Law Regulating Culture: The Legislative War on Videogames

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Introduction

In a connected world, people now have access to an overwhelming array of information and entertainment from books, movies, videogames, and internet sites. Traditionally, the United States has valued the free exchange of information and ideas, but this tradition is not without conflict. While freedom of speech is guaranteed by the First Amendment of the U.S. Constitution, people are often so outraged or offended by the content or message of speech that they argue the danger outweighs the right. The Supreme Court has laid out some exceptions to the absolute mandate of the First Amendment, but there is a strong presumption against content-based regulations. Despite this, many organizations and legislators have lobbied for increasingly restrictive regulations over the content of videogames.

With the increased capabilities of computers and videogame consoles, game designers have been able to create increasingly complex and detailed games. Games usually include enemies, weapons, and violence to varying degrees. Many parents are now concerned that the exposure to exceedingly graphic violence is desensitizing their children to real-life violence and harming them psychologically. No game has received quite the amount of parental outrage as the Grand Theft Auto series, though plenty of other games are as graphically violent, if not more so. However, for several gamers

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questioned during the writing of this Article, *Grand Theft Auto* did not even make the list of most violent videogames.¹

First Amendment aside, several state legislatures have attempted to restrict, if not outright criminalize, violent videogames. At the time of this writing, Arizona, Massachusetts, California, Illinois, Michigan, Minnesota, Florida, Utah, Maryland, Virginia, Louisiana, Oklahoma, New York, and Washington have all introduced legislation attempting to restrict violent videogames in some manner.² Of the proposed bills that made it through the legislature, most have not ultimately passed constitutional muster with the judicial system. Recently, the Supreme Court granted certiorari to a first amendment case out of California restricting the sale of violent videogames. This is the first time the Supreme Court will address videogames as a form of speech.

This paper examines the current law revolving around videogames and chooses one game, Call of Duty: Modern Warfare 2, to discuss in light of these law and the proposed laws, particularly the California law at the center of the upcoming Supreme Court case.

I. The Controversy

Videogames have come a long way since “Pong” was released in 1972 on the Magnavox Odyssey.³ Early videogames were generally composed of shapes and relatively simplistic actions, like Tetris or Pacman. Even Super Mario Brothers on the

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¹ Top of this informal list was *Manhunt*, a game released in 2003 where the player is a death row inmate enlisted to kill people for snuff films in exchange for his freedom. Gamespot.com, *Manhunt Review for Xbox*, http://www.gamespot.com/xbox/action/manhunt/review.html?om_act=convert&om_clk=gssummary&tag=summary%3Bread-review (last visited May 2, 2010).
NES console, a game and a system considered advanced for the time period, is outshone by the graphics and storylines of modern games. As technology has improved, videogames have evolved, often looking more like a movie than what has traditionally been categorized as a videogame.

Now that game developers have the ability to design very realistic looking games and complex storylines, controversy has followed suit. Many parents and psychiatric professionals are concerned about the effect videogames characterized as violent have on children. Studies on the effects games, violent or otherwise, have on the brain and personality have been conducted since the dawn of arcades in the 70s. The focus now is largely on violent videogames, though again studies on violence in the media are certainly not new.

Plenty of studies have found a correlation between video game violence and violent behavior, however to date none have definitively pointed out causation.

Additionally, some psychologists, research scientists, and jurists have pointed out

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4 See Rus McLaughlin, IGN Presents the History of Super Mario Bros., IGN, Nov. 8, 2009, http://games.ign.com/articles/833/8336151p1.html. Though technology has left the console far behind, fans still remember the original Super Mario Bros and the NES fondly.

