Free Speech and Election Law

Violence ≠ Obscenity

*By Geoffrey W. Hymans**

On September 17, 2007, the United States District Court for the Western District of Oklahoma became the latest federal court to strike down a state law regulating the distribution of "violent" video games.[1] This followed hard on the heels of a similar decision from the Northern District of California.[2] In both cases the state crafted regulations that tracked the legal test for obscenity set forth in *Miller v. California*,[3] yet neither court accepted the argument that depictions of violence could constitute a separate category of unprotected "obscene" speech akin to currently unprotected sexual obscenity. An examination of the history of the "violence as obscenity" argument provides an opportunity to examine how and why sexual expression really is uniquely treated under the First Amendment.[4]

The recent United States District Court opinions are not the first to examine the regulation of violent video games. Two federal Circuit Courts have struck down local regulatory schemes. The Eighth Circuit stuck down a St. Louis County ordinance barring the sale, rental, or provision of "graphically violent" video games to minors.[5] In that case, the court dismissed comparisons of violence to sexual obscenity with a curt: "Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults."[6]

Judge Richard Posner authored a Seventh Circuit opinion that engaged in significantly more analysis of the different regulatory rationales for censoring sexual obscenity and violence, but reached the same result.[7] In typical Posnerian style, the judge closely examined the distinct rationales for banning sexual obscenity and violence, and determined that insulating children from the "cartoon-like" violence presented in the video games at issue was not a compelling interest.

Five other district courts have invalidated direct state regulation of violent video games.[8] Direct regulation of violent movies and videos have fared no better,[9] and courts have also rejected secondary regulation through the tort liability mechanism.[10] Thus, those members of the Federalist Society with a libertarian bent might cheer the consistent protection the courts have provided when faced with the censorship of violent video games. Yet the consistent rejection of video game regulation using the same basis—and often the same language—as statutes regulating sexual obscenity encourages us to take a step up the abstraction ladder and inquire why violence is treated differently than sex when it comes to classification as obscenity?

The "Violence as Obscenity" approach can largely be traced back to a single source: Professor Kevin W. Saunders' book by that title published in 1996.[11] Although there appear to have been prior scattered legislative attempts to restrict access to violent media materials, particularly with respect to minors,[12] Professor Saunders provided the playbook when the development of interactive videogames and highly publicized school shootings coincided to spur state and local regulatory zeal.[13] The introduction to his book was straightforward:

> This work accepts the existence of the obscenity exception, but it will be argued that the exception is misfocused, or at least too finely focused, on depictions of sex and excretory activities. Violence is at least as obscene as sex. If sexual images may go sufficiently beyond community standards for candor and offensiveness, and hence be unprotected, there is no reason why the same should not be true of violence.[14]

Saunders work thoroughly tracked the development of obscenity law, including the sliding-scale obscenity standards which the Supreme Court applied to minors.[15] He cited studies from that time arguing that exposure to violent media causes aggressive behavior.[16] The book actually included a chapter specifying how to draft a statute regulating violent content using the *Miller* test adapted from sexual obscenity.[17]

That playbook was followed by the legislatures of Oklahoma, California, Louisiana, Michigan, and Illinois, and by local legislative bodies in the City of Indianapolis and St. Louis County.[18] All utilized the *Miller* standards adapted to violent content. Often the *Miller* standards were incorporated into the definition of a "violent video game," the distribution of which was then limited by the statute or ordinance. The California statute[19] is typical:

> (d) (1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:
>
> (A) Comes within all of the following descriptions:
>
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
>
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
>
> (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

Thus far, no court has adopted Professor Saunders view that portrayals of violent acts can be obscene in the same manner as portrayals of sexual acts. Obviously legislatures have differed in their conclusions. Commentators have even latched on to sexual descriptors, referring to very violent movies as "torture porn."[20] And scholars continue to debate in the pages of law journals.[21]

But since the courts seem set on rejecting the "violence as obscenity" trope, might we not inquire about the rationales for the distinction? Judge Posner came closest to enunciating such a rationale, asserting the violent content was being regulated for its potential effect upon the viewer, while obscene sexual

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depictions were banned merely for their offensiveness.[22] But while that may have been true for the Indianapolis ordinance under review in *Kendrick*, that is not the focus of Professor Saunders' work, and presumably not the focus of the legislatures which used his road map. Saunders wants to regulate violence both for the effects it allegedly has on its viewers and because it is offensive.

In truth, as Posner seems to acknowledge, it is very hard to separate these rationales. Perhaps violent media is offensive to some both because they believe it causes violent behavior in viewers and because it makes their stomachs churn. Certainly, the effect on the viewer includes both any increased propensity to violence and any psychic—or gastrointestinal—impacts.

