers Say,” *The Gazette*, May 19, 1999, D1.
- ¹⁵⁹ Carl T. Hall, “Preventing Youth Violence: Experts Cite Media, Absent Parents as Possible Explanations,” *The San Francisco Chronicle*, April 22, 1999, A5.
- ¹⁶⁰ John Ellis, “Colorado’s Carnage is Inevitable in Our Culture of Violence,” *The Boston Globe*, April 22, 1999, A25.
- ¹⁶¹ Bill Clinton, “Radio Address of the President to the Nation.” April 24, 1999, <<http://www.ed.gov/PressReleases/04-1999/wh-0424.html>>.
- ¹⁶² Many writers cited Grossman in articles. One example was Joanne Laucius’s, “We Are Learning to Like Killing, Expert Says,” *The Ottawa Citizen*, April 22, 1999, A13.

¹⁶³ For an in-depth discussion of Grossman's contention, see Chapter I where I discuss and explore his arguments.

¹⁶⁴ Gail Russell Chaddock, "Bridging the Divide," *Christian Science Monitor*, May 18, 1999, 11.

¹⁶⁵ President Clinton gave three addresses concerning violent media. He also provided the public with two press releases and a radio address all attending to this issue. I use these additional addresses to supplement these three original addresses because they basically offer the same message.

¹⁵⁶ "President Clinton Announces New Study to Examine the Marketing of Violent Media to Children," *The White House: The Office of the Press Secretary*, <www.ed.gov/PressReleases/06-1999/wh-0601.html>.

¹⁵⁷ "Coalition Wants Congress to Authorize the FTC to Protect Children from Harmful Advertising," *Commercial Alert*, <<http://lists.essential.org/commercial-alert/msg00025.html>>.

¹⁵⁸ Kwame Kolman, "Update: Targeting Kids," *Public Broadcasting Service*, September 13, 1999, <http://www.pbs.org/newshour/bb/media/july-dec00/targeting_children_9-13.html>.

¹⁵⁹ Kolman, "Update: Targeting Kids," *Public Broadcasting Service*.

¹⁶⁰ "Clinton Slams Violent Images," *Associated Press*, May 11, 1999.

¹⁶¹ Shawn J. and Trevor Parry-Giles, *Constructing Clinton: Hyperreality & Presidential Image-Making in Postmodern Politics*, (New York, NY: Peter Lang Publishing, 2002).

¹⁶² President Bill Clinton quoted in Parry-Giles' *Construction Clinton*, 92.

¹⁶³ Parry-Giles, *Constructing Clinton: Hyperreality & Presidential Image-Making in Postmodern Politics*, 93.

¹⁶⁴ Chris Black, "White House Summit Looks for Answers to Youth," *CNN.com*, May, 10 1999, <<http://www.cnn.com/ALLPOLITICS/stories/1999/05/10/youth.violence.summit>>.

¹⁶⁵ "President Clinton Announces New Study to Examine the Marketing of Violent Media to Children," *The White House: The Office of the Press Secretary*, June 1, 1999, <www.ed.gov/PressReleases/06-1999/wh-0601.html>.

¹⁶⁶ Degaetano & Grossman, *Stop Teaching Our Kids to Kill: A Call to Action Against TV, Movie, and Video Game Violence*, 74.

¹⁷⁷ Conrad deFiebre, “Legislators Urge Crackdown on Violent Video Games,” *Star Tribune*, 2 April 1999, 3B. Other titles that defied regulations were those like *Mortal Kombat* and contemporary titles like *JFK Reloaded*, a docu-game where the player reenacts Lee Harvey Oswald’s gunshots, and *Vietcong*, which claims that “napalm never smelt this good.” For examples, see “Game Firm Rapped Over Napalm Quote,” *CNN.com*, November 24, 2004, <<http://www.cnn.com/2004/WORLD/europe/11/24/britain.video.reut/index.html>>.

¹⁶⁸ Bill Clinton, “Columbine- Tragedy and Recovery,” *DenverPost.com*, May 21, 1999 <www.denverpost.com/news/shot0521b.htm>.

¹⁶⁹ Robert Pitofsky, “Prepared Statement of the Federal Trade Commission,” September 20, 2000, <http://www.ftc.gov/os/2000/09/jctestimony.htm#N_14_>.

¹⁷⁰ Kwame Kolman, “Update: Targeting Kids,” *Public Broadcasting Service*, September 13, 1999, <http://www.pbs.org/newshour/bb/media/july-dec00/targeting_children_9-13.html>.

¹⁷¹ Kolman, “Update: Targeting Children,” *Public Broadcasting Service*.