5 See, e.g., DAVID WALSH, PH.D., VIDEOGAME VIOLENCE AND PUBLIC POLICY, NATIONAL INSTITUTE ON MEDIA AND THE FAMILY 1 (2001) available at www.soc.iastate.edu/sapp/videogames2.pdf. Of course, there was some outcry over videogame violence long before technology had advanced past 8-bit games. In the 1970s, when gaming was still in its infancy, an arcade game called “Death Race,” based on a movie by the same name, caused public outrage upon release. Gamespot, When Two Tribes Go to War: The History of Video Game Controversy, http://www.gamespot.com/features/6090892/p-2.html (last accessed Nov. 30, 2009). The game and movie were based on the plot that in the year 2000 hit-and-run driving was a sport. Id. The game consisted of controlling a vaguely car-shaped object and attempting to run over vaguely-peopleshaped objects (called “gremlins”). Id. When the car shape hit the people shapes the game would make an “ahhhk” noise and the person shape would transform into a gravestone. Id. The game was pulled from the market after it was “aggressively rejected by the public…” Id.


8 See, e.g. Ferguson, et al., supra note 6, at 312 (“However, as many of the studies included in these analyses fail to consider ‘third’ variables…, it remains unclear whether these results are truly causal as opposed to spurious.”)
methodological flaws in those studies casting doubt on the data.\(^9\) Despite this, the American Psychological Association, American Academy of Pediatrics, and other organizations support the connection between violent media and aggressive behavior in adolescents.\(^10\) According to these organizations, “prolonged viewing of media violence can lead to emotional desensitization toward violence in real life.”\(^11\)

In *Videogame Software Dealers Ass’n v. Schwarzenegger*, the Ninth Circuit found that studies relied on by the state of California did not sufficiently show “a causal link between violence in video games and psychological harm.”\(^12\) For each study the court found that there were certain flaws that prevented the court from definitively finding the causal link. One study by Dr. Craig Anderson concerned the court because of “its retreat from the study of the psychological effects of video games as related to the age of the person studied.”\(^13\) A second study relied on by California admitted that they could not directly answer whether the correlation between violent videogames and aggression was because of the exposure to violent videogames or rather because aggressive adolescents


\(^11\) *Id.*

\(^12\) *Id.*

\(^13\) *Id.* This study by Dr. Anderson found significant links between adolescent exposure to violent videogames and increased aggression. Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. ADOLESCENCE 113, 113 (2004). The paper looked at different studies and found that ones utilizing “better methods” found very high “effect size” between videogame violence and aggression that was higher than that for condom use and HIV infection decreases. *Id.* at 120. However, Dr. Anderson does note that there is a “glaring empirical gap” for violent videogame studies, which is the lack of long term observational studies (“longitudinal studies”) of the effects on aggression. *Id.* at 121.
prefer violent games.\textsuperscript{14} Another significant issue for some critics is that these studies largely “fail[ed] to account for participants’ exposures to family violence.”\textsuperscript{15}

Despite the conflicting data about violent videogames and the confusion around causation vs. correlation in scientific data, many parents and media watch groups have been keen to impose legislation controlling or outright banning access to violent videogames. Some early cases brought against videogame companies held that videogames were not speech protected by the First Amendment and so could be controlled as legislatures saw fit.\textsuperscript{16} The first of these cases was \textit{America’s Best Family Showplace Corp. v. City of New York} in 1982.\textsuperscript{17} In \textit{America’s Best}, the city of New York passed a zoning ordinance prohibiting restaurants from installing more than four video game devices.\textsuperscript{18} There the court determined that “[i]n no sense can it be said that video

\textsuperscript{14} \textit{Videogame Software Dealers Ass’n}, 556 F.3d at 964. The research by Douglas Gentile and others examined students from eighth and ninth grade classes from four schools in the Midwest United States. Douglas A. Gentile, \textit{et al.}, \textit{The Effects of Violent Video Games Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance}, 27 J. ADOLESCENCE 5, 9–10 (2004). The study collected data on exposure to violent videogames, amount of time spent playing videogames, “trait hostility” using a modified version of the Cook & Medley Hostility Scale, parental limits on videogame play, number of arguments with teachers, grades, and number of physical fights. \textit{Id.} at 10–11. They found that exposure to video game violence was positively correlated with higher trait hostility based on three factors: amount of violence adolescents prefer in games, how much they prefer violence in comparison to two or three years prior, and amount of exposure to violent games. \textit{Id.} at 18. It is interesting to note that the study found parental involvement with the videogame habits of their children “appear[ed] to act as a protective factor.” \textit{Id.} at 19.