Is the redefinition of violence as obscenity any different than the attempted redefinition of pornographic media as actual acts of violence against women? Those arguments, made most prominently by Catherine MacKinnon and Andrea Dworkin in the 1980s,[23] were also rejected by courts.[24] In that instance, the inability to expand the *Miller* definition of obscenity to include "soft-core" pornography led to the attempt to change the "rules of the game" by shifting the terrain from message to action.

Although the courts have thus far rejected the social science studies cited to them regarding the correlation between violent media and aggressive behavior,[25] the question remains: why are the courts so much more vigilant when it comes to the effects of violence as compared to the effects of sex? Compare the treatment of the effects of violent video games with the treatment of "secondary effects" with regard to exotic dancing. One might wonder why the postulated "effects" (since courts have even eliminated the requirement to demonstrate such effects with regard to the actual establishment being regulated) of nude dancing on a surrounding neighborhood form the basis for significant regulation of that dancing (including regulations that experts have testified affect the "message"—such as distance regulations[26]) while similar correlations of game playing violence with "desensitivity" to actual violence are insufficient basis for regulation.[27] And why is the legislative body due deference in the fact-finding role of deciding what are the secondary effects of nude dancing while the legislature is not due any deference in determining the degree of correlation (or even causation, if that is a factual issue) with regard to violent video games?[28]

If the courts want to close the door on these repeated "redefinition" arguments to eliminate First Amendment protection for discrete categories of speech, the only effective way to halt such attacks would be for the courts to eliminate the comparison class. This is not because of actual similarity between materials deemed sexually obscene and other categories of expression regulators seek to restrict. Rather, it is because of the way lawyers think.

Lawyers reason and argue by analogy.[29] And lawyers representing those trying to regulate violent video games will reach for the nearest analogy. Categories of wholly unprotected speech related to violence include incitement[30] and "fighting words,"[31] both of which require immediacy of effect unlikely to ever be demonstrated in sufficient empirical certainty to support regulation of video games. But the obscenity category of wholly unprotected speech, because of its amorphous and inherently undefined character, presents the most attractive analogous target.

With seven decisions rejecting regulation of "violent" video games, only a quantum causational leap in the studies underlying the regulatory efforts, or an adverse Supreme Court decision, appears likely to permit future regulation. However, add a dose of sex and we will see if the courts take a different approach. [32]

Endnotes

1 Entm't Merchants Ass'n. v. Henry, 2007 WL 2743097 (W.D. Okla.).

2 Video Software Dealers Ass'n. v. Schwarzenegger, 2007 WL 2261546 (N.D. Cal.)

3 413 US 15 (1973). The *Miller* test is:

(a) whether the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. at 24.

4 Given time and space limitations, the scope of this article is necessarily narrow, addressing only the federal case law on violence as obscenity.

5 Interactive Digital Software Association v. St. Louis County, 329 F.3d 954 (8th Cir. 2003).

6 *Id.* at 958.

7 Am. Amusement Machine Ass'n. v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

8 Entertainment Software Ass'n. v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006); Entm't Software Ass'n. v. Hatch, 442 F. Supp. 2d 1065 (D. Minn. 2006); Entm't Software Ass'n. v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006); Entm't Software Ass'n. v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Video Software Dealer's Ass'n. v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

9 Video Software Dealers Ass'n. v. Webster, 968 F.2d 684 (8th Cir. 1992) (affirming Video Software Dealers Ass'n. v. Webster, 773 F. Supp. 1275 (W.D. Mo. 1991)); Davis-Kidd Booksellers v. McWherter, 866 S.W. 2d 520 (1993).

10 James v. Meow Media, Inc., 300 F.3d 683 (6th Cir.2002); Wilson v. Midway Games, Inc., 198 F.Supp.2d 167 (D.Conn.2002); Sanders v. Acclaim Entm't, Inc., 188 F.Supp.2d 1264 (D.Colo.2002); Byers v. Edmondson, 826 So.2d. 551 (2002).

11 Kevin W. Saunders, Violence as Obscenity: Limiting the Media's First Amendment Protection (1996) (*hereinafter* "Saunders").

12 *Supra,* note 10.

13 Highly publicized school shootings included the Columbine massacre in 1999. Perpetrators Eric Harris and Dylan Klebold were reportedly fans and players of "first-person shooter" video games such as Doom. *Available at* http://www.time.com/time/magazine/article/0,9171,1101991220-35870,00.html. The sponsor of the Washington State statute cited the Columbine shootings and violent video games such as Grand Theft Auto (in which characters can shoot police officers) as the motivation for her introduction of the legislation. *Available at* http://www.pbs.org/newshour/extra/features/july-dec03/video_7-16.html. And the St. Louis ordinance struck down by the Eighth Circuit specifically mentioned several school shootings in the legislative findings. *See* Interactive Digital Software Ass'n v. St. Louis County, Mo., 200 F.Supp.2d 1126 (E.D.Mo. 2002).

14 Saunders at 3.

15 Ginsburg v. New York, 390 U.S. 629 (1968).

16 *See, e.g.,* Saunders, ch. 2.

