

# SHIELDING CHILDREN FROM VIOLENT VIDEO GAMES THROUGH RATINGS OFFENDER LISTS

KEVIN W. SAUNDERS\*

## INTRODUCTION

The past decade has seen a great deal of concern over the exposure of children to violent video games. Social scientists have provided a basis for that concern through studies linking the playing of such games to real world aggression,<sup>1</sup> but the links have not been sufficiently strong for the courts to accept legal limitations on access by children.<sup>2</sup> In each case, legislative limitations have been opposed by the video game industry, even though the industry's own ratings system considers many of the violent games unsuitable for children.<sup>3</sup> The purpose of this Article is not to suggest the abandonment of the legislative attempts at limiting access. The analysis of the courts rejecting the previous attempts has focused on the purported failure of the science to support the necessity of the restrictions to meet the accepted compelling interest in the physical and psychological well-being of youth.<sup>4</sup> That analysis is time bound. That is, all a court could say is that the science, as it existed at the time of the court's examination of the issue, failed to support adequately the limitations. That conclusion says nothing with regard to the science even six months or a year in the future, and each time a legislature tries to limit the access of children to violent video games, courts must examine the science anew. The continued development of social science, and the new insights being provided by neuroscience,<sup>5</sup> make the possibility that courts will recognize the necessity of these limits at some point in the future very real.

What is suggested here is that, at least as a temporary means of protecting children, parents be provided with notice as to which stores and arcades are allowing access to games that are inappropriate for their children, according to the video game industry's own ratings systems. There is evidence that media ratings systems may be confusing or misleading,<sup>6</sup> so parents may not recognize which games have been rated as inappropriate. There may also be confusion as to the legal status of the industry ratings systems. If parents believe that their children are not allowed to buy games or play games in arcades rated beyond the

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\* Professor Law, Michigan State University College of Law. A.B., Franklin & Marshall College; M.S., M.A., Ph.D., University of Miami; J.D., University of Michigan.

1. See *infra* notes 18-55 and accompanying text. The cited material also shows that the courts have not been receptive to the social science.

2. See *infra* notes 19, 27, 43-55 and accompanying text. *But see* notes 26, 31 and accompanying text.

3. See *infra* notes 92-117 and accompanying text.

4. See *infra* notes 18-55 and accompanying text.

5. For a discussion of the relevant neuroscience, see Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695.

6. See *infra* notes 108-14 and accompanying text.

ages of their children,<sup>7</sup> they may not realize what their children experience in arcades or buy in stores.

The confusion over what is available to children could be cleared up by attempts by either public interest groups or governmental units to have children purchase, or play in arcades, games rated as beyond their age. Where the attempt is successful, the name of the store selling the game or the mall or other place in which the arcade is located could be placed on a web site, using the model of sex offender web sites. Parents could then know the stores at which they may safely let their children shop and the malls at which their children may similarly “hang out.” The video game industry and retailers will likely be unhappy with the effort and will certainly see it as the back door effort to limit children’s access. Where the web site is compiled and accurately maintained by a private entity, there would be little recourse for the industry. However, where the effort is undertaken by a governmental entity, there is certain to be a First Amendment challenge, although it is a challenge that should prove to be unsuccessful.

This Article begins by examining briefly the failed efforts at shielding children from violent video games.<sup>8</sup> Part II examines the video game ratings system,<sup>9</sup> presents past “sting” operations,<sup>10</sup> and proposes such future operations.<sup>11</sup> Once the proposal is laid out, Part III examines the potential First Amendment and other constitutional challenges. The Article concludes with an examination of the potential content of the proposed web site and a discussion of “ratings creep.”<sup>12</sup>

## I. THE CASE LAW ON VIOLENT VIDEO GAME RESTRICTIONS

There has been a growing number of cases decided in this decade striking down limitations on children’s access to violent video games. The first arose in 2000, when the combined city and county councils for the City of Indianapolis and Marion County, Indiana, passed an ordinance requiring that video arcades separate their sexually explicit and violent games from their more innocuous fare and not allow those under eighteen to play those games, unless accompanied by a parent, guardian, or custodian.<sup>13</sup> When the video game industry challenged the ordinance in federal district court, the court refused to enjoin its enforcement.<sup>14</sup>

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7. The Author has identified no studies on this issue, but is regularly asked why the video game industry is not subject to the same restrictions as the film industry. There is clearly a belief that the film industry ratings have a legal force that does not in fact exist for that similarly voluntary video game system.

8. *See infra* Part I.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part II.C.

12. *See infra* notes 133-341 and accompanying text.

13. The ordinance is discussed in *American Amusement Machine Ass’n v. Kendrick*, 115 F. Supp. 2d 943, 946-48 (S.D. Ind. 2000), *rev’d*, 244 F.3d 572 (7th Cir. 2001).

14. *Id.* at 981.

The court relied primarily on the variable obscenity doctrine found, as applied to youth, in *Ginsberg v. New York*,<sup>15</sup> stating that “the court is not persuaded there is any principled constitutional difference between sexually explicit material and graphic violence, at least when it comes to providing such material to children.”<sup>16</sup> The court, however, did not rely solely on obscenity law; it also recognized a strong government interest in preventing or limiting the harmful effects it saw as demonstrated from violent video games.<sup>17</sup>

On appeal, the United States Court of Appeals for the Seventh Circuit rejected the inclusion of violent material with sexual material as potentially obscene when provided to youth.<sup>18</sup> The appellate court also rejected any connection between video game violence and real world violence. The court’s view of the social science was that “[t]he studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. . . . Common sense says that the City’s claim of harm to its citizens from these games is implausible, at best wildly speculative.”<sup>19</sup>

The second attempt at a limitation was the passage of a St. Louis County ordinance, also in the year 2000.<sup>20</sup> The ordinance also addressed arcade play by minors without parental permission, but limited sales and rentals as well.<sup>21</sup> This time the age limit was seventeen.<sup>22</sup> Once again, the ordinance survived the first industry salvo, when the district court refused to enjoin enforcement.<sup>23</sup> The district court concluded that video game play is not an activity protected by the First Amendment.<sup>24</sup> That may seem an odd position, but if the creative aspects of game, design, artistic, and story presentation, are separated from the act of playing the game, an act that communicates to no one, it is a position that may be reasonable.<sup>25</sup> With regard to harm, the district court could not be more in opposition to the earlier Seventh Circuit opinion. As the district court saw it, “[f]or plaintiffs to . . . argue that violent video games are not harmful to minors is simply incredulous.”<sup>26</sup>

On appeal, the Eighth Circuit did not express quite the degree of skepticism that the Seventh Circuit had, but still rejected the claims that the games posed a

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15. 390 U.S. 629 (1968).

16. *Am. Amusement Mach. Ass’n*, 115 F. Supp. 2d at 946.

17. *Id.*

18. *See Am. Amusement Mach. Ass’n*, 244 F.3d at 574-76.

19. *Id.* at 578-79.

20. The ordinance is discussed in *Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1129-31 (E.D. Mo. 2002), *rev’d*, 329 F.3d 954 (8th Cir. 2003).

21. *Id.* at 1130.

22. *Id.*

23. *Id.* at 1141.

24. *Id.* at 1135.

25. *See* Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 MICH. ST. L. REV. 51, 93-105.

26. *Interactive Digital Software Ass’n*, 200 F. Supp. 2d at 1138.

danger to youth. Examining what seemed to be a limited submission of the available social science research, the court viewed the submissions as consisting of a “vague generality [that fell] far short of a showing that video games are psychologically deleterious” and the studies as “ambiguous, inconclusive, or irrelevant.”<sup>27</sup> The court also held that video games are protected expression under the First Amendment, but did not distinguish between game design and game play.<sup>28</sup>

In the third case, the State of Washington focused restrictive legislation only on games in which the player shoots law enforcement officers.<sup>29</sup> The statute imposed a ban on distributing such games to minors, and the hope seemed to be that this approach, narrowly tailored to concerns over the safety of police officers, would survive constitutional challenge, where the others had failed. In addition, the State said that it wished to “to foster respect for public law enforcement officers.”<sup>30</sup>

As it turned out, the statute fared no better, and ironically, it was the narrower focus that led to its downfall. The federal district court actually seemed receptive to the general concerns over media, and especially video game violence, saying that the State had

presented research and expert opinions from which one could reasonably infer that the depictions of violence with which we are constantly bombarded in movies, television, computer games, interactive video games, *etc.*, have some immediate and measurable effect on the level of aggression experienced by some viewers and that the unique characteristics of video games . . . makes video games potentially more harmful to the psychological well-being of minors than other forms of media. In addition, virtually all of the experts agree that prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or anti-social behavior . . . .<sup>31</sup>

What made the statute unconstitutional was the fact that there was no evidence that those games in which players shoot law enforcement officers are any more dangerous than games in which players shoot other individuals.<sup>32</sup> While the court found fault in the social science studies submitted by the State, it did indicate that statutes that took aim at the most violent games, as opposed to focusing on virtual victim’s identity, could, with more scientific support, be held constitutional.<sup>33</sup>

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27. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003).

28. *Id.* at 957-58.

29. The ordinance is discussed in *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1186-90 (W.D. Wash. 2004).

30. *Id.*

31. *Id.* at 1188.

32. *Id.* at 1188-90.

33. *See id.* at 1190. The court, while noting that it could not offer advisory opinions, did go on to indicate the “[k]ey considerations” in analyzing future violent video game statutes:

—does the regulation cover only the type of depraved or extreme acts of violence that

The results of the first three cases, while all losses in the attempt to restrict access by children to violent video games, provided some hope for eventual success. Interestingly, the district courts, the courts that regularly make the findings of fact, all seemed to see the danger involved in the games. Two were convinced and refused to enjoin the ordinances at issue.<sup>34</sup> The third also found the studies generally plausible, but found fault in the lack of specific results regarding law enforcement officers.<sup>35</sup> The third court indicated that the continued development of the science could lead to holdings of constitutionality.<sup>36</sup> However, in both successful cases the appellate courts not only declared the ordinances unconstitutional, but in doing so went against the conclusion of the traditional finders of fact and held that violent video games do not pose a danger to youth.<sup>37</sup> These appellate court decisions would prove to be important in their influence on later district court examinations of other statutes.

After a short lapse there was renewed activity, with 2005 seeing statutes adopted in the states of Illinois, California, and Michigan. All three were quickly challenged by the video game industry, with the Illinois case being the first to reach a final district court decision. The Illinois Violent Video Games Law imposed criminal penalties for the sale or rental to minors of violent video games and imposed labeling requirements.<sup>38</sup> The statute did define the games to be considered violent, as had the previous attempts, but the court found the definition vague.<sup>39</sup>

The court also examined the science offered to support the State's position and found it wanting.<sup>40</sup> It should be noted that the district court hearing the case

violate community norms and prompted the legislature to act?

—does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint or status? and

—do the social scientific studies support the legislative findings at issue?

*Id.*

34. See *Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp. 2d 1126, 1141 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000), *rev'd*, 249 F.3d 572 (7th Cir. 2001).

35. *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1188-90.

36. *Id.* at 1190.

37. See *Interactive Digital Software Ass'n*, 329 F.3d at 959; *Am. Amusement Mach. Ass'n*, 244 F.3d at 578-79.

38. The statute is discussed in *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1057-58 (N.D. Ill. 2005).

39. See *id.* at 1076-77. The statute addressed games in which there are “depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human. “Serious physical harm” meant “death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.” *Id.* at 1057 (quoting 720 ILL. COMP. STAT. 5/12A-10(e) (2006)). The court found vagueness in what constitutes a human in the fantasy world of video games and what constitutes serious harm to such creatures, who may for example sprout a new arm in the place of one cut off. See *id.* at 1076-77.