\textsuperscript{15} Ferguson, \textit{et al.}, \textit{supra} note 6, at 312. In this study, researchers found that once they controlled for exposure to family violence “video games did not hold any predictive power regarding the commission of violent crimes.” \textit{Id.} at 329. Rather, their results suggested some aggressive personalities seek out violent video games. \textit{Id.} The first study described in this paper involved undergraduate student volunteers split into three groups. The first group was assigned a violent videogame, the second group a nonviolent videogame, and the third chose which game they wanted to play based on written descriptions. \textit{Id.} at 316. The study measure volunteer demographics, trait aggression, video game habits, aggressive behavior, and a follow-up survey on reactions to the games. \textit{Id.} at 316–17. The second study examined exposure to family violence by participants. \textit{Id.} at 316. In this study the researchers collected data on student demographics, trait aggression, video game habits, exposure to family violence, and violent criminal behavior. \textit{Id.} at 323–24.


\textsuperscript{17} 536 F. Supp. 170, 173 (E.D.N.Y. 1982).

\textsuperscript{18} \textit{Id.} at 171.
games are meant to inform.”19 According to the court, videogames are more akin to playing chess or baseball despite the fact that “some of these games talk to the participant, play music, or have written instructions….20 Therefore, videogames are not protected by the First Amendment.21 Applying the less stringent requirements of due process and equal protection, the court held the ordinance was valid.22 Other courts in the 1980s followed this example and found videogames were not protected speech.23

The Seventh Circuit in 1989 went in a different direction, acknowledging that there was uncertainty surrounding the protected status of videogames.24 In Rothner, the City of Chicago passed an ordinance prohibiting minors from playing videogames on school days.25 The Seventh Circuit never reached the issue of whether videogames are protected speech and instead affirmed the district court on the premise that even if they are protected speech, the ordinance is a legitimate restriction.26 The court did note, however, while other courts had held that video games are not protected speech, this did not mean all video games were “completely devoid of any first amendment protection.”27 The court was also uncertain how to interpret the games at issue in the specific case and stated, “To hold on this record that all video games—no matter what their content—are completely devoid of artistic value would requires us to make an assumption entirely

19 Id. at 174.
20 Id.
21 Id.
22 Id.
23 Li, supra note 16, at 473, n. 57.
24 Rothner v. City of Chicago, 925 F.2d 297, 303 (7th Cir. 1991) (“[W]e cannot tell whether the video games at issue here are simply modern day pinball machines or whether they are more sophisticated presentations involving storyline and plot that convey to the user a significant artistic message protected by the first amendment.”)
25 Id. at 298.
26 Id. at 303.
27 Id.
unsupported by the record and *perhaps* totally at odds with reality.”

Following this case, courts began recognizing that video games were entitled to first amendment protection.

In 2001 the Seventh Circuit granted a preliminary injunction to a complaining arcade industry group, regarding an Indianapolis ordinance restricting minors access to arcade games depicting violence. The ordinance used the phrases “morbid interest” for violent videogames and “prurient interest” for videogames involving sex and then included the familiar *Miller* obscenity test language regarding lack of serious scientific, artistic, literary, or political value. The Seventh Circuit began by pointing out that “[v]iolence and obscenity are distinct categories of objectionable depiction” and that excluding violence from the realm of protected speech is not compelled or foreclosed based on obscenity’s exclusion. After comparing some of the obscenity factors with violence, the court stated clearly that “[c]hildren have First Amendment rights.” Going even further, the court opined that it is in fact integral to our society that children be exposed to many ideas rather than be “raised in an intellectual bubble.” Next, the court listed several literary classic with graphic descriptions of violence, including the “Odyssey,” “War and Peace,” and “Grimm’s Fairy Tales,” and concluded that protecting children from violent imagery was “deforming.” The court also noted that the interactive nature of videogames is a superficial and erroneous point and “all

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28 *Id.*
29 American Amusement Machine Ass’n v. Kendrick, 244 F.3d 572, 573 (7th Cir. 2001).
30 *Id.*
31 *Id.*
32 *Id.* at 576.
33 *Id.* at 577.
34 *Id.* (“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.”)
The court continued to wax philosophical on the depictions of violence in the popular culture for generations, but more importantly determined that the city had to demonstrate compelling grounds to restrict videogames, not just plausible grounds. While the injunction was preliminary only, the court’s tone was very clear: videogames are protected speech and any restrictions have to pass constitutional muster.