¹⁷² Scripps Howard News Service, “Clinton Slams Violent Images,” *RockyMountainNews.com*, May 11, 1999.

¹⁷³ Robert Pitofsky, “Marketing Violent Media to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording, & Electronic Game Industries,” *Federal Trade Commission*, September 2000, <<http://www.ftc.gov/reports/violence/vioreport.pdf>>.

¹⁷⁴ Pitofsky, “Marketing Violent Media to Children” *FTC*, 2000.

¹⁷⁵ David Walsh, “Video Game Violence and Public Policy,” *National Institute on Media and the Family*, 2001, <<http://culturalpolicy.uchicago.edu/conf2001/papers/walsh.html>>. For a more in depth discussion of the ESRB, see Chapter II.

¹⁸⁶ Bill Clinton, “Radio Address of the President to the Nation,” *White House Education Press Releases and Statements*, May 15, 1999, <<http://www.ed.gov/PressReleases/05-1999/wh-0515.html>>.

¹⁸⁷ Clinton, “Radio Address of the President to the Nation,” May 15, 1999.

¹⁸⁸ Bill Clinton, “Remarks by the President, the First Lady, The Vice President and Mrs. Gore, After White House Strategy Session on Children, Violence and Responsibility—The Rose Garden,” *National Archives and Records Administration*, May 10, 1999, <http://clinton4.nara.gov/WH/EOP/First_Lady/html/generalspeeches/1999/19990510.htm>.

¹⁸⁹ Clinton, “Remarks by the President,” *NARA*, May 10, 1999.

¹⁹⁰ Bill Clinton, “Radio Address of the President to the Nation,” *White House Education Press Releases and Statements*, April 24, 1999, <<http://www.ed.gov/PressReleases/04-1999/wh-0424.html>>.

¹⁹¹ Celeste Condit, *Decoding Abortion Rhetoric*, 191.

¹⁹² Like many visual messages, the commercial’s message was not without its ambiguities. However, the political statement was clear—terrorists see justice through bullet-riddled deaths. Particularly with employing the United Nations symbol, the commercial exhibited a political message. While this message is a television commercial, it represents the game’s content. It is an indicator of the subject matter of game play. “Rainbow Six 3: TV Spot 1,” *Ubisoft*, October 30, 2003, <<http://www.gametrailers.com/player.php?id=3238&type=wmv>>.

¹⁹³ *IDS v. St. Louis*, 200 F. Supp. 2d 1126 (2003).

¹⁹⁴ *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922 (1983).

¹⁹⁵ Scott A. Pyle, “Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance that Passes Constitutional Muster,” *Valparaiso University Law Review* Fall (2003): 429.

¹⁹⁶ Patrick M. Garry, “Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games,” *Southern Methodist University Law Review* Winter (2004): 139.

¹⁹⁷ “Ethnic Cleansing: The Game,” *Resistance Records*, <<http://www.resistance.com/ethniccleansing/catalog.htm>>.

¹⁹⁸ Francois Laramee, *Secrets of the Game Business* (Charles River Media, 2003), 30.

¹⁹⁹ Laramee, *Secrets of the Game Business*, 25.

²⁰⁰ David C. Kiernan, “Shall the Sins of the Son be Visited Upon the Father? Video Game Manufacturer Liability for Violent Video Games,” *Hastings Law Journal* November (2000): 207.

- ²⁰¹ Pyle, “Is Violence Really Just Fun and Games?” 431.
- ²⁰² Garry, “Defining Speech in an Entertainment Age,” 150.
- ²⁰³ Garry, “Defining Speech in an Entertainment Age,” 152.
- ²⁰⁴ Pyle, “Is Violence Really Just Fun and Games?” 431.
- ²⁰⁵ James D. Ivory, “Protecting Kids or Attacking the First Amendment? Regulation and Protected Expression,” Presentation to the *Law Division of the Association for Education in Journalism and Mass Communication*, July 2003. *AEJMC Conference Papers*, <<http://list.msu.edu/cgi-bin/wa?A2=ind0309d&L=aejmc&F=&S=&P=9431>>.
- ²⁰⁶ Clay Calvert and Robert D. Richards, “The 2003 Legislative Assault on Violent Video Games: Judicial Realities and Regulatory Rhetoric,” *Villanova Sports and Entertainment Law Journal* 11 (2003): 207.
- ²⁰⁷ Garry, “Defining Speech in an Entertainment Age,” 152.
- ²⁰⁸ Note that in previous chapters, I primarily discuss home video games instead of public arcade games. When games and free speech issues first arose legally, courts dealt with this issue in terms of public arcade games. But as the issue matured, home console video games received more scrutiny as a legal issue because they are richer and game developers design them for hours of play. Conversely, arcade game designers devise arcade games for a few minutes of play.
- ²⁰⁹ *America's Best Family Showplace Corp. v. City of New York*, 530 F. Supp. 607; 1982 U.S. Dist.
- ²¹⁰ 530 F. Supp. 607; 1982 U.S. Dist.
- ²¹¹ 530 F. Supp. 607; 1982 U.S. Dist.
- ²¹² 530 F. Supp. 607; 1982 U.S. Dist.
- ²¹³ *Rothner v. City of Chicago*, 929 F.2d 297; 1991 U.S. App.
- ²¹⁴ 929 F.2d 297; 1991 U.S. App.
- ²¹⁵ *Video Software Dealers Association v. Webster* 968 F.2d 684; 1992 U.S. App., 2.
- ²¹⁶ *Eclipse Enterprises v. Gulotta*, 134 F.3d 63; 1997 U.S. App., 5.