40. *Id.* at 1059-75.

is a part of the Seventh Circuit, the circuit that had already expressed skepticism regarding the science in the Indianapolis case. The State, faced with this previous determination, seemed to recognize that it had to rely on newly developed science, science on which the circuit had not ruled. The State offered recent video games studies and a study on the neurological effects of violent media, but the court rejected both.<sup>41</sup>

As for the social science, the State brought in Professor Craig Anderson as an expert. Professor Anderson is the leading researcher in the area, and that turned out, in a way, to be a problem for the State.<sup>42</sup> In rejecting the social science, the court noted that fourteen of the seventeen scholarly articles in the legislative record were authored or co-authored by Professor Anderson, one was written by a colleague, and the other two were written by a scientist who relied on Anderson's work in developing his own studies.<sup>43</sup> Rather than taking this as a sign of the preeminence of Professor Anderson, and also seemingly failing to recognize the peer review process that the articles had to undergo, the court seemed to find that the, in a sense too great, expertise weakened the testimony.

The court also heard testimony from two other scientists with what it took to be views contrary to those of Anderson. Dr. Jeffrey Goldstein, a social scientist in the Netherlands, has completed research that shows video games can "improve cognitive skill."<sup>44</sup> That, in fact, seems quite likely, but no one really argues that no good can come from the games. The second scientist was a relatively newly minted communications professor, Dr. Dmitri Williams, whose dissertation was based on a one-month study of individuals playing a violent, multi-player game,<sup>45</sup> but multi-player games contain a social interaction that might distinguish them from the video games in Anderson's studies.

What the industry witnesses testified to was that Anderson's work fails to establish causation, although they agreed that there was a correlation between exposure to video game violence and increased aggression.<sup>46</sup> They also had some methodological concerns regarding Anderson's studies,<sup>47</sup> but that sort of concern may always be raised, and it is again worth noting that Anderson's work was subject to peer review. On the causation issue, it should be noted that causation is never directly observed. It is always the conjunction, the correlation, of events that is present to the senses, and causation is an inference from the circumstances and that correlation. It did allow the court to state that it could not determine from correlation which way causation runs: "it may be that aggressive children may also be attracted to violent video games."<sup>48</sup> Maybe so, and maybe people with precancerous lung irritations are drawn to cigarette smoke and people with

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41. *Id.*

42. *Id.* at 1059.

43. *Id.* at 1058.

44. *Id.* at 1062.

45. *See id.*

46. *See id.*

47. *Id.*

48. *Id.* at 1074.

low IQs are more inclined to eat lead based paint, but Anderson's laboratory studies, again rejected by the court as insignificant, again despite peer review, purport to show the direction of causation.<sup>49</sup>

The court also was unimpressed at the effect size in Anderson's studies. In its analysis of one study involving noise blasts, the court noted that

on a one to ten scale of intensity, the most "aggressive" violent video game players administered an average blast of 5.93, and the least "aggressive" non-violent video game players administered an average blast of 3.98. There was only a two point difference, and both averages were in the middle of the intensity scale.<sup>50</sup>

However, the "two point" difference could also be described as a near fifty percent increase. It is also not clear what the significance of being near the middle of the scale is and whether a two point difference at one end would really be any different.<sup>51</sup>

The court also addressed the recent brain science results regarding violent media. Dr. William Kronenberger testified regarding an experiment in which the functioning of the brains of adolescents engaged in a computer recognition task were examined using functional magnetic resonance imaging.<sup>52</sup> The results showed that adolescents with greater exposure to violent media had a brain functioning in the regions of the brain normally associated with aggressive or violent behavior or with inhibition that differed from the brain functioning of children with less exposure to violent media.<sup>53</sup> Furthermore, the functioning of the high exposure group was similar to that of adolescents diagnosed with disruptive behavioral disorders.<sup>54</sup>

In response, the industry offered rebuttal from a cognitive psychologist who criticized two assumptions he saw as affecting the studies. The first criticism was that it had been assumed that there was a "one-to-one relationship" between behaviors and brain regions, and the second was that it had been assumed that a decrease in activity in a region of the brain should be considered an impairment or deficiency and that "decreased activity can signal expertise or use of an alternate method to complete the assigned task."<sup>55</sup> Even accepting that criticism

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49. *Id.* at 1060-61 (discussing studies briefly). There is also a citation to an article on the causation issue. *Id.* at 1061 (citing Douglas A. Gentile & Craig A. Anderson, *Violent Video Games: The Effects on Youth, and Public Policy Implications*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 225, 232 (N. Dowd et al. eds., 2006)).

50. *Id.* at 1061.

51. The percentages would of course change. A two-point increase from eight to ten would only be a twenty-five percent increase, while a two-point increase as the lower level approaching zero would grow without bound. As to the issue of being mid-scale, it depends entirely on how the scale is set up.

52. *Entertainment Software Ass'n*, 404 F. Supp. 2d at 1063-65.

53. *Id.*

54. *Id.*

55. *See id.* at 1066.

as valid, and there seemed to be no offering of evidence of any such alternative method, the result is still that there is a decrease in that region of the brain normally responsible for controlling behavior, and the resultant functioning is more similar to the functioning of a disruptively behaviorally disordered adolescent than a normal adolescent.

Had that been the end of the court's analysis, coupled with a conclusion that the State had not demonstrated the necessity of violent video game bans to meet the compelling government interest in the physical and psychological well-being of youth, the conclusion might arguably have been wrong, but it would only have been another in a short line of cases saying the science is not yet there. The court, however, went on to make an error of law that poses a more serious threat to future attempts, and if the science is correct, to the nation's youth.

Adopting the industry's legal theory, the court said that "when it comes to regulating expression protected by the First Amendment, the state may regulate only expression that meets the requirements of *Brandenburg v. Ohio*."<sup>56</sup> As the court explained, "the State may regulate protected expression based on the belief that it will cause violence only if the expression is directed to inciting or producing imminent lawless action, and is likely to incite or produce such action."<sup>57</sup> However, *Brandenburg* is not the appropriate test. *Brandenburg* concerned a meeting of the Ku Klux Klan and whether the leader of the rally could be charged under a criminal syndicalism law.<sup>58</sup> It was the culmination of a long line of cases stretching from World War I through the Cold War, all of which addressed rallies or speeches at which the audience was exhorted to perform some illegal act.<sup>59</sup> *Brandenburg* is the test for charges of attempting to cause public disorder, criminal solicitation, or accessory liability based on that solicitation. It is even an appropriate test for tort liability of a speaker, when a member of the speaker's audience commits an unlawful act.<sup>60</sup> It is not the appropriate test for the sort of public health argument offered in the case of video games.

The inappropriateness of *Brandenburg* is demonstrated by an admittedly far-fetched example. Suppose the science developed in the direction of showing that

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56. *Id.* at 1073 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

57. *Id.* (citing *Brandenburg*, 395 U.S. at 447).

58. *See Brandenburg*, 395 U.S. at 444-47.

59. *See id.* at 447-48.

60. Thus, *Brandenburg* is relevant when a victim or victim's survivors sue a video game manufacturer on the theory that the crime was the result of video game play. *See James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002). It was also the relevant test in *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979), a case in which the claim was that a television caused a criminal act. Furthermore, it was relevant in *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), where judgment against the publisher of a manual for contract killers was used in the commission of a multiple murder. There was a lack of imminence between the publication date and the murders, but the admission by the publisher that it expected and intended that the manual be used as it was, combined with the detailed instructions, allowed liability to be imposed. *Id.* at 249.

thirty years of violent video game play invariably caused the deterioration of the entirety of the brain region or regions responsible for judgment and inhibition. Invariably, such players become extremely violent and incapable of controlling their emotions. If *Brandenburg* is the test, the state could not prohibit video game play, even in light of this evidence. The video game makers would still not intend to incite or produce the lawless action. There would also not be the imminence that the court here required, at least until just before the violent effect hypothesized was about to occur and clearly after there had been significant damage to the players' brains.

*Brandenburg* is best seen as a way of meeting strict scrutiny, when the concern is intentionally induced lawless action. The serious lawless action provides the compelling interest, and the imminence indicates that stopping the speech is necessary to that interest. If the act were not imminent, the remedy would be counter speech, rather than a ban. However, *Brandenburg* is not the only way to meet strict scrutiny where speech is involved. The Supreme Court, in *Burson v. Freeman*,<sup>61</sup> recognized the applicability of the more traditional strict scrutiny test. That case involved a Tennessee statute barring campaigning within one hundred feet of any polling place.<sup>62</sup> While the speech involved, political speech, is at the core of the First Amendment, the Court found a compelling interest in elections being free from coercion and fraud and that the ban was necessary to that interest.<sup>63</sup>

Bans on violent video game play by children may have to meet strict scrutiny, assuming the rejection of the obscenity theory of the district court in the Indianapolis case and the lack of protection argued by the district court in the St. Louis case, but they do not have to meet the test of *Brandenburg*. Instead, there needs to be a compelling government interest, and the physical and psychological well-being of youth is such an interest. There also needs to be a demonstration that the ban is necessary to that interest, a showing that has so far been seen as lacking in the existing science.

Another recent case declared a California statute unconstitutional.<sup>64</sup> The opinion broke no new ground in analyzing the scientific evidence. The court simply surveyed the prior case law, including the Seventh and Eighth Circuit Indianapolis and St. Louis cases, the Washington and Illinois district court opinions, and the preliminary injunction against the enforcement of the Michigan statute,<sup>65</sup> and from those opinions determined that the plaintiffs were likely to prevail on the merits of their claim of unconstitutionality.<sup>66</sup>

However, the California court did reach several conclusions that are

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61. 504 U.S. 191 (1992).

62. *Id.* at 193.

63. *Id.* at 199.

64. *See* Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

65. The opinion and judgment establishing the permanent injunction against the Michigan statute is discussed *infra* note 77 and accompanying text.

66. *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1043-44.

important to any continuing efforts to limit the access of children to these games. First, the plaintiffs argued that the analytic framework to bring to bear in the case is that found in *Brandenburg*, but the court rejected that approach.<sup>67</sup> The court recognized that *Brandenburg* applies to expression directed to producing or inciting imminent illegal acts, but it said “[t]he Act seems to be intended more to prevent harm to minors than preventing minors from engaging in real-world violence.”<sup>68</sup> As the court recognized, the claims against violent video games are not that their designers and manufacturers are trying to induce minors to commit violent acts or that they are teaching children dangerous ideology. Rather the claims are that the games cause psychological and even neurological damage to children, damage which may eventually manifest itself in violence, unintended by the game developers and not driven by the developers’ ideologies. There have also been claims that the games may teach skills that are dangerous for children to possess.<sup>69</sup> The court applied strict scrutiny, and given the rejection of the scientific evidence by other courts, found the statute to fail that test.<sup>70</sup>

A second important point from the California court’s opinion is found in its rejection of the defendants’ theory of the case in deciding the strict scrutiny standard. As had the prior courts, with the exception of the Indianapolis court, the court rejected reliance on *Ginsberg v. New York*.<sup>71</sup> *Ginsberg* upheld a New York statute addressing material that is harmful to minors, using a variable obscenity doctrine that judged obscenity by a standard applicable not to adults, but to minors.<sup>72</sup> The California court did not follow the defense suggestion, noting that neither the Supreme Court nor the Ninth Circuit had extended

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67. *Id.* at 1045.