In a similar case to the Indianapolis ordinance, city of St. Louis, Missouri passed an ordinance in 2000 that made it “unlawful for any person knowingly to sell, rent, or make available graphically violent video games to minors, or to permit the free play of graphically violent video games by minors, without a parent or guardian’s consent.” Predictably, the videogame industry was not pleased by these turn of events and sued to enjoin St. Louis County from enforcing this ordinance. The district court dismissed the suit after denying the plaintiff industry’s motion for summary judgment based on the unconstitutionality of the ordinance.

On appeal, the Eighth Circuit reversed, finding that videogames are in fact a form of speech protected under the First Amendment. The district court maintained that “because video games are a new medium, they must be designed to express or inform, and there has to be a likelihood that others will understand that there has been some type of expression” to qualify for First Amendment protection. The Eighth Circuit did not

35 Id.
36 Id. at 576.
37 Id. at 580.
38 Interactive Digital Software Ass’n v. St. Louis County, Missouri, 329 F.3d 954, 956 (8th Cir. 2003), petition for reh’g en banc denied, 2003 U.S. App. LEXIS 13782 (2003) (internal quotation marks omitted).
39 Id.
40 Id.
41 Id.
42 Id. at 957.
find this argument persuasive, noting that the Supreme Court had long stated that entertainment speech was protected and that there need not be a “particularized message.” Beyond that, the court stated that the violent videogames at issue contained “age-old themes of literature,” among other factors, that books and movies do and the fact they are a “novel medium is of no legal consequence.” After determining that videogames were entitled to constitutional protection and the ordinance was a content-based regulation, the Eighth Circuit held that “strict scrutiny” must be applied. Finding that the obscenity exception to the First Amendment did not apply here, the court determined the County lacked empirical support for the ban. Given this, the court remanded the case to the district court with an order to enjoin the ordinance.

Despite these cases, many still hope to regulate the popular culture of videogame violence through legislation and lawsuits. Recently, the Arizona legislature passed a law making videogame publishers financially liable for “any felony, act of violence, or terrorism that an individual might commit while under the influence of dangerous or obscene viewing materials.” The legislation lasted two days before the Arizona Senate Judiciary Committee struck it down. The majority of the committee was concerned with “the bill’s gray areas” and the possibility that the legislation could be used to prosecute or sue media companies with movies, shows, or games “deemed objectionable

43 Id.
44 Id.
45 Id. at 958.
46 Id. The court found the County failed to produce enough evidence that violent videogames had a “deleterious effect” on the psychological health of minors who played them. Id. Additionally, the court found that the County did not have a “compelling interest in assisting parents to be the guardians of their children’s well-being” in this case. Id. at 959–60 (internal quotation marks omitted).
47 Id. at 960.
49 Id.
by certain parties.”51 The bills sponsors maintained they intend to reintroduce a “narrower version” of the bill.52

Additionally, the state of Massachusetts has attempted to pass a law reminiscent of the obscenity standard in Miller.53 Under the new bill the term “harmful to minors” would include matter that is

“obscene or, if taken as a whole it...(2) depicts violence in a manner patently offensive to prevailing standards in the adult community, so as to appeal predominantly to the morbid interest in violence of minors; (3) is patently contrary to prevailing standards of adults in the county where the offense was committed as to suitable material for such minors; and (4) lacks serious literary, artistic, political or scientific value for minors.”54

In May of 2008, however, the legislation was “sent into study” and essentially stalled.55 Interestingly enough, the legislation was stalled a month after Rockstar Games, the developer responsible for the Grand Theft Auto series, bought a smaller game company in New England and set up “Rockstar New England.”56 Given that the legislation has not yet made it through the Massachusetts court system, it is unclear whether it would be upheld if passed, though a similar statute in Louisiana was struck down by the courts.57

Finally, the state of California has been embroiled in a legal battle concerning video game legislation since 2005 when Governor Schwarzenegger, who notably starred