- ²¹⁷ 134 F.3d 63; 1997 U.S. App.
- ²¹⁸ *American Amusement Association v. Kendrick*, 244 F.3d 572; 2001 U.S. App.
- ²¹⁹ 244 F.3d 572; 2001 U.S. App.
- ²²⁰ 244 F.3d 572; 2001 U.S. App.
- ²²¹ *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954; 2003 U.S. App.
- ²²² 329 F.3d 954; 2003 U.S. App.
- ²²³ 329 F.3d 954; 2003 U.S. App.
- ²²⁴ In Chapter II, I discuss Senator Joseph Lieberman's efforts to threaten the video game industry with federal content regulation. In the early 1990s, he forced the electronic gaming business leaders to solve the problem of content regulation. The *IDSA v. St. Louis County* decision seems to fly in the face of Lieberman's previous attempts.
- ²²⁵ Kiernan, "Shall the Sins of the Son be Visited Upon the Father?" 220.
- ²²⁶ In *Haitian American Coalition of Palm Beach County v. Take-Two Interactive*, a Haitian-American Florida group claimed that Take-Two Interactive's *Grand Theft Auto: Vice City* caused outbursts of violence toward Haitians. One of the game's assignments within one of the missions urged the player to "Kill the Haitians." This case was scheduled to go to court in December of 2003, but virtually disappeared after the initial media explosion.
- ²²⁷ Kevin W. Saunders, "Do Children Have the Same First Amendment Rights as Adults?: The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children," *Kent Law Review* 79 (2004): 257.
- ²²⁸ D. Christopher Goodman, "Toward a Definition of Video Games," *The Electronics Conservancy, Inc. Presents Videotopia*, <<http://www.videotopia.com>>.
- ²²⁹ Kevin W. Saunders, "Do Children Have the Same First Amendment Rights as Adults?" 259.
- ²³⁰ Pyle, "Is Violence Really Just Fun and Games?" 431.
- ²³¹ Pyle, "Is Violence Really Just Fun and Games?" 431.
- ²³² Catharine A. MacKinnon, *Only Words* (Harvard University Press, 1993), 12.

²³³ Kevin W. Saunders, "Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns," *Michigan State Law Review* Spring (2003): 51.

²³⁴ Saunders, "Regulating Youth Access to Violent Video Games," 51.

²³⁵ *Mortal Kombat* was one of the few games that translated to arcade games. In 1993, it premiered on both home console systems as well as arcade games. According to obscenity standards, Senator Joseph Lieberman may have been correct to object to *Mortal Kombat's* content. However, current arcade games are irrelevant to the grand scheme of gaming.

²³⁶ Elizabeth A. Previte, "Insert Coins to Slay! Regulating Children's Access to Violent Arcade Games," *Villanova Sports & Entertainment Law Forum*, 69.

²³⁷ "Fed. Trade Comm'n, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries," *Federal Trade Commission: For the Consumer*, September 2000, <<http://www.ftc.gov/reports/violence/Appen%20F.pdf>>.

²³⁸ Larry Copeland, "Battle Over Violent Video Games Heating Up," *USA Today Tech*, January 28, 2004, <http://www.usatoday.com/tech/news/techpolicy/2004-01-28-videogame-fracas_x.htm>.

²³⁹ Lisa M. Bowman, "Judge: Violent-game Law Stifles Speech," *CNet News.com*, July 11, 2003, <http://news.com.com/Judge+Violent-game+law+stifles+speech/2100-1028_3-1025032.html?tag=st.rn>. In this case, "objectionable" equals violence against a law-enforcement official. This is one example where the lawmakers wisely crafted legislation tailored to a very specific case of violence. They also restricted sale only to minors.