68. *Id.*

69. David Grossman, a former psychology instructor at the U.S. Military Academy discusses the shootings by Michael Carneal at Heath High School in the Paducah, Kentucky area. *See* DAVE GROSSMAN & GLORIA DEGAETANO, STOP TEACHING OUR KIDS TO KILL: A CALL TO ACTION AGAINST TV, MOVIE AND VIDEO GAME VIOLENCE 75-76 (1999). Carneal killed three and wounded five, all with wounds to the head or upper torso, with only eight or nine shots. *See id.* at 76. Carneal developed this remarkable accuracy not through firearm training, but through video game exposure, and that training was reflected in his manner. *See id.* Carneal

never moved his feet during his rampage. He never fired far to the right or left, never far up or down. He simply fired once at everything that popped up on his “screen.” It is not natural to fire once at each target. The normal, almost universal, response is to fire at a target until it drops and then move on to the next target. This is the defensive reaction that will save our lives, the human instinctual reaction—eliminate the threat quickly. Not to shoot once and go on to another target before the first target has been eliminated. But most video games teach you to fire at each target only once, hitting as many targets as you can as fast as you can in order to rack up a high score. And many video games give bonus effects . . . for head shots.

*Id.* at 75-76.

70. *Video Software Dealers Ass’n*, 401 F. Supp. 2d at 1048.

71. *See id.* at 1045 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)).

72. *Id.*

*Ginsberg* beyond the sexual focus of that case.<sup>73</sup> However, the court went on to state that

[n]or, on the other hand, have the plaintiffs shown that either the Supreme Court or the Ninth Circuit has ever held that sexual obscenity represents a unique category of expression that is the only category to which a state may permissibly restrict minors' access without running afoul of the First Amendment.<sup>74</sup>

The California court then, while not following the lead of the Indianapolis court, recognized that at the Supreme Court level, and at its own circuit level, the theory had not been rejected.<sup>75</sup>

The last point to be drawn from this case is in the court's response to the plaintiff's assertion that the California statute was unconstitutionally vague. Without going into the details of the definitions contained in the statute, the court concluded that they were sufficient for the ordinary person to apply to the video games at issue.<sup>76</sup> Thus, the California court established that the task of defining the category of games to which violent video game statutes apply is not impossible. Legislatures drafting later statutes may be guided by the approach found in the California statute.

The decision of the Michigan federal district court,<sup>77</sup> in striking down that state's statute, was less than clear in terms of the applicable theory. It was clear that the court rejected the State's reliance on *Ginsberg*, but when it came to the plaintiffs' suggestion that *Brandenburg* is the proper test, the court stated both that test and the strict scrutiny test.<sup>78</sup> Since the court indicated that neither test would be satisfied,<sup>79</sup> in the end it may have made no difference, but again, it should be pointed out that the proper test is strict scrutiny. There may be no difference now, but if the science continues to develop to the point where the need to limit violent video game access is seen as necessary to the well-being of youth, the choice of test will be important.

Still more statutes were enacted in 2006 and quickly met the same fate. A Louisiana statute again criminalized the sale or rental to minors of violent video games, but it was struck down in *Entertainment Software Ass'n v. Foti*.<sup>80</sup> The federal district court granted a preliminary injunction against the enforcement of

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73. *Id.*

74. *Id.*

75. On this topic, see generally KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION* (1996).

76. *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1041-42.

77. *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006). The Michigan statute provided a defense based on the video games industry's ratings. No one could be convicted if the sale was to a person within the age rating for the game involved.

78. *Id.* at 651-52.

79. *Id.* at 651-55.

80. 451 F. Supp. 2d 823 (M.D. La. 2006).

the ordinance and in doing so, followed the lead of the earlier cases.<sup>81</sup> The court took as well established that video games enjoy First Amendment protection, and since it involved sales rather than play, not drawing the distinction between the software and presentation, on the one hand, and game play on the other, was proper.<sup>82</sup> Thus, strict scrutiny is required, but this court also seemed to believe that the *Brandenburg* test is the only way to meet strict scrutiny where violent media is involved.<sup>83</sup> “Seemed” is the right word because the court went on to consider evidence that would speak to the dangerousness of the media on a basis other than advocacy of violence.<sup>84</sup> That evidence was rejected, based primarily on the fact that it had been rejected by other courts, but it was also noted that the legislative record was rather weak, relying on secondary sources rather than primary source psychological studies.<sup>85</sup>

A second 2006 statute took a different approach with the same result. A Minnesota statute would have imposed a fine for the sale of violent video games not on the retailer, but on the minor buying a game rated beyond the child’s age.<sup>86</sup> Again the industry challenged the statute, and in *Entertainment Software Ass’n v. Hatch*,<sup>87</sup> the federal district court issued a permanent injunction.<sup>88</sup> Following previous courts, the court took video games as protected and applied strict scrutiny, properly looking for a compelling interest to which the statute was necessary or narrowly tailored.<sup>89</sup> In so doing, the court found the evidence lacking as to video games harming the physical and psychological well-being of youth.<sup>90</sup> The court was also concerned with the statute’s sole focus on video

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81. *Id.* at 837.

82. *See id.* at 829-31.

83. *See id.* at 830-33.

84. *See id.* at 832.

85. *See id.*

86. MINN. STAT. § 325I.06 (2006).

87. 443 F. Supp. 2d 1065 (D. Minn. 2006).

88. *Id.* at 1073.

89. *Id.* at 1068-70.

90. *Id.* at 1069. Given that not that much time had elapsed since the previous year’s cases, the result is certainly not surprising. It is still important to note, however, that as the science develops, it may reach the point where prior determinations of inadequacy may no longer apply. More disturbing in the opinion is the suggestion that science can demonstrate only correlation rather than causation. *See id.* at 1069-70. The move from correlation to causation is common in many other areas, and laboratory experiments and certain factors in longitudinal studies can indicate causation.

There is also a footnote in the opinion that may indicate a lack of understanding of how meta-analysis works. The court said, seemingly with skepticism, that “Dr. Anderson’s meta-analysis seems to suggest that one can take a number of studies, each of which he admits do not prove the proposition in question, and ‘stack them up’ until a collective proof emerges.” *Id.* at 1069 n.1. That is just what meta-analysis can do, and it makes common sense. The significance of a result depends in part on the size of the samples. The fact that a single apple drawn from one barrel is sweeter than a single apple drawn from another may not lead one to make confident statements

games as a source of danger and with due process in the adoption of a rating system developed by a nongovernmental body.<sup>91</sup>

All the statutes have been struck down, and that is why the alternative presented here is being suggested. The alternative suggestion is not based on any conclusion that courts always will continue to reject bans on children's access to violent video games. The science may well develop to the point that the bans are seen as justified, at least as long as the courts apply the correct strict scrutiny test and are not led by the industry into the incorrect view that *Brandenburg* is the test to apply. The suggestion offered is a stopgap measure designed to help parents limit their own children's access until that time may come. Of course, if the industry prevails on the test to apply or if the science never develops, the suggestion made here may have to serve its protective role indefinitely.

## II. RATINGS, STINGS, AND WEB SITE LISTS

### A. *The Video Game Industry Rating System*

The Entertainment Software Rating Board ("ESRB") has established a rating system for video and computer games.<sup>92</sup> Games fall into one of six rating categories. A game rated "Early Childhood" is seen as appropriate for ages three and older and "[c]ontains no material that parents would find inappropriate."<sup>93</sup> Games rated "Everyone" are seen as suitable for everyone aged six or older and may contain mild violence.<sup>94</sup> "Everyone 10+" rated games are said to be appropriate for ages ten and above and may contain an increased amount of mild violence.<sup>95</sup> "Teen" rated games, seen as appropriate for those thirteen and older, "may contain violence . . . [and] minimal blood."<sup>96</sup> Games rated "Mature" are said to be suitable for those seventeen and older and "may contain intense

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about the overall differences between the qualities of the two lots. A consistent result over a dozen makes one more confident and over a gross may give one great confidence. Meta-analysis allows the combination of many studies that may involve samples inadequate to establish a result to be combined. If the single apple "study" is replaced not by a study of a gross of apples from each barrel, but is augmented by an additional 143 single apple studies, the same increase in confidence is warranted.

91. *Id.* at 1070-71. The Michigan statute had provided a definition for violent video games and then allowed the fact that a sale was in accord with the ratings as a defense. Here the offense was defined by the ratings. See *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006).

92. Entertainment Software Rating Board, *Game Ratings & Descriptor Guide*, [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp) (last visited Nov. 26, 2007). The organization's web site explains the ratings process, and the ratings and descriptors that result from that process. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

violence, blood and gore.”<sup>97</sup> The highest rating, “Adults Only,” should be played only by those eighteen and older and may include “prolonged scenes of intense violence.”<sup>98</sup> Violence is not the only input in the determination of a rating; language, sexual themes, and gambling may play roles as well.<sup>99</sup> The ESRB also provides content descriptors for the games indicating levels or types of violence, nudity, drug or alcohol use, etc.<sup>100</sup>

The ratings and descriptors are the result of a process spelled out by the ESRB. Before they release a game, publishers submit a response to an ESRB questionnaire regarding the game’s content.<sup>101</sup> The publisher also provides a videotape or DVD that is supposed to depict the most extreme content in terms of violence, sex, language, etc.<sup>102</sup> The submissions are examined by trained game raters, all of whom are adults and typically have professional or parental experience with children.<sup>103</sup> The raters use their own judgment, but are checked for consistency both among the independent raters of the particular game and from game to game.<sup>104</sup> If a publisher does not like the rating a game receives, the content may be changed or the rating appealed to a board “made up of publishers, retailers and other professionals.”<sup>105</sup>

The ratings have no legal force, as the video game cases demonstrate. The ESRB can impose sanctions against publishers who voluntarily submit to the ESRB’s jurisdiction, but that only addresses the rating process itself.<sup>106</sup> With regard to retail sales, the ESRB says it works with retailers and game centers to provide in-store signs explaining the ratings and supports training store employees on the ratings system;<sup>107</sup> however, there is no enforcement involved.

There is some dispute as to how effective the ratings are in helping parents determine what games are appropriate for their children. A study by researchers at Harvard revealed differences over what ratings and descriptors should have attached to particular games.<sup>108</sup> Of the games they studied, the researchers found

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97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Entertainment Software Rating Board, Ratings Process, [http://www.esrb.org/ratings/ratings\\_process.jsp](http://www.esrb.org/ratings/ratings_process.jsp) (last visited Nov. 26, 2007).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* It is not immediately clear from what profession the professionals are to be drawn.

106. Entertainment Software Rating Board, Enforcement, <http://www.esrb.org/ratings/enforcement.jsp> (last visited Nov. 26, 2007).

107. *See id.*; *see also* Entertainment Software Rating Board, Retailers, Frequently Asked Questions, <http://www.esrb.org/retailers/faq.jsp> (noting that game centers that register with ESRB may download ratings education material or order ratings signs) (last visited Sept. 1, 2007).