51 Whiting, supra note 48.
52 Wong, supra note 50.
56 Id.
in several violent films, signed the legislation into law. The legislation would ban “certain games” from being sold to minors and require game manufacturers to place a “four-inch square marker with 18 printed on it” on the packaging of violent games. The State argues that there is a “link between in-game violence and real-world violence” that justifies prohibiting minors from purchasing them, just as with pornography. In this Act, California defines a “violent video game” as “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” provided those acts fit into specified situations. One situation is where the game “[e]nables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.” The other situation is akin to the Miller obscenity standard, requiring the game to appeal to a “deviant or morbid interest of minors” based on a reasonable person standard, be patently offensive based on the “prevailing standards in the community” for minors, and the morbid or deviant interest “cause the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” Shortly after the legislation was passed, the district court enjoined enforcement of the legislation, holding that the law was likely unconstitutional. The court first stated that video games, “even though mere entertainment,” fall within the protection of the

60 Id.
62 Id.
63 Id.
64 Id. at 1048.
First Amendment. Applying a strict scrutiny standard, the court found that the plaintiffs were likely to prevail at trial, justifying a preliminary injunction. Noting first that content-based regulations on free speech are “presumptively invalid,” the court found that a state must demonstrate some real harm and that the “regulation will in fact alleviate these harms in a direct and material way.” Examining other cases, the court found other courts had not been persuaded that there was a causal link between video game violence and real life violence by minors. They found it likely the state of California would face this same problem as well.

On appeal, the Ninth Circuit affirmed the district court, finding the law was an “invalid content-based restriction on speech…subject to strict scrutiny….” The court also found that the state failed to demonstrate a compelling interest, to “tailor[ ] the restriction to the alleged compelling interest,” and that there was a “less-restrictive means” to further that interest. Similarly, the court also found that the act’s requirement that violent games be marked with a 4-inch square with the number 18 in it was “unconstitutionally compelled speech….”

In discussing the State’s alleged compelling interest, the court stated that they “must distinguish the State’s interest in protecting minors from actual psychological or neurological harm from the State’s interest in controlling minors’ thoughts. The latter is not legitimate.” As the other circuits have largely done, the Ninth Circuit examined the

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65 Id. at 1045.
66 Id. at 1046.
67 Id.
68 Id.
69 Id.
70 Videogame Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 953 (9th Cir. 2008).
71 Id.
72 Id.
73 Id. at 962.
psychological research proffered by the state to support the restriction and found it to be inadequate. As for less restrictive alternatives, the court suggested “an enhanced education campaign about the ESRB rating system directed at retailers and parents….”

According to the court, the State focused solely on “the most effective” means, ignoring their duty to demonstrate the measure is the least restrictive means reasonably available. Based on these findings, the court found the labeling requirement unconstitutional because it compelled speech that was not merely factual.

The state of California appealed the Ninth Circuit’s decision to the U.S. Supreme Court, who granted certiorari on April 26, 2010. This decision comes on the heels of another first amendment case where the Supreme Court held a federal law criminalizing depictions of animal cruelty was unconstitutional. In Stevens, Justice Roberts writing for the 8 to 1 majority stated:

“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document ‘prescribing limits, and declaring that those limits may be passed at pleasure.’”

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74 Id. at 964. The court examined three different studies introduced by California and found that they all specifically stated they were correlations only and they could not speak definitively as to causation. Id. Additionally, the court found that most of the studies had significant flaws in their methodology that were admitted by the researchers conducting them. Id.

75 Id. at 965.

76 Id. at 966. The court found that because they found the Act was unconstitutional the statement required was not factual: “Unless the Act can clearly and legally characterize a video game as violent and not subject to the First Amendment protections, the 18 sticker does not convey factual information.” Id. at 966–67. Additionally, they found the requirement failed the “Zauderer’s rational relationship test” because the requirement was not “reasonably related to the State’s interest in preventing deception of customers.” Id. at 967.