17 *Id.*, ch. 9.

18 Minnesota and Washington adopted more targeted statutes. Minnesota enacted a ban on rental or purchase of video games with an Entertainment Software Rating Board rating of AO (Adults Only) or M (Mature) by those under seventeen years of age. Minn. Stat. §325I.06. Washington enacted civil penalties for selling or renting to minors video games that contain "realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game depicted, by dress or other recognizable symbols, as a public law enforcement officer." RCW 9.91.180. A bit of a disclaimer—the Washington statute was passed during the time in which I served as Senior Counsel for the Republican Caucus of the Washington State House of Representatives, however I did not work on the bill or the issue.

19 Cal. Civ.Code §§ 1746(d), cited in *Schwarzenegger*, *supra* note 2.

20 Commentator Julie Hilden has written presciently on these issues. *See* Julie Hilden, *The Attacks on "Violent" Video Games" and "Torture Porn" Films: Two Different Strategies to Try to Get Around First Amendment Protections*, Sept. 17, 2007, *available at* http://writ.news.findlaw.com/hilden/20070917.html; Julie Hilden, *Free Speech and the Concept of "Torture Porn": Why are Critics So Hostile to "Hostel II"?*, July 16, 2007, *available at* http://writ.news.findlaw.com/hilden/20070716.html . *See also, e.g.,* David Edelstein, *Now Playing at Your Local Multiplex: Torture Porn*; *available at* http://nymag.com/movies/features/15622/.

21 A simple Westlaw search for "video game" in the title of journals and law reviews produces thirty-eight citations.

22 *Kendrick*, 244 F.3d at 574-76.

23 *See, e.g.* Catherine McKinnon, Only Words (1993).

24 *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

25 *See, e.g.*, *Schwarzenegger*, *supra* note 2, at 6, 11 (discussing California legislature's reliance on studies by Dr. Craig Anderson, a Ph.D. psychologist).

26 Experts have testified, often without opposing testimony, that distance affects the *content* of exotic dance. *See, e.g.,* Colacurcio v. City of Kent, 163 F.3d 545, 559 (9th Cir. 1998) (Reinhardt, J., dissenting; discussing the expert opinions of Dr. Edward Donnerstein and Dr. Judith Hanna).

27 Compare *Interactive Digital Software Ass'n. v. St. Louis County*, *supra*, in which the County legislative body's conclusion – based on the testimony of an expert who appeared before them – that violent video games frequently result in more aggressive behavior, with the same federal circuits typical treatment of the evidentiary requirements for restricting nude dancing. SOB, Inc. v. County of Benton, 317 F.3d 856 (8th Cir. 2003)(holding that local government may rely on studies from other local governments to justify banning nude dancing). In many ways video games would appear to be rather close analogs of dance, since both are expressive activities rather than "pure" expression.

28 Perhaps the secondary effects test, like the obscenity doctrine itself, is merely a reflection of the "sex is different" approach of the Supreme Court. While we have started to see arguments regarding "secondary effects" made beyond the nude dancing/adult entertainment context, perhaps Justice Brennan's concurrence/dissent from *Boos v. Barry*, 485 U.S. 312, 334-338 (1988), Justice Souter's concurrence in *Barnes v. Glen Theatre, Inc.*, 501 US 560, 585-586 (1991), and footnote 7 from the majority opinion in *RAV v. St. Paul*, 505 U.S. 377 (1992), serve to limit the spread of this unique doctrine.

29 *See, e.g.,* Cass R. Sunstein, *On Analogical Reasoning,* 106 Harv. L. Rev. 741, 741 (1993); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy,* 109 Harv. L. Rev. 925, 926 (1996) (describing how the common law promotes reasoning by analogy to tie changing facts and circumstances to earlier judgments); Richard Posner, *Reasoning By Analogy*, 91 Cornell L. Rev. 761 (2006) (reviewing Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, 2005).

30 Courts analyzing violent video games have noted that they don't spur imminent violence. *See*, *e.g., Schwarzenegger*, *supra* note 2 at 4, discussing Brandenburg v. Ohio, 395 U.S. 444 (1969)(*per curiam*).

31 *See, e.g.*, *Kendrick*, *supra* at 575, discussing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

32 The "Grand Theft Auto: San Andreas" video game included code which, when unlocked with a software modification, allowed the player to view explicit sex scenes. Steve Lohr, *In Video Game, a Download Unlocks Hidden Sex Scenes*, N.Y. Times, July 11, 2005, *available at* http://www.nytimes.com/2005/07/11/technology/11game.html. This spurred the interest of at least one potential regulator. Raymond Hernandez, *Clinton Urges Inquiry Into Hidden Sex in Grand Theft Auto Game*, N.Y. Times, July 14, 2005, *available at* http://www.nytimes.com/2005/07/14/nyregion/14hillary.html.