108. Kevin Haninger & Kimberly M. Thompson, *Content and Ratings of Teen-Rated Video Games*, 291 JAMA 856 (2004), available at [www.kidsrisk.harvard.edu/mainFrame/news/faqs4.html](http://www.kidsrisk.harvard.edu/mainFrame/news/faqs4.html).

that 48% of the sample could have had, but did not have, an ESRB descriptor.<sup>109</sup> In another 9% of the games there was a descriptor, but the researchers did not find the material indicated.<sup>110</sup> This failure to find the material may well be due to the fact that the games were played for only one hour, and the material described could be in later stages of the games. The study led to recommendations that there be greater clarity in the descriptors and in the overall rating process and that the rating process include playing the games.<sup>111</sup>

The National Institute on Media and the Family also suggests that the ESRB ratings underrate some games, rating them as appropriate for teens, when they should, in the Institute's view, be rated for a mature audience.<sup>112</sup> This criticism has been repeated by legislators. For example, Senator Sam Brownback has argued for a "Truth in Video Game Rating" Act that would require raters to play the games "in their entirety" and would provide punishment for rating groups that "grossly mischaracterize" game content.<sup>113</sup> On the House side, Congressman Joe Baca has been a regular critic, arguing that the ratings are not sufficiently clear and do not provide enough information and that parents are thus misled.<sup>114</sup>

On the issue of parents being misled, there is some question as to how much input parents have been playing in the purchase of video games. The National Institute on Media and the Family found that its survey did not really comport with ESRB claims that 74% of parents regularly use the ratings and that 94% find them helpful.<sup>115</sup> Their study showed that while 73% of parents say that they always help decide on the games their children buy or rent, only 30% of children reported that their parents played such a role.<sup>116</sup>

Whatever may be the role of parents and the accuracy or appropriateness of the ratings, adherence to the ratings at the retail level would provide some protection for children. Indeed, it is a protection with which the Michigan statute was seemingly satisfied.<sup>117</sup> If the ratings have little such effect, they are merely window dressing. That, of course, leads to the question of retail practices.

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109. *Id.*

110. *Id.*

111. *Id.*

112. DAVID WALSH ET AL., NAT'L INST. ON MEDIA & THE FAMILY, 11TH ANNUAL MEDIA WISE VIDEO GAME REPORT CARD 2 (2006), available at [http://www.mediafamily.org/research/2006\\_Video\\_Game\\_Report\\_Card.pdf](http://www.mediafamily.org/research/2006_Video_Game_Report_Card.pdf).

113. See Anne Broache, *Senator Wants to Ban "Deceptive" Video Game Ratings*, CNET NEWS.COM, Feb. 14, 2007, [http://www.news.com/2100-1028\\_3-6159413.html](http://www.news.com/2100-1028_3-6159413.html). In response, a representative of the Entertainment Software Association questioned whether one could "play a game in its 'entirety' when a game has no defined end?" See *id.* While the games have no defined end, they do have finite content that sufficient play would seem likely to expose.

114. See, e.g., Claire Vitucci, *Baca Pushes to Clarify Video-Game Ratings*, PE.COM, Apr. 27, 2006, [http://www.pe.com/localnews/inland/stories/PE\\_News\\_Local\\_H\\_game27.fddc7b9.html](http://www.pe.com/localnews/inland/stories/PE_News_Local_H_game27.fddc7b9.html).

115. See WALSH ET AL., *supra* note 112.

116. *Id.*

117. See *supra* note 77.

### B. A History of Sting Operations

The ratings, no matter how much information they may provide, are not prohibitions. They can serve a role in letting parents know the content of games available for sale or play and guide them in their choices if they purchase games for their children. They cannot, without more, limit the ability of children to buy the games themselves. Indeed, this has been the focus of statutes tying bans to the ratings system. It is an effort, however, that the industry has fought with success. Even when the only attempt is to bar sales of games to children below the age at which the industry established ratings regime has said is appropriate, the industry has balked. Because the ratings have not been legally enforceable, the only source of limitation on direct sales to children would have to be with retailers and the operators of video arcades. Those limitations have only been partially successful.

The limited success in the retail realm is shown by sting operations or undercover shopping. While there are smaller local or state efforts to test the vigilance of the retail sector in enforcing the ESRB ratings,<sup>118</sup> there are also more widespread, even national, studies. The Federal Trade Commission conducted undercover shopping tests in 2000, 2001, 2003, and 2005.<sup>119</sup> Children between the ages of thirteen and sixteen were sent into stores, without a parent, to attempt to purchase an M-rated game, that is, a game rated as suitable for those seventeen and older.<sup>120</sup> The most recent study, starting in 2005, but running into January 2006, tested 406 stores in forty-three states.<sup>121</sup>

The results over the four studies show increasing diligence on the part of retailers. In 2000, 85% of the attempts were successful.<sup>122</sup> That dropped to 78% in 2001, 69% in 2003, and 42% in 2005.<sup>123</sup> While the progress is positive, it is still the case that in better than two of five attempts, the child was able to purchase an inappropriate game.

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118. See, e.g., Emily Robinson, *Sting Targets Video Games*, ST. NEWS, Nov. 10, 2000, available at [http://www.statenews.com/index.php/article/2000/11/sting\\_targets\\_video\\_games](http://www.statenews.com/index.php/article/2000/11/sting_targets_video_games) (discussing sting operation by then Michigan Attorney General Jennifer Granholm). The ESRB Retail Council requires member retailers to participate in two "mystery shopper" audits per year. See Entertainment Software Rating Board, ESRB Retail Council, [http://www.esrb.org/retailers/retail\\_council.jsp](http://www.esrb.org/retailers/retail_council.jsp) (last visited Aug. 19, 2007). The results, however, are published only "in aggregate." *Id.*

119. For the results released in March 2006, see FED. TRADE COMM'N, UNDERCOVER SHOP FINDS DECREASE IN SALES OF M-RATED GAMES TO CHILDREN: RESULTS FROM THE 2005 NATIONWIDE UNDERCOVER SHOP DEMONSTRATE NEED FOR CONTINUING IMPROVEMENT (2006), <http://www.ftc.gov/opa/2006/03/videogameshop.shtm>. The publication recounts the results of all four studies.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

A second measure looked at was whether the cashier or clerk asked the child his or her age. The progression in stores asking age, over the four periods studied, went from 15% to 21% to 24% to 50%.<sup>124</sup> Again, the increase in likely inquiry is positive, but 50% of the children were still not asked.

An interesting difference is seen when stores that are part of a national chain are compared with local or regional retailers. At the national retailers, 35% of the children were successful, while at the local and regional stores, 63% were successful.<sup>125</sup> Of the national retailers, 55% asked the child his or her age, while the local and regional retailers asked the child's age only 35% of the time.<sup>126</sup>

The National Institute for Media and the Family conducted its own series of undercover buy attempts.<sup>127</sup> The most recent, conducted in 2006, used a much smaller sample of twenty-five retail locations in five states.<sup>128</sup> That series of studies in four consecutive years showed a similar decrease in successful purchases by children, although not with the same monotonicity. In 2003, 55% had been successful; in 2004, 34% were successful; in 2005 it was 44%; and in 2006, 32% were successful.<sup>129</sup> The variability in small samples is not surprising, and again the general trend in decrease is a positive development. The Institute also found the same difference between national and local retailers. Best Buy, Target, and Wal-Mart all had perfect scores, but "specialty stores seem more interested in making money than anything else," and buys were successful half the time.<sup>130</sup>

National chain stores are, of course, also interested in making money. Perhaps they are also more socially responsible, but it may instead be that they are more wary of negative publicity. A failure by a national chain to limit the access of children to Mature-rated games could generate national negative publicity. The failure of a local store to do so has, so far, seemed to generate no publicity aimed at the particular store. While it is worth lauding the practices of Best Buy, Target, and Wal-Mart, it would also be worth making available to the public the identity of stores that are not as socially responsible.

There also seems to be a dearth of studies of video game arcades. Perhaps this is due to a reluctance to expose the underage testers to the violent depictions playing the games would involve. After all, buying the game exposes the child only to the box, while playing the game exposes the child to the action of the game. Given the largely local nature of video game arcades, it would seem reasonable to expect that children would be at least as successful in playing the games as they were in buying them from local and regional retailers. There is also the fact that there is less likely to be the one-on-one encounter with a clerk or cashier that would provide the easy opportunity to ask for an indication of age.

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124. *Id.*

125. *Id.*

126. *Id.*

127. *See* WALSH ET AL., *supra* note 112.

128. *Id.*

129. *Id.*

130. *Id.*

### *C. The Sting/Web Site Proposal*

What is proposed here is that there be more regular and widespread conduct of undercover shopper and undercover player operations. These operations would be coupled with web sites, modeled on the sex offender web site, on which those establishments making inappropriate games available to children would be listed. Rather than national studies of retailers, which may provide the parent with little or no information regarding the local store, local studies would allow parents to know where their children can safely shop or play.

Local or state authorities would arrange for children to attempt to purchase age-inappropriate games. The same would occur involving attempts to play inappropriate games in video arcades. While there might be reluctance to expose children to the violent images in the games, children could at least start to play to see if they were interrupted by the arcade operator. Rather than a statistical result for success and failure, a list of the individual stores and arcades that failed to limit youth access would be compiled.

The web site aspect of the proposal is necessary to its success. Even if a local operation is conducted and there is immediate local publicity, the rapidity with which the results would become old news would lessen its impact. If the results are maintained on a web site, either one provided by the local government unit or perhaps better by a state government web site searchable by postal code, the publicity would not fade away. Parents could always turn to the web site to know how concerned the retailer or arcade is with their children's exposure to games rated beyond their ages.

There should be follow-up studies, both out of fairness to retailers and arcade operators, and so as not to be self-defeating. It would be self-defeating if, once a retailer or arcade operator is on the list, it always remained on the list. There would then be no incentive to change its practices. Furthermore, a retailer or arcade operator that sees the error of its ways ought to have the opportunity to clear its record. A later undercover buy or play operation in which the child was refused access should remove the retailer or operator from the web site list. The follow ups do not have to occur at great regularity because a period on the list is to serve as a deterrence, but they should occur at reasonable intervals.<sup>131</sup>

The effect of these controlled efforts would be to provide a disincentive to retailers and arcade operators to provide age-inappropriate games to children. Parents have the choice of not allowing their children to shop at stores that are on the list. Indeed, parents may themselves choose not to patronize such stores. Parents may also choose not to allow their children to spend time at video arcades or the malls that contain them, if the arcade does not prevent children from playing games rated beyond their age. Parents themselves may also complain to

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131. The most appropriate length of the interval between original and follow up attempts would seem to be an empirical question. Experience will indicate how long a retailer or operator will have to remain on the list to provide sufficient deterrence, while still providing incentive to improve.

mall operators or choose not to shop at the malls containing the offending arcades.

Any of these possible effects brings economic pressure on stores and malls to prevent children from buying or playing these games. It is important to note that the direct economic pressure comes not from the government, but from private citizens. It is parents and others who would refuse to shop at or would complain to stores and malls. While the governmental entity involved would provide the information so that parents know what to target for their criticism, the direct pressure is not governmental. The video game industry might well still see a First Amendment concern in these operations and web lists, but the program should stand up to a First Amendment challenge.<sup>132</sup>

#### *D. Forbidden Fruit*

The possibility of the web site lists serving as an enticement should also be briefly considered. The “forbidden fruit” effect in which individuals seek out that which is denied them is always a concern with bans. Any forbidden fruit aspect of the games themselves is already present in the rating system. The web site list does not itself rate games nor need it even indicate which games were successfully purchased or played. Children know what games are rated as beyond their age from walking through stores or arcades, and they gain no new knowledge on that subject from the proposed web site list.

What children might glean from the list is the places at which others have been successful in buying or playing the games. Again, children often know where they can obtain goods not allowed to them, and they would probably have knowledge of which retailers or arcade operators do not ask for proof of age without the benefit of the list. Furthermore, once an entity goes on the list, the negative publicity would, one would hope, have the effect of reducing the likelihood that age-inappropriate games would continue to be accessible. This is, at any rate, a contingent question. If the web site list turns out to be a furtherance of children accessing these games, it can be discontinued. It seems more likely that the economic pressure against the retailer or mall, where an independent retailer or video arcade is involved, would lessen access.