79 Id. at 17–19.
While Justice Roberts noted that past first amendment cases, such as *R.A.V. v. St. Paul* 80 and *New York v. Ferber* 81, have espoused balancing the interests involved, he ultimately determined that these were “descriptive” and that “[t]hey do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary….” 82 Some commentators believe the reasoning in this case will be applied to the Supreme Court’s future ruling on the *Schwarzenegger* case. 83 If so the onus is on California to rebut the presumption that video games are protected speech and may not be restricted on the basis of content. 84

Currently, the videogame industry employs a voluntary rating system to inform consumers what age range the game is appropriate for. 85 While currently there are no federal mandates requiring this of the videogame industry, a US Congressman from California has introduced a labeling bill, entitled “The Video Game Health Labeling Act of 2009.” 86 If passed, games rated teen or higher by the ESRB would require a health warning label, similar to those on cigarettes, stating “WARNING: Excessive exposure to violent video games and other violent media has been linked to aggressive behavior.” 87 It is not clear whether this bill would pass constitutional muster. The issue of video games,

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82 Stevens, 2010 U.S Lexis at 18–19.
83 See, e.g., Melissa Maleske, *Violent Video Games at the Supreme Court*, INSIDECOUNSEL, April 26, 2010. It is interesting to note, however, that the Supreme Court could have simply sent the case back to the Ninth Circuit to review in light of the Stevens decision but instead chose to hear the case itself. Lyle Denniston, *Court to Rule on Violent Video Games*, SCOTUSBLOG, April 26, 2010, http://www.scotusblog.com/2010/04/court-to-rule-on-violent-videos/.
84 See Stevens, 2010 U.S. Lexis at 14 (“Section 48 explicitly regulates expression based on content… As such, 48 is ‘presumptively invalid,’ and the Government bears the burden to rebut that presumption.”)
87 Id.
free speech, and restrictions may be more clear when the Schwarzenegger case is decided on by the Supreme Court next term.

II. Modern Warfare

While there are a myriad of more violent games to choose as an example of violent video games possibly impacted by the restrictions and bans discussed above, *Call of Duty: Modern Warfare 2* has the distinction of being controversial within the gaming community. The *Call of Duty* series at large has been a wildly successful series, combining both a single-player campaign and multi-player battles online. The most recent incarnation, *Modern Warfare 2*, sold close to 5 million copies ($310 million) on opening day in the UK and North America alone.\(^88\) *Call of Duty: Modern Warfare* and its sequel *Modern Warfare 2* are played from the perspective of modern American special ops forces waging war against terrorists.

As one might imagine, violence is an inherent element to military operations, and this game delivers. Often military games escape the wrath of video game reformers, but *Modern Warfare 2* sparked controversy before it was even released.\(^89\) In the single-player campaign, one mission puts the player in the shoes of a CIA operative undercover with the terrorist cell antagonist of the game. The mission, called “No Russian,” puts the player into an airport in the company of several heavily armed terrorists. The player walks slowly through a door into a crowded terminal and the men around the player open fire on the civilians milling about. The group continues walking through the airport at an excruciatingly slow pace gunning down civilians, including children, indiscriminately.

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break with the ordinary rules of the game, the player is not penalized for killing civilians. At the player’s discretion, they can try to maintain their cover by participating in the slaughter or simply walk behind the terrorists, observing. The player loses nothing by killing the civilians but nor does he or she gain anything. If they kill the terrorists in an attempt to protect the innocents, the player fails the mission. Once they exit the airport, the controversial part of the mission stops, but the violence certainly continues just with heavily armed police officers. In the end, the player is shot point blank through the skull by the terrorists, who knew all along the character was an American spy.

While the gaming community is largely united in the opinion that the game designers had every right to make the scene, there is a difference of opinion on whether it was necessary, advisable, or just plain in poor taste.\textsuperscript{90} Even some hardened gamers found themselves moved emotionally. One Gamespot.com commenter wrote:

“I heard of all the news of this level and how it’s all controversial and stuff…but when I actually played it. Oh man was i [sic] surprised, it felt so horrible, watching all those civilians die. And i [sic] never felt that kind of emotion in any game…..yes even GTA4, which the civilians seemed pretty generic. But this was deep man, it really gives you a sense of what’s it [sic] really like to be there….”\textsuperscript{91}

The reactions of parents and legislators in the U.S. has, to date, been reasonably subdued. Reactions from other countries, however, were pronounced. Australia’s Attorney General, for example, has pushed to have the game banned outright.\textsuperscript{92} It seems likely that inevitably the game will be added to the violent game list parents and politicians want legislatures to limit or ban.