²⁴⁰ *Interactive Digital Software Association v. St. Louis County*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002).

²⁴¹ Calvert & Richards, "The 2003 Legislative Assault on Violent Video Games: Judicial Realities and Regulatory Rhetoric," 203.

²⁴² Pyle, "Is Violence Really Just Fun and Games?" 431.

²⁴³ Kiernan, "Shall the Sins of the Son be Visited Upon the Father?" 209.

²⁴⁴ "Fed. Trade Comm'n, Marketing Violent Entertainment to Children."

²⁴⁵ Calvert & Richards, “The 2003 Legislative Assault on Violent Video Games: Judicial Realities and Regulatory Rhetoric,” 204.

²⁴⁶ Brad King, “Want to Play Doom? Not in St. Louis,” *Wired News*, September 30, 2002, <<http://wired-vig.wired.com/news/print/0,1294,55422,00.html>>.

²⁴⁷ Garry, “Defining Speech in an Entertainment Age,” 144.

²⁴⁸ Parents concerned with objectionable video game content have two options in discovering a game’s rating. First, parents may visit <www.esrb.org> to find a game’s rating. Parents may access this database from the homepage and need not search far for a game rating. Second, virtually every game box brandishes a ratings label on the front and back. For legislators to argue that parents need more information is problematic, since the only criterion for discerning appropriate games is literacy.

²⁴⁹ Also see: *Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002). In this case, the plaintiff brought suit against Acclaim Entertainment, makers of the violent video game which Columbine killers, Klebold and Harris, frequently played.

²⁵⁰ Rex Feral, *Hit Man: A Technical Manual for Independent Contractors—An Instructive Guide for Preparing, Executing, and Covering Up Contract Killing* (Paladin Press, 1983). While the book is out of print, it is available online at <<http://ftp.die.net/mirror/hitman/>>.

²⁵¹ “Court Backs Lawsuit Against Publisher of Hit Man Book that gives Murder Tips,” *The Legal Intelligencer*, November 12, 1997, 4.

²⁵² Adrianna D. Kastanek, “From Hit Man to a Military Takeover of New York City: The Evolving Effects of *Rice v. Paladin Enterprises* on Internet Censorship,” *Northwestern University Law Review*, 2004, Fall, 383.

²⁵³ Kastanek, “From Hit Man to a Military Takeover of New York City,” 384.

²⁵⁴ Garry, “Defining Speech in an Entertainment Age,” 150.

²⁵⁵ Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (New York, NY: Little, Brown and Company, 1995).

²⁵⁶ Garry, “Defining Speech in an Entertainment Age,” 150.

²⁵⁷ Pyle, “Is Violence Really Just Fun and Games?” 431.

- ²⁵⁸ Mathieu Ferland, "Tom Clancy's Splinter Cell- Double Agent Q & A," *Gamespot.com*, December 14, 2005, <<http://www.gamespot.com/xbox360/action/splintercell4/news.html>>.
- ²⁵⁹ "Splinter Cell: Trailer 2," *Gamespot.com*, September 10, 2002, <<http://www.gamespot.com/xbox/action/splintercell/media.html>>.
- ²⁶⁰ Colleen Carey, "The Blame Game: Analyzing Constitutional Limitations Imposed on Legislation Restricting Violent Video Games Sales to Minors After St. Louis," *Pace Law Review* Fall (2004): 127.
- ²⁶¹ "Splinter Cell Chaos Theory: Official Trailer 5," *Gamespot.com*, April 2, 2005, <<http://www.gamespot.com/xbox/action/splintercell3/media.html>>.
- ²⁶² "Army Recruits Video Games," *CBSNews.com*, March 30, 2004, <<http://www.cbsnews.com/stories/2004/03/30/eveningnews/main609489.shtml>>.
- ²⁶³ "Full Spectrum Warrior: Take Command," *THQ.com*, <<http://thq.com/game.asp?1027|52023>>.
- ²⁶⁴ Clive Thompson, "The Making of an Xbox Warrior," *New York Times*, August 22, 2004, 33.
- ²⁶⁵ "Advertisers Go After Video Game Spectators," *CNN.com*, May 18, 2005, <<http://www.cnn.com/2005/TECH/fun.games/05/18/e3.advertising.reut/index.html>>.
- ²⁶⁶ Curt Feldman, "Jeep's Jeff Bell Jumps in With Both Feet: DaimlerChrysler Marketing Boss Says Online is King, and He's Come to E3 Looking for Games Good Enough for His Ads," *Gamespot.com*, May 18, 2005, <http://www.gamespot.com/news/2005/05/18/news_6124360.html>.
- ²⁶⁷ "Law Shields Firms that Sanitize Movies," *Chicago Sun Times*, April 28, 2005, <<http://www.suntimes.com/output/movies/cst-nws-clean28.html>>.
- ²⁶⁸ Francois Laramee, *Secrets of the Game Business* (Charles River Media, 2003).
- ²⁶⁹ "Woman Sues Video Game Manufacturer," *CNN.com*, 28 July 2005, <<http://www.cnn.com/2005/TECH/fun.games/07/27/game.lawsuit.ap/index.html>>.
- ²⁷⁰ Mark Morford, "There's Sex in My Violence. Anyone Game?" *The San Francisco Chronicle*, July 22, 2005, E1.