### III. LEGAL ISSUES SURROUNDING THE PROPOSAL

The First Amendment does not mention speech by the government. In limiting the law making authority of the government, the Amendment speaks most clearly to the protection of individual expression. This is, of course, the variety of expression that needs protection against government limitations. Leaving aside cases in which federal and state interests may be at odds, it seems strange even to consider the need for the government to protect its speech from its own abridgments. Yet, government does, and must, speak regularly. It informs the people of its policies and, in providing the rationales for those policies, may be seen as advocating positions on political or social issues. This

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132. See *infra* Part III.A-B.

section will provide an examination of some of the early work on government speech.<sup>133</sup> It will then turn to an examination of the cases in which speech by the government has been argued to be an infringement of the speech rights of others.<sup>134</sup> Lastly, it will turn to the possible due process issues that may arise in compiling the web site list suggested.<sup>135</sup>

### A. Government Speech

An examination of scholarship in the area of government speech must begin with the seminal work of Thomas Emerson.<sup>136</sup> Emerson recognized that government participation in the public debate is both enriching and essential, but that it also poses serious risks:

Emanating from a source of great authority . . . government expression carries extra psychological weight for many citizens. It comes from officials who often wield enormous actual power over those they address, thereby evoking concern in the listener lest he offend the powers that be by appearing to oppose. The government controls many of the sources of information in the society. It also possesses almost unlimited capacity to reach all members of the community . . . .<sup>137</sup>

Despite this concern, Emerson argued that expression can remain free, as long as the government's speech does not overpower other voices.<sup>138</sup>

Emerson analyzed a number of issues arising out of government speech, but the one relevant to the discussion here is in a section titled, "Use of Government Expression as a Sanction Against Private Expression."<sup>139</sup> That would be the claim of the video game industry against the sting and web list proposed here. Any government sponsored web list would certainly be government expression, and the industry would argue that it is an attempt to sanction stores, arcades, and malls for their own delivery of expression to children. Emerson sought to balance the government's right of expression with the "special impact" it could have on the system of free expression. In doing so, he pointed to the concern most often raised by the cases.<sup>140</sup>

Most commonly [deterrence or suppression] takes place when the

133. See *infra* Part III.A.

134. See *infra* Part III.B.

135. See *infra* Part III.C.

136. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 697-716 (1970). Emerson does cite earlier, less comprehensive works: ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS* (1947); Ted Finman & Stewart Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632. See EMERSON, *supra*, at 698 n.1.

137. EMERSON, *supra* note 136, at 698.

138. *Id.*

139. See *id.* at 699-708.

140. See *infra* Part III.B.

government expression hints at or threatens official reprisals against persons or groups holding views in conflict with official policy; or when the government expression arouses hostility in the community against certain opinions and thereby brings private economic and social pressures to bear on those who espouse the unpopular position.<sup>141</sup>

The first of these two possibilities raises the more serious problem. Government speech hinting at or threatening a reprisal may certainly suppress private speech as effectively as a statute authorizing the same sort of sanction. The second is less clear. If the government expresses disagreement with a view and the public comes to recognize the danger or foolishness of that view and refuses to deal with those expressing it, that may not be a violation of the First Amendment. After all, in that situation, the government is not really in any different position than that of any influential media figure. If, however, there is an implication to the public or other entities that they themselves may be threatened by the government if they continue to deal with the person or entity whose speech the government does not like, that raises a problem similar to the first Emerson presents.

Emerson ends up concluding that government speech is worth retaining and protecting.<sup>142</sup> In fact, he argues that government speech and private speech should be accorded the same level of respect and that judicial relief against government speech raises similar difficult problems.

The argument that government officials “must be free to speak . . . without fear of criminal or civil liability,” and that their right of expression “would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial,” are the same arguments that justify the full protection doctrine for private expression.<sup>143</sup>

Professor Emerson’s initial foray into the area did not ignite an immediate interest in the topic, and when Professor Mark Yudof addressed the issue almost a decade later, he still found the topic “largely ignored” in the legal literature.<sup>144</sup> Professor Yudof argued against the recognition of a constitutional right protecting government expression, but again, except in the case of the federal government attempting to limit a state government’s expression, it would seem that government would need little protection against itself. What Yudof appears to have most in mind is legislative limits on speech by government officials and a challenge by those officials, who as individuals would have First Amendment rights, but might be lacking those rights in their official capacities.<sup>145</sup> In that regard, Professor Yudof argues that the legislature, rather than a court, is in the best position to determine the negatives that may attach to government

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141. EMERSON, *supra* note 136, at 699-700.

142. *Id.* at 706.

143. *Id.*

144. See Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 864 (1979).

145. See *id.* at 871.

communication, and that leads him to suggest against recognizing any constitutional right to such expression.<sup>146</sup> That, of course, is not the issue here, at least if the web lists suggested have the support, or lack the specific rejection, of the legislature. What is at issue is whether individuals have expression rights that are violated by government speech.

Turning to the effect of government speech on the expression of others, Yudof recognizes that government speech may overwhelm the speech of others, but rejects regulation on that basis because of analytic and institutional difficulties.<sup>147</sup> He also rejects limitations against “misleading” speech by members of the executive branch, citing Justice Jackson for the proposition that “if high level executive officers were held accountable for every misstatement or omission, government leadership on vital matters or national concern might well come to a halt.”<sup>148</sup>

Professor Yudof’s conclusion is to suggest an ultra vires approach for the courts not unlike the approach taken in dormant commerce clause cases.<sup>149</sup> It should be left to the legislature to set the parameters of government speech. “Courts should declare as ultra vires government speech activities that are particularly offensive and that are likely to interfere with individual judgment, unless they are specifically authorized by legislative bodies.”<sup>150</sup> It seems unlikely that test would result in a court finding a violation in the government speech suggested here. There would not seem to be offensiveness, and it is unlikely that the web site list would interfere with individual judgment. Given advertising budgets and the ability of the video game industry to make its views known, government speech would not be so dominant as to prevent the dissemination of other views. Secondly, all that Professor Yudof would require, even if the web list were offensive and likely to interfere, is that the legislature be on board. It is, at most, an argument against unilateral executive action, not against action by the government.<sup>151</sup>

In an article effectively contemporaneous with Professor Yudof’s, Professor

146. *See id.*

147. *See id.* at 897-906.

148. *Id.* at 908. Professor Yudof finds his teachings from Justice Jackson in Jackson’s opinion in *Wickard v. Filburn*, 317 U.S. 111, 118 (1942).

149. *See* Yudof, *supra* note 144, at 917.

150. *Id.*

151. In a more recent article, Professor Yudof recognized the need for government speech, even as a way of policy implementation.

An effective government must communicate, provide information, publicize its rules, educate, persuade and amass public support for policies. These functions are as legitimate as providing a national defense, regulating building construction practices, providing access to medical care and social security, or delivering the mail. If there is a hallmark of modern governments, apart from their bureaucratic structure, it is their extraordinary reliance on communication as an instrument of policy.

Mark G. Yudof, *Personal Speech and Government Expression*, 38 CASE W. RES. L. REV. 671, 678 (1988) (footnotes omitted).

Steven Shiffrin added his take on government speech.<sup>152</sup> He began by noting that the case law did not bar even government prescription of orthodoxy, such as requirements that public school texts teach a specific point of view, although the right to dissent from that orthodoxy is protected.<sup>153</sup> He also pointed to a number of other government actions that require recognition that “speech financed or controlled by government plays an enormous role in the marketplace of ideas.”<sup>154</sup> In a search for limitations, Shiffrin, like Yudof, rejects the “drowning out” approach, arguing that it lacks practicality and explanatory power.<sup>155</sup> While recognizing the problem of possible government domination of the marketplace of ideas, Professor Shiffrin recognizes that such domination may sometimes be quite acceptable.<sup>156</sup> He concludes that an “eclectic approach . . . of definitional or general balancing” is what is required.<sup>157</sup> In application, Professor Shiffrin would find problems if there are no rules regarding “government departure[] from electoral neutrality,”<sup>158</sup> although he recognizes the propriety of government communication on controversial initiative issues,<sup>159</sup> and clearly an office holder can state reasons why the voter should vote to return him or her rather than an opponent. Outside the electoral process, Professor Shiffrin says that the task of the eclectic approach is “to promote structures that help assure that government speech does not overwhelm individual choice.”<sup>160</sup> Again, even in that case, he recognized that the government’s speech may still be justified.<sup>161</sup> As with Yudof, in the context of the suggestion offered here, there is not the danger of government domination of the media that should even require the balancing suggested.<sup>162</sup>

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152. See Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

153. *Id.* at 567-68 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) for the protection mentioned).

154. *Id.* at 569 (pointing to government access to the mass media, the franking privilege, publication of government reports, and grants and subsidies affecting communication).

155. *Id.* at 595.

156. *Id.* at 601. Later in the article, he provides the example of a military instructor not having the right to teach contrary to the commander’s views, not because there is no drowning out, but because of the need for uniformity and efficiency. See *id.* at 607-08.

157. *Id.* at 610.

158. *Id.* at 655.

159. See *id.* at 637.

160. *Id.* at 655.

161. See *id.*

162. In another roughly contemporaneous article, Professor Laurence Tribe addressed the issue of government speech. He recognized that government need not remain neutral on controversial issues, while recognizing a problem where government speech “drown[s] out private communication.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-4 (1978). He also discussed, in the second edition of his book, the issue raised by the government labeling films as propaganda and found that to raise constitutional difficulties. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 809-12 (2d ed. 1988). For the courts’ different view on the “propaganda” label, see *infra* notes 183-200 and accompanying text.

### B. First Amendment Case Law

There have been a variety of attempts to analyze the issue of government speech in the context of developing case law. These efforts have resulted in suggested rules as varied as the government speech analysis preceding the more recent cases. One suggestion most deferential to government speech is to find a violation of First Amendment rights only when that speech constituted actual coercion.<sup>163</sup> Another asks whether the government's speech serves as a restraint in a particular case, but then calls for a balancing of the negative and positive effects of the government's expression.<sup>164</sup> Still another suggests a rule based on whether the recipient of the government's speech felt threatened, whether the intent of the government speaker was to censor, and if the censor was effective.<sup>165</sup> Rather than continue in an endeavor to draft general rules, this effort will turn to an examination of the cases with an eye to seeing what they say about the violent video game proposal contained herein.

The most important and the first case the video game industry or the retailers are likely to cite, in any effort to enjoin the suggested approach, is *Bantam Books, Inc. v. Sullivan*.<sup>166</sup> *Bantam Books* grew out of the efforts of the Rhode Island Commission to Encourage Morality in Youth.<sup>167</sup> The Commission's duties included educating the public regarding "obscene, indecent or impure language" and pictures in a variety of material and to recommend prosecutions regarding material tending to corrupt youth.<sup>168</sup> The Commission was also charged more generally with combating juvenile delinquency and encouraging morality in youth, and it had the authority to investigate, to educate the public, and to recommend legislation and prosecution.<sup>169</sup>

The Commission took its assigned duties seriously.

The Commission's practice [was] to notify a distributor on official Commission stationery that certain designated books or magazines distributed by him had been reviewed by the Commission and had been declared by a majority of its members to be objectionable for sale, distribution or display to youths under 18 years of age. . . .

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163. See Jeffrey Brian Greenstein, *The First Amendment v. The First Amendment: The Dilemma of Inherently Competing Rights in Free Speech-Based "Constitutional Torts,"* 71 UMKC L. REV. 27, 57 (2002).