\textsuperscript{91} Id. (comment by “NoLifeGamin” on Nov. 26, 2009).
\textsuperscript{92} Steve Watts, Australian Attorney General Pushing for Modern Warfare 2 Ban, 1UP.com, Nov. 25, 2009, \url{http://www.1up.com/do/newsStory?cId=3177089}. 
Assuming the Supreme Court took California’s video game legislation case and ultimately found the law constitutional, the question becomes what is Modern Warfare’s status under the law? Similarly, if Massachusetts legislature passed the stalled video game legislation and the judiciary upheld it, would Modern Warfare 2 be lumped in with hardcore pornography?

California’s proposed statute subjects violent games to restriction if it “[e]nables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.”93 Reading this on its face, it seems clear that the “No Russian” mission enables the player to inflict serious injury to human beings and most would agree that gunning down innocent civilians is heinous, cruel, and depraved. As it happens, though, these terms are defined in the proposed statute. First, “serious physical abuse” is defined as “significant or considerable amount of injury or damage to the victim’s body” involving a number of unpleasant action, including extreme physical pain and substantial impairment of the function of body parts and organs.94 The definition for “torture” is similar, but requires the victim to be conscious and includes mental abuse in addition to physical abuse.95

“Cruel” is defined as those situations where “the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.”96 Certainly players can theoretically choose to kill the civilians in a

94 Id.
95 Id.
96 Id.
variety of ways, including shooting them repeatedly while they try to crawl away.\textsuperscript{97} Would that meet the definition of torture or serious physical abuse? In the real world one would certainly hope so. Whether it’s what the author’s of the legislation had in mind is another matter. Regardless there is certainly the potential to inflict serious mental and physical abuse on virtual people.

The term “heinous” is reserved for violence that is “shockingly atrocious.”\textsuperscript{98} This means the killing “must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.”\textsuperscript{99} As noted previously with the term “cruel,” theoretically player’s could likely kill civilians in a way that could be perceived as torture or serious physical abuse that would certainly be set apart form simply shooting them quickly. It seems that the “No Russian” mission of the game could easily fit within this definition. Finally, “[d]epraved means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.”\textsuperscript{100} While there is no way to argue that the player is supposed to \textit{relish} the virtual killing of civilians, it is entirely possible an individual player could. Giving the California legislature the benefit of the doubt, however, and assume they intended this language to mean the game intends the player’s character to relish the killings. Arguably the player’s character in “No Russian” shows indifference to the suffering of victims since regardless of whether he or she ever fires a shot you have to follow the terrorists and ignore the screams of civilians.

\textsuperscript{97} See, e.g., Seth Schiesel, \textit{Choices in Infiltrating a Terrorist Cell}, \textit{NY TIMES}, Nov. 11, 2009, available at \url{http://www.nytimes.com/2009/11/12/arts/television/12call.html} (“If you go through the scene at all, you will watch [the civilians] mown down, then crawling for the lives before finally being dispatched.”)

\textsuperscript{98} \textit{Video Software Dealers Ass’n}, 401 F. Supp. 2d at 1038.

\textsuperscript{99} Id.

\textsuperscript{100} Id.
As a final important clarifying factor, the California legislature also included a section that states: “[p]ertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved includes infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim’s body, and helplessness of the victim.”101 There is no question that all of the civilians in the airport are helpless. They are unarmed airport patrons who have zero protection from the terrorist gunmen. Beyond that, the player is also able to inflict wounds on the victim far beyond what is necessary to kill the virtual victim. The ability to needlessly mutilate the victim’s body is less clear, but might be possible. Applying these factors to the above definitions and scenarios California could restrict Modern Warfare 2 as a violent videogame regardless of the game’s political, literary, or artistic value.