²⁷¹ In other words, when using a PC, a gamer can easily access the game's software code. However, on the Xbox and PS2, the consoles have a closed source code which cannot be accessed except by very specialized programmers.

²⁷² "Lieberman Praises 'Adults Only' Rating for Grand Theft Auto," *Joe Lieberman: United States Senator*, July, 21 2005, <<http://lieberman.senate.gov/newsroom/release.cfm?id=241127>>.

²⁷³ "Video Game Rating Board in the Hot Seat," *CNN.com*, 19 July 2005, <<http://www.cnn.com/2005/TECH/fun.games/07/19/grading.games.ap/index.html>>

²⁷⁴ Curt Feldman, "Cooling Hot Coffee: Inside San Andreas' AO Rating," *GameSpot.com*, July 21, 2005, <http://www.gamespot.com/news/2005/07/21/news_6129557.html>.

²⁷⁵ Salisbury, *Game Development Business and Legal Guide*, 6.

²⁷⁶ Tom Loftus, "Is that Your Joystick? Or Are You Playing 'Leisure Suit Larry?'" *MSNBC.com*, Technology & Science, October 12, 2004. Available at: <<http://www.msnbc.msn.com/id/6072813/>>.

²⁷⁷ See Paul Hyman, "Console Makers Tout new Features, but Content is Still King," *Game Daily Biz*, August 4, 2005, <http://biz.gamedaily.com/features.asp?article_id=10207&filter=hollywood&email=>. "Next-Generation Graphics," *IGN.com*, July 26, 2005, <<http://cube.ign.com/articles/636/636818p1.html>>.

²⁷⁸ Francois Laramee, *Secrets of the Game Business* (Charles River Media, 2003), xix.

²⁷⁹ Jeff Gerstmann, "BMX XXX Video Review," *GameSpot.com*, November 10, 2002, <<http://www.gamespot.com/xbox/sports/bmxxxx/review-2.html>>.

²⁸⁰ Laramee, *Secrets of the Game Business*, xx.

²⁸¹ These three consoles are not the only ones on the market. Sony's recently-released PlayStation Portable competes for portable console users like those that Nintendo's Game Boy has.

²⁸² Note: personal computer titles are considerably cheaper to develop and publish since the two parties can skip the console step and proceed straight to the retailer. The developers and publishers need no licensing contract because PCs require no license.

²⁸³ Patrick M. Garry, “Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games,” *Southern Methodist University Law Review* Winter (2004): 149.

²⁸⁴ John Stuart Mill, *On Liberty* (Penguin Books, 1975): 20.

²⁸⁵ A game like *The Political Machine* is indeed political but does not necessarily push the limits of speech. In this game, the player manages a political season from primaries until the presidential election. The game comes complete with President Bush’s and Senator Kerry’s likenesses. Perhaps a game like *Getting Up: Contents Under Pressure* would be political, but not brazenly political. This game, released by The Collective Publishing in Fall 2005, features characters that the player may control in order to spread graffiti around a city.

²⁸⁶ “Jesse ‘Video Game’ Ventura,” *CBSNews.com*, April 26, 2002, <<http://www.cbsnews.com/stories/2002/04/26/politics/main507378.shtml>>.

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VITA

Joseph Bailey has taught at Hardin-Simmons University in Abilene, Texas since 2004. Mr. Bailey graduated in 2000 with a Bachelor's Degree in Communication from Hardin-Simmons University and from Abilene Christian University in 2002 with a Master of Arts in Communication and from Texas A&M University in 2006 with a Doctor of Philosophy. He is available at Hardin-Simmons University, HSU Box 16145 Abilene, TX 79698 and at jbailey@hsutx.edu.