164. See Brian C. Castello, Note, *The Voice of Government as an Abridgment of First Amendment Rights of Speakers: Rethinking Meese v. Keene*, 1989 DUKE L.J. 654, 681-85.

165. See Beth Orsoff, Note, *Government Speech as Government Censorship*, 67 S. CAL. L. REV. 229, 251-54 (1993).

166. 372 U.S. 58 (1963).

167. *Id.* at 59. The members of the Commission were appointed by the Governor and served five-year terms. *Id.* at 60 n.1. They were not paid for their work, although the State did cover the expenses of the Commission. *Id.*

168. *Id.* at 59-60.

169. *Id.* at 60 n.1.

The typical notice . . . either solicited or thanked [the distributor] in advance, for his “cooperation” with the Commission, usually reminding [the distributor] of the Commission’s duty to recommend to the Attorney General prosecution of purveyors of obscenity. Copies of the lists of “objectionable” publications were circulated to local police departments, and [the distributor] was so informed in the notices.<sup>170</sup>

It is not surprising that the distributors took the notices seriously. The reaction of the major distributor in the state of the targeted publications was to refuse to fill any new orders for the publications in the notice, to not fill pending orders, and to order his representatives to pick up all unsold copies from the retailers to be returned to the publishers.<sup>171</sup> Police would usually visit the distributor, shortly after the notice was sent, and the distributor was able to demonstrate his “cooperation,” but as his testimony indicated, he took actions not out of public spirit, but out of a fear of court action.<sup>172</sup>

The response of the major distributor had a strong negative impact on the availability in the state of the targeted books, and the books’ publishers sought an injunction against the activities of the Commission.<sup>173</sup> The defendants contended that the body of obscenity law recognizing the fine line between the obscene and the nonobscene, and the procedural requirements attached to determining the side of the line on which material fell, did not apply to their activities “because it does not regulate or suppress obscenity but simply exhorts booksellers and advises them of their legal rights.”<sup>174</sup>

The Court did not accept the distinction between the Commission’s work and other efforts at addressing obscenity.

This contention, premised on the Commission’s want of power to apply formal legal sanctions, is untenable. It is true that appellants’ books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed “objectionable” and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.<sup>175</sup>

In support of that last sentence, the Court cited to cases that involved threats of prosecution or license revocation, or notices or listings by police chiefs or

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170. *Id.* at 61-63 (footnote omitted).

171. *Id.* at 63.

172. *Id.*

173. *Id.* at 61.

174. *Id.* at 66.

175. *Id.* at 66-67 (footnotes omitted).

prosecutors of supposedly obscene, or objectionable films and publications.<sup>176</sup> All of these instances seem to include a direct threat or the sort of implied threat of prosecution also found in this case.<sup>177</sup>

It is clear in the Court's remaining analysis that it is this implied threat that is the crux of the violation. As the Court noted, "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."<sup>178</sup> It was this threat of criminal prosecution that made the difference.

Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. . . . The Commission's practice . . . provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.<sup>179</sup>

The Commission's work was, in the Court's view, a form of administrative prior restraint that faced the heavy, almost unbearable, burden due such systems.<sup>180</sup> Even though prior restraints, in the form of injunctions, may be obtained for obscene materials,<sup>181</sup> the sort of judicial review required for such injunctions was not present under the Commission's procedures.<sup>182</sup>

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176. *Id.* at 67 n.8.

177. There is also a Supreme Court case making it clear that vagueness is a problem for statutes that impose classification, particularly under a statute that allows fines and license revocation. In *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968), the Court considered the work of a classification board determining the suitability of films for children. There were fines for exhibiting such films without notice of a classification of unsuitable or for knowingly admitting a child under sixteen unaccompanied by a parent or spouse, and the potential loss of license to show such films for repeated violations of the statute. *Id.* at 680. The Court said that "[v]agueness and [its] attendant evils . . . are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression." *Id.* at 688. In a separate challenge to the same statute, the U.S. Court of Appeals for the Fifth Circuit objected to the inclusion of violent films with those involving sexual expression. *See Interstate Circuit, Inc. v. Dallas*, 366 F.2d 590 (5th Cir. 1966). The Supreme Court case stemmed from a state court decision. *See Interstate Circuit, Inc. v. Dallas*, 402 S.W.2d 770 (Tex. Ct. App. 1966), *aff'd*, 390 U.S. 676 (1968).

178. *Bantam Books, Inc.*, 372 U.S. at 68.

179. *Id.* at 69-70.

180. *Id.* at 70; *see, e.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931).

181. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

182. *Bantam Books, Inc.*, 372 U.S. at 71. The Court also noted that, while the assigned focus of the Commission's work was the morality of youth, the effect of the procedures employed was also to deprive adult readers the opportunity to obtain the works listed. *See id.* There have been

The video game industry could, then, try to make out similar claims against sting/web site operations. The key difference between what was found constitutionally flawed in *Bantam Books* and what is suggested here is the lack of a criminal threat to make the effort truly coercive. It was perhaps the not so subtle threat of prosecution that made the Rhode Island Commission's operations a system of prior restraint. In the case of video games, the approach is constitutional due to the fact that selling the games to children, even if the children are below the age suggested by the industry ratings, is not illegal. The industry's thus far successful effort to keep such sales legal removes the coercive force from the publicity attendant to the operation of the sting and maintenance of the web site.

The web site is still, however, government speech that, in a sense, disparages a variety of video games and may chill sales of those games. That might be argued to be sufficient to violate the First Amendment rights of designers and manufacturers/publishers, but there are several cases that speak against this argument.

The Supreme Court addressed a somewhat analogous issue in *Meese v. Keene*.<sup>183</sup> *Keene* grew out of a challenge to certain aspects of the Foreign Agents

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similar later efforts specifically aimed at adult magazines. See Council for Periodical Distrib. Ass'n v. Evans, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part, vacated in part*, 827 F.2d 1483 (11th Cir. 1987) (vacating lower court's order on attorney's fees). There, the local district attorney employed informal means to suppress *Playboy*, *Newlook*, and *Penthouse* magazines, meeting with distributors, suggesting that the magazines may be obscene under state law, but offering a civil consent decree agreeing not to sell the magazines that could obviate the need for criminal prosecution. *Id.* at 554-57. The court had no difficulty in finding a sufficient threat in the suggestion as to be unconstitutional under *Bantam Books*. *Id.* at 562-65. Indeed, the court saw the only difference between the two cases being that the threats in the Alabama case were "less subtle" and the "threats of criminal prosecution more direct." *Id.* at 563; see also *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968) (enjoining police commissioner's practice of continually stationing uniformed police officers in bookstore).

In what might seem a contrary case, the U.S. Court of Appeals for the First Circuit allowed a state prosecutor and state police officer to operate informally. In *State Cinema of Pittsfield, Inc. v. Ryan*, 422 F.2d 1400 (1st Cir. 1970), the court considered a request for an injunction against the prosecutor and officer from threatening arrest and prosecution for the exhibition of a particular film or the seizure of the film, should the plaintiff fail to comply with the order. The court distinguished the case from those brought against book and magazine distributors in that the advice here was private and not a notice of disapproval delivered to the public. *Id.* at 1402. Further, advice directed to a distributor was seen as unlikely to be challenged, given the large number of titles distributors carry and the marginal value of challenging advice suggesting that a few not be distributed. *Id.* The film exhibitor had the incentive to contest the advice, and the lack of a public aspect to the notice would not cut into ticket sales. *Id.* The court found a good faith attempt to enforce the state law, and it would not let the informal manner used lead to a finding of unconstitutionality without bad faith. *Id.*

183. 481 U.S. 465 (1987).

Registration Act.<sup>184</sup> The Act addressed, in part, the distribution of films produced by a foreign government and aimed at influencing the public regarding a political or public interest of that government.<sup>185</sup> Such films faced certain reporting requirements and would be classified and labeled as “political propaganda.”<sup>186</sup> The determination of whether the film did have the aim that activates the political propaganda provisions was left to the Registration Unit of the Justice Department.<sup>187</sup> In *Keene*, the Registration Unit determined that three environmental films produced by the government funded National Film Board of Canada, two on acid rain and one on the perils of nuclear war, were within the scope of the provisions.<sup>188</sup>

The challenge was brought by an elected official in California who wished to show the films, but feared a negative public reaction to his showing foreign “political propaganda” and the negative impact that could have on his political career.<sup>189</sup> The Court was unswayed by the state senator’s concerns, noting that the word “propaganda” has two meanings.<sup>190</sup> One of the meanings may be the slanted and misleading speech with which the plaintiff would not want to be associated, but it also includes fully accurate advocacy materials deserving of close attention, and both are considered proper usage.<sup>191</sup>

The Court refused to find any First Amendment violation.<sup>192</sup> The Act did not prohibit, restrain, or even burden distribution.<sup>193</sup> Nor did the government censure the films.<sup>194</sup>

To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda. The statute does not prohibit appellee from advising his audience that the films have not been officially censured in any way. Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public’s viewing of the materials.<sup>195</sup>

The video game industry may argue that the case is inapposite, since the web site might well be seen as censure, rather than as simply providing information for parental use. Interestingly, this issue is addressed by another case hearing a

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184. *Id.*; 22 U.S.C. §§ 611-621 (1982).

185. *See Keene*, 481 U.S. at 469-70.

186. *Id.* at 470-71.

187. *See id.*

188. *Id.* at 468, 480-81.

189. *Id.* at 467-68.

190. *Id.* at 477.

191. *Id.* at 477-78.

192. *Id.* at 485.

193. *Id.* at 480.

194. *Id.*

195. *Id.* at 480-81 (footnotes omitted).

separate challenge to the same statute and films under review in *Keene*.

In *Block v. Meese*,<sup>196</sup> the U.S. Court of Appeals for the District of Columbia Circuit heard an appeal arising from a challenge brought by a distributor of the same Canadian films. While taking the same view as the Supreme Court that there is no limitation on distribution and no actual expression of government disapproval in the use of the word “propaganda,” the opinion, written by now Justice Scalia,<sup>197</sup> goes beyond the Supreme Court’s analysis to consider in some detail the result, if “propaganda” were to be considered a term of disapproval. His conclusion is that, even if the labeling were an expression of disapproval of the ideas conveyed, there is no precedent or reason to find that labeling unconstitutional.<sup>198</sup> “Not every governmental action which affects speech implicates the first amendment.”<sup>199</sup>

Judge Scalia went on to address government speech that is critical of the ideas put forth by other speakers.

We know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech’s content. Nor does any case suggest that “uninhibited, robust, and wide-open debate” consists of debate from which the government is excluded, or an “uninhibited marketplace of ideas” one in which the government’s wares cannot be advertised. . . .

. . . A rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler’s Germany, but not to denounce Nazism. It is difficult to imagine how many governmental pronouncements, dating from the beginning of the Republic, would have been unconstitutional on that view of things.<sup>200</sup>

Indeed, the court seems correct. Many actions of government implicate and criticize the ideas of others. A presidential statement or the State of the Union Address may well criticize the ideas advocated by the other party. This official statement, as disparaging as it may be of others’ political views, would not reasonably be seen as a violation of the First Amendment rights of those holding and expressing those other views. The same should be true of a congressional resolution approving of one position and disapproving of another. If critical speech by the government were a First Amendment violation, only those out of

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196. 793 F.2d 1303 (D.C. Cir. 1986).