Addressing the second part of the California statute and the Massachusetts proposed bill, which are very similar, violent videogames may be banned if they appeal to a morbid interest of minors, are patently offensive passed on community standards for minors, and lacks serious value for minors.102 This is a highly subjective standard and really can vary from community to community. It does seem likely that a reasonable person would find the killing of unarmed civilians appeals to a morbid interest. It is also not hard to imagine a community that would largely find such a scene patently offensive, particularly in the context of minors.

The last factors, however, is the hardest to justify. It is very hard to argue that the game as a whole lacks serious political or artistic value. The scene itself arguably has

101 Id. at 1038–39.
serious political and artistic value. It addresses what are unfortunately real world events and puts the player in a situation that evokes strong emotions and makes them observe heinous acts, but ones that happens every day around the world. It is hard to argue that highlighting the atrocities of war lacks value. It is possible, however, that a legislature, judge, or jury could find differently. Ultimately, the game tells a story and this scene is part of that story, just as there are often violent and horrifying scenes in books and movies. A novel or a movie does not lose value simply because it depicts graphic violence. It is all part of the artistic expression of the storyteller. Critics of course may argue that the scene was for shock value to boost sales rather than artistic expression. While this part of the law is less likely to impact *Modern Warfare 2* than the part of the California act outlined in the above section, it certainly has the possibility of serious impact.

Finally, if laws like Arizona’s media liability statute were passed and upheld by courts, the designers and publishers of *Modern Warfare 2* would have cause for concern. Suppose a disturbed individual played *Modern Warfare 2*, then sometime within the next month walked into an airport and opened fire on the patrons? Was the individual under the influence of the game? These would be difficult questions to answer but there is little doubt someone would sue the company asserting just that. Arizona’s law does not elaborate on what constitutes “under the influence” so it is difficult to ascertain how much potential this law has to impact *Modern Warfare 2*, but it seems safe to say game publishers would think twice about releasing any game that could potentially contain imitateable violence.

III. The Bottom Line
The bottom line is that video games are protected speech under the First Amendment. They are stories, just like books or movies. Violence is not a new theme in literature and so it should not be surprising that theme is continued in new forms of storytelling. If video games are speech, just like books, then they do not lose their First Amendment protections purely because they contain violent imagery. For this reason, most legislative attempts to control this part of the popular culture should and must fail as content-based restrictions on free speech.

The problem with most of the proposed violent videogame regulations is that they are reactionary. After the Columbine school shootings, people immediately pointed to the fact that the young shooters played a myriad of “violent” video games.\(^\text{103}\) It is much easier to blame a videogame for teaching violence to the young than taking a close look at the individuals and asking why it happened, how it was allowed to happen, and what signs did everybody miss. These laws allow people to feel as if they are controlling what they perceive to be the violent culture of youth, but at the expense of free expression. As Judge Posner wrote in the *Kendrick* case, “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”\(^\text{104}\) Nor are they likely to be “[ ]equipped to cope with the world as we know it…,”\(^\text{105}\) which is in fact prone to violence. The fact that a videogame can make a person feel uncomfortable, nauseous, angry, or sad just as a great novel or film can, should confirm its place as protected speech in the public exchange of ideas.

Leaving aside for a moment the fact that children have first amendment rights, these laws ultimately impact adult use of video games. Some of these proposed laws,
like the Arizona liability statute, would chill speech outright. Companies will think twice about publishing a violent game if chances are good they will be sued for an individual’s violent actions. If no one publishes the games, adults cannot play. This ultimately harms adults by limiting their access to certain kinds of speech. The violent video game restrictions for minors are unlikely to chill speech outright, but may also impact access of these games to adults since some retailers may choose not to carry them because of the hassle.

The temptation to regulate popular culture, such as video games, through legal channels is very great. But it is simply not the place of the government to control or limit it. The government sets dangerous precedent when it regulates how an individual may express their views and ideas simply because people are afraid or offended by that expression. The term “pop culture” is often connoted as material that is insubstantial and less important than other forms of expression. This is an erroneous concept. Pop culture expression, such as video games, deserve the same legal protections art, literature, and political speeches are entitled to under the Constitution. Beyond those protections the law is not an appropriate venue for controlling pop culture.