197. Justice Scalia had gone on to the Supreme Court by the time *Meese v. Keene* reached that Court and took no part in the decision in that case. The panel for *Block v. Meese* included not only Judge Scalia, but also Judges Bork and Wright. *Id.* at 1306.

198. *Id.* at 1312.

199. *Id.* (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983)).

200. *Id.* at 1313.

power could engage in political debate. Their speech, alone, would be nongovernmental and not restricted by this view of the First Amendment.

Applying the reasoning of the D.C. Circuit opinion to the video game context, it may be argued that limiting government disparagement would not have the same effect on the political debate, and, thus, any disapproval expressed by a web-based list should be seen as a violation of the First Amendment rights of game designers and producers. If anything, the distinction should cut in the opposite direction. The speech examples in Judge Scalia's opinion were political speech,<sup>201</sup> and that sort of speech is the most protected form of speech. If members of the government can criticize Nazism, it would seem that they could also criticize games such as *Ethnic Cleansing*, in which players take on Nazi roles and carry out virtual missions that would have had Nazi approval.<sup>202</sup>

Government warnings about violent video games are similar to statements on public health, and even if the public health concerns have not yet been sufficiently proven as to justify bans on video games, the statements may be made in an effort to inform the public. Any web site list would still not constitute a ban, and government warnings or even disapproval fall short, in the view of the D.C. Circuit, of implicating the First Amendment rights of the video game industry or of those who would play the games.

There is also a somewhat more recent case from the D.C. Circuit that is relevant here. In *Penthouse International, Ltd. v. Meese*,<sup>203</sup> the court addressed an action by the Attorney General's Commission on Pornography. The procedural aspects of the case are rather convoluted. The Commission held hearings on pornography and its availability to the public.<sup>204</sup> Based on those hearings, it sent a letter to a number of corporations indicating that the Commission had received evidence that the corporation was involved in the distribution of pornography and saying that the Commission thought it appropriate to allow the corporation to respond before the Commission issued its report on the distributors of pornography.<sup>205</sup> For example, the response of Southland Corporation, the parent of the 7-Eleven chain, was to tell the Commission that they had decided to stop selling adult magazines and hoped that their name would be left out of any final report.<sup>206</sup>

In an earlier case, *Playboy Enterprises, Inc. v. Meese*,<sup>207</sup> Playboy and Penthouse sought an injunction against the publication of any "blacklist" of corporations distributing their magazines.<sup>208</sup> The court there decided that the

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201. *See id.*

202. For a description of the game, see *Racist Groups Using Computer Gaming to Promote Violence Against Blacks, Latinos and Jews*, ANTI-DEFAMATION LEAGUE, Feb. 19, 2002, <http://www.adl.org/videogames/default.asp>.

203. 939 F.2d 1011 (D.C. Cir. 1991).

204. *Id.* at 1012-13.

205. *Id.* at 1013.

206. *Id.*

207. 639 F. Supp. 581 (D.C. Cir. 1986).

208. *Id.* at 582-84.

magazines were likely to prevail on the merits of a First Amendment claim since the letters were an informal system of government censorship and a system of prior restraints, and issued a preliminary injunction.<sup>209</sup> The court ordered the Commission to withdraw the letters, to so inform the corporations to which they had been addressed, and to refrain from naming any corporations in the final report.<sup>210</sup> In a case in which the magazines might better have left well enough alone, they instead persisted in pursuing a permanent injunction, declaratory relief, and a damages action.<sup>211</sup> The defendants sought summary judgment on the grounds that the equitable claims were now moot and that the damages were barred by qualified immunity.<sup>212</sup> The district court granted the summary judgment motion,<sup>213</sup> and Penthouse appealed.<sup>214</sup>

When the D.C. Circuit considered the claim, the court seemed less hospitable to the First Amendment claims.<sup>215</sup> Penthouse argued that the Commission had attempted to prevent or chill the distribution of constitutionally protected magazines and that the case fit within the parameters of *Bantam Books*.<sup>216</sup> The court, however, found the cases to be distinguishable. In the instant case, the court found an advisory commission lacking the tie to prosecutorial power present in the *Bantam Books* case and no authority to censor.<sup>217</sup> The present case also lacked threats of prosecution or other indications that the Commission was trying to ban distribution.<sup>218</sup> Penthouse suggested that the corporations receiving the letters would think they were being threatened, but the court was not swayed.<sup>219</sup> The court thought the Commission may have come close to suggesting that it had more power than it, in fact, did possess, but noted that the Commission had never threatened to use the state's coercive powers against the corporations receiving the letters.<sup>220</sup>

Speaking more generally, and in terms that are particularly important to the issue under consideration here, the court went on to say:

We do not see why government officials may not vigorously criticize a publication for any reason they wish. As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the

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209. *Id.* at 587-88.

210. *Id.* at 588.

211. *Penthouse*, 939 F.2d at 1012.

212. *Id.*

213. *Playboy Enters., Inc. v. Meese*, 746 F. Supp. 154 (D.C. Cir. 1990).

214. *Penthouse*, 939 F.2d at 1011.

215. The D.C. Circuit opinion is categorized as an affirmance, but it is an affirmance of the grant of summary judgment refusing additional equitable relief and damages. *Id.* at 1020.

216. *Id.* at 1014-15.

217. *Id.* at 1015.

218. *Id.*

219. *Id.*

220. *Id.*

statutory or even constitutional authority to regulate. If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized.<sup>221</sup>

Even accepting the claims of Penthouse that the letter was a threat to blacklist the corporations distributing the magazines. The court saw the charge "with the rhetoric drawn out" as no more than a threat publicly to embarrass the corporations and that this was a perfectly legal option.<sup>222</sup>

[C]orporations and other institutions are criticized by government officials for all sorts of conduct that might well be perfectly legal, including speech protected by the First Amendment. At least when the government threatens no sanction—criminal or otherwise—we very much doubt that the government's criticism or effort to embarrass . . . threatens anyone's First Amendment rights.<sup>223</sup>

The opinion was not unanimous in its First Amendment analysis. Judge Randolph concurred in affirming the denial of additional equitable relief and damages, but did not join fully in the First Amendment portions of the opinion.<sup>224</sup> Judge Randolph read the majority opinion as suggesting that the government may even make false, derogatory statements to interfere with the distribution of protected material.<sup>225</sup> Instead, he would draw a line between cases where the statements were true or even the result of inadvertent misstatement and intentional falsity calculated to bring about an injury to expression rights.<sup>226</sup>

In still another case from the D.C. Circuit, the court refused to find a constitutional violation in a situation in which an order by the Federal Communications Commission ("FCC") might have seemed to include an implied threat of license revocation directed at radio stations. *Yale Broadcasting Co. v. FCC*<sup>227</sup> considered an order by the FCC regarding "drug oriented" music.<sup>228</sup> The FCC order "remind[ed] broadcasters of a pre-existing duty, required licensees to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug

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221. *Id.* at 1015-16 (citation omitted).

222. *Id.* at 1016.

223. *Id.* The court did point to one case in which it had found a violation in attempts to disrupt political activities by publishing false allegations about the targeted group. *Id.* (citing *Hobson v. Wilson*, 737 F.2d 1, 28 (D.C. Cir. 1984)). The court distinguished that case by noting the secret "agents provocateurs" role of the FBI agents in that case compared to what was seen as open criticism present in the instant case. *Id.*

224. *Id.* at 1020 (Randolph, J., concurring).

225. *Id.*

226. *Id.*; but see *supra* note 223.

227. 478 F.2d 594 (D.C. Cir. 1973).

228. *Id.* at 595.

use.”<sup>229</sup> The order had stated that the FCC was not banning the play of “drug oriented” records and that there would be no reprisals against stations playing such music, but that it was still necessary for broadcasters to know the contents of what they broadcast and to make their own judgment as to the wisdom of broadcasting such music.<sup>230</sup>

A radio station argued that the order was a violation of its free speech rights, but the court found no such problem.<sup>231</sup> The task of knowing the contents of the music on the playlist was not seen as burdensome, given the FCC’s suggestions as to how such knowledge could be obtained, including from listener complaints.<sup>232</sup> The better argument by the station owner would seem to be the implicit threat behind the order. The court noted that licensees are required to operate in the public interest and that the knowledge required in the order was necessary for the station to know if it was meeting that requirement.<sup>233</sup> The implication would seem to be that by playing “drug oriented” music, presumably constitutionally protected matter, the stations would be violating their public interest mandate. The court, however, said, “[f]ar from constituting any threat to freedom of speech of the licensee, we conclude that for the Commission to have been less insistent on licensees discharging their obligations would have verged

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229. *Id.*

230. *Id.* at 596. An implied threat would, of course, have made a difference. Another FCC case, this time involving television violence, provides an example. *See Writers Guild of Am., W., Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated*, 609 F.2d 355 (9th Cir. 1979). In the mid-1970s, pressure was asserted against broadcasters to reduce violence, play it during hours when children were less likely to be in the audience, and include warnings. *Id.* at 1099-1128. The provisions were implemented by the National Association of Broadcasters (the “Association”), against a background of a concerted effort by the FCC and members of Congress, complete with threats that should “voluntary efforts” fail, there would be legislation. *Id.* The provisions were challenged by those involved in the creative aspects of the television industry. *Id.* In the federal district court, the policy was invalidated on the ground that the Association’s rules were the result of these threats and a violation of the First Amendment rights of writers, actors, directors, and producers. *Id.* at 1161. The district court opinion was vacated by the U.S. Court of Appeals for the Ninth Circuit on the grounds that the FCC had primary jurisdiction to hear the complaints. *See Writers Guild of Am., W., Inc. v. Am. Broad. Co.*, 609 F.2d 355 (9th Cir. 1979). For an argument that the vacating of the opinion has led the FCC not to learn the lessons of the district court’s analysis, see Robert Corn-Revere, *Television Violence and the Limits of Voluntarism*, 12 YALE J. ON REG. 187 (1995) (discussing efforts in the mid-1990s also to limit television violence).

The case does not speak to the video game proposal offered here. The FCC clearly has regulatory authority over the broadcast industry. That authority causes “suggestions” to be taken very seriously. When the prospect of legislation is added, the compulsion may reach the level of being a violation of the First Amendment. At least at this point, there is no similar regulatory authority over the video game industry.

231. *Yale Broad. Co.*, 478 F.2d at 597-99.

232. *Id.* at 600-01.

233. *Id.* at 598.

on an evasion of the Commission's own responsibilities."<sup>234</sup> The court pointed out that the plaintiff had recently had its license renewed, and there had been no showing of any broadcaster having failed to have a license renewed based on the order.<sup>235</sup> The court further noted that if there should be an unfair license denial, then legal redress would be available.<sup>236</sup>

This seems to be the sort of situation actually addressed by *Bantam Books*. There may be a sufficient threat that compliance is obtained and protected material is limited, without any action by a court. Only if a broadcaster is willing to risk its license to challenge the order will there be a legal determination of the constitutionality of this system of informal restraints. Yale Broadcasting moved for rehearing en banc, and although the motion was denied, Judge Bazelon did issue a statement as to why a rehearing should have been granted in recognition of the threat to the First Amendment rights of the broadcasters.

Talk of "responsibility" of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments. Since the imposition of the duty of such "responsibility" involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air.<sup>237</sup>

Judge Bazelon seems correct in his observations, but even here the court allowed this system of informal restraints. This may be a weakening of the case law protecting speech from such informal restraints, but even if the court would have agreed with Judge Bazelon, the case is still distinguishable from the program suggested here. The Bazelon view still rests on the power of the government to revoke or to not renew a license. No such power is available to the state in a program that lets parents know which stores and arcades make violent or sexually explicit games available to children younger than appropriate under the industry rating system.

Even government speech casting individuals in a very negative light has passed First Amendment scrutiny. In *American Family Ass'n v. City and County of San Francisco*,<sup>238</sup> the court considered a campaign against the advertising effort of the American Family Association. The advertisements took positions against homosexual activities, employing a Christian point of view.<sup>239</sup> A full page ad in the *San Francisco Chronicle* asserted that God abhors all sexual sin and that

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234. *Id.* at 599.

235. *Id.* at 602.

236. *Id.*

237. *Id.* at 605.

238. 277 F.3d 1114 (9th Cir. 2002).

239. *Id.* at 1118.

homosexuals “[make] a choice in yielding to temptation.”<sup>240</sup> It went on to complain about the reaction to the association’s and similar organizations’ positions on homosexuality.<sup>241</sup> The groups had been labeled as bigots and homophobes and said all they wanted was a reasoned debate on the issue.<sup>242</sup>

The Board of Supervisors for the City and County of San Francisco wrote to the plaintiffs blaming the murder of Matthew Shepard, in part, on the messages promulgated by groups like the American Family Association.<sup>243</sup> The letter went on to say, “[i]t is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians.”<sup>244</sup>

The Board also passed two resolutions. One condemned another murder of a homosexual and “call[ed] for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible crimes [against gays and lesbians].”<sup>245</sup> The second resolution addressed anti-gay television ads.<sup>246</sup> The resolution included the name of one of the plaintiffs, noted that “a prominent San Francisco newspaper” had accepted and published ads opposing toleration for gays and lesbians, and suggested that the “ads suggesting gays or lesbians are ‘immoral and undesirable create an atmosphere which validates oppression of gays and lesbians’ and encourages maltreatment of them.”<sup>247</sup> The resolution also claimed that a marked increase in violence against gays coincides with such campaigns and called on local television stations not to air ads aimed at converting homosexuals to heterosexuality.<sup>248</sup>

The court’s analysis was somewhat complex because the plaintiffs, instead of filing a free speech claim, filed a complaint based on the Establishment and Free Exercise Clauses of the First Amendment.<sup>249</sup> The free speech issue was, nonetheless, important to the Free Exercise claim.<sup>250</sup> Such claims must either assert that the law or practice at issue is not a general law or practice neutrally

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240. *Id.* at 1118-19.

241. *Id.* at 1119.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1120.

248. *Id.*

249. *Id.*

250. The court found no merit in the plaintiffs’ Establishment Clause claim. *Id.* at 1123. This position did, however, cause Judge Noonan to dissent. Since the case came to the court as an appeal of the grant of summary judgment to the defendants, Judge Noonan noted that the plaintiffs’ allegations must be accepted as true. *Id.* at 1126 (Noonan, J., dissenting). Accepting those allegations, he felt that there was a triable issue as to whether the Board had expressed official condemnation of the plaintiffs’ religious beliefs. *Id.* at 1126-27.

applied, but is instead aimed at religion, or that there is both a restriction on religious exercise and the implication of an additional constitutional right.<sup>251</sup> The additional constitutional right offered was the free speech right of the plaintiffs.<sup>252</sup> In response, the court said that the only cases in which government criticism of speech was unconstitutional were cases in which there was government conduct beyond the criticism.<sup>253</sup> The court refused to extend these cases and said: “We agree with the host of other circuits that recognize that public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of governmental power or sanction.”<sup>254</sup> Finally, in denying the violation of free speech, the court said:

[A]lthough the Defendants may have criticized Plaintiffs’ speech (or at least the perceived effect of it) and urged television stations not to air it, there was no sanction or threat of sanction if the Plaintiffs continued to urge conversion of homosexuals or if the television stations failed to adhere to the Defendants’ request and aired the advertisements.<sup>255</sup>

It appears, then, that government speech, when it is critical of the speech of others, may be very critical.<sup>256</sup> There seems to be no need to pull punches, and it would seem that the asserted correlations on which the Board’s claims rested are no better established than those surrounding violent video games. That seems to imply that a web site could assert the claim that the games are detrimental to

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251. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 878-81 (1990).

252. *Am. Family Ass’n*, 277 F.3d at 1124.

253. *Id.*

254. *Id.* at 1125.

255. *Id.* Judge Noonan also dissented on this issue. As he read the complaint, Plaintiffs alleged that the television stations refused to air plaintiffs’ ads in part because of the Board’s resolution. *Id.* at 1127 (Noonan, J., dissenting). From this, Judge Noonan said it was a fair inference that the television stations felt some compulsion. *Id.* It is not clear that this follows from the allegation. The stations, even if they refused to air the ads in response to the resolution, may have done so because they came to see the problems caused by the ads or did so out of public concern. However, in the view of all three judges, the refusal by the television stations had to be the result of a perceived threat to raise a constitutional issue.

256. In another case involving very critical speech, *Suarez Corp. Industries v. McGraw*, 202 F.3d 676 (4th Cir. 2000), the members of the Attorney General’s Office in the State of West Virginia accused the plaintiff of “cheating West Virginia residents out of their money.” *Id.* at 681. The plaintiff was every bit as active in the press, taking out ads accusing the Attorney General of playing politics and wasting the State’s money and time. *Id.* The Attorney General, in discussions with the Better Business Bureau (“BBB”), also indicated an unwillingness to assist the BBB in expansion, if Suarez remained a member. *Id.* at 682. The court said, “where a public official’s alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow, such speech does not adversely affect a citizen’s First Amendment rights, even if defamatory.” *Id.* at 687. Finding no such threat or coercion, the court held that there was no violation of Suarez’s rights. *Id.* at 689.

the well-being of youth. The holdings of various courts that the evidence is not yet strong enough to support the state's position under a strict scrutiny test does not mean that such a statement on a web site would itself be a constitutional violation. It could, of course, constitute libel, if the industry could bear the burden of proving its falsity.

The next case considered in this portion of the analysis, as a part of looking at the Second Circuit's decisions in this area, may well be the most relevant to the suggestions in this Article. That relevance comes from the fact that the case, *Hammerhead Enterprises, Inc. v. Brezenoff*,<sup>257</sup> also concerns a game. Hammerhead Enterprises produced the game *Public Assistance—Why Bother Working for a Living?*<sup>258</sup> It was a game in the style of *Monopoly* in which players moved around a board twelve times, once for each month of the year.<sup>259</sup> There were two routes to be taken in trying to accumulate the most money.<sup>260</sup> On the inside route, the "Able Bodied Welfare Recipient's Promenade," money was more easily accumulated, especially if the player landed on the "have an illegitimate child" square.<sup>261</sup> On the outside track, the "working person's rut," players faced obstacles in the nature of oppressive taxes, excessive regulation, and reverse discrimination.<sup>262</sup>

The game's developers sought publicity for their offering, appearing on *The Today Show* and *The Phil Donahue Show*.<sup>263</sup> The attempt at publicity also brought negative reaction, with the National Association of Women condemning the game and the Maryland NAACP's call for a boycott of stores carrying the game.<sup>264</sup> The criticism that led to the court action was from New York City's Administrator of the Human Resources Administration.<sup>265</sup> The Administrator, believing the game to be a distortion of the nature of the welfare system, saw it as his duty to express his disagreement with the view presented.<sup>266</sup> He did so by writing to thirteen department stores in the city, urging them not to carry the game.<sup>267</sup> The letter said that the game "does a grave injustice to taxpayers and welfare clients alike" and closed with: "Your cooperation in keeping this game off the shelves of your stores would be a genuine public service."<sup>268</sup>

Two stores responded, both indicating that they had already decided not to stock the game.<sup>269</sup> The Administrator took no further action following up on the

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257. 707 F.2d 33 (2d Cir. 1983).

258. *Id.* at 34.

259. *Id.* at 34-35.

260. *Id.* at 35.

261. *Id.*

262. *Id.*

263. *Id.* at 36.

264. *Id.*

265. *Id.* at 36-37.

266. *Id.* at 36.

267. *Id.*

268. *Id.* at 37.

269. *Id.*

other letters, did not investigate stores that were carrying the game,<sup>270</sup> and as the court noted, his department had no regulatory power over the merchants, and the Administrator did not contact any department that did have such power.<sup>271</sup> The court also noted that “no credible evidence suggests that any store decided not to carry the game as a result of Brezenoff’s letter.”<sup>272</sup>

Turning to the consideration of the First Amendment claim, the court found no violation,<sup>273</sup> only the Administrator’s “well-reasoned and sincere entreaty in support of his own political perspective” that the game should not be carried by the stores.<sup>274</sup> The court explained:

The record before us, however, shows this claim to be little more than a figment of appellants’ collective imagination. . . . Where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official’s request, a valid claim can be stated. Similarly, claimants who can demonstrate that the distribution of items containing protected speech has been deterred by official pronouncements might raise cognizable First Amendment issues. We have already noted, however, appellants cannot establish that this case involves either of these troubling situations.<sup>275</sup>

The court distinguished *Bantam Books* by once again noting the lack of power to impose sanctions and the lack of influence over the decision of any store.<sup>276</sup>

The question left by this opinion is what the result would have been if any department stores had decided not to carry the game because of the Administrator’s letter. If the stores had taken such action, given the content of the letter and the lack of regulatory authority in the department, there still would not have been an intimation of punishment or regulatory action, the first factor mentioned in the last quoted language. There would, however, have been an

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270. An investigation may constitute a violation of the First Amendment. In *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), the San Francisco office of the U.S. Department of Housing and Urban Development (“HUD”) conducted an investigation of three neighbors to a potential multi-family housing unit. The neighbors were concerned over the potential residents and conducted a political campaign against the project, and the HUD office investigated the campaign as an instance of housing discrimination. *Id.* at 1220-26. The Washington office of HUD eventually recognized that the neighbors had done nothing more than exercise their First Amendment rights, *id.*, and the Ninth Circuit allowed the neighbors’ suit for violation of their rights to proceed. *Id.* at 1240-41.

271. *Hammerhead Enter., Inc.*, 707 F.2d at 37.

272. *Id.*

273. *Id.* at 38.

274. *Id.*

275. *Id.* at 39 (citation omitted).

276. *Id.* The plaintiffs had also suggested that the Administrator’s efforts were unconstitutional because of their secret nature. *Id.* The court’s response was to note that “[t]he First Amendment does not require [that] public officials to communicate only through the media.” *Id.*

effect on distribution that might be said to be the result of official deterrence, the second factor. Which factor would control?

The result might be divined from the difference between the use of “a valid claim can be stated,” with regard to the first factor, and “might raise a cognizable First Amendment issue[],” with regard to the second factor.<sup>277</sup> That is, a government speaker threatening punishment or regulatory action is sufficient to constitute a violation of the First Amendment. On the other hand, if the basis for the claim is the effect of the government’s speech, that may be sufficient to raise such a claim. At least the plaintiff should have the opportunity to show that the negative distribution decision was motivated by some sense of threat arising from the government speech. Such an opportunity for the plaintiff would put the Second Circuit in line with the Ninth Circuit’s *American Family Ass’n* decision and mean that it is not the effectiveness, in itself, of the government speech that makes a difference. If it is effective because it provides a convincing argument or raises social values with which the hearers agree, similar to the effect that speech by a private citizen might have, that is not a violation. If it is effective because it is from the government and implies the imposition of some form of official sanction, that is a violation of the First Amendment.

This view may be reinforced by a later Second Circuit case, *Rattner v. Netburn*.<sup>278</sup> In that case, Rattner, a local businessman, had been very critical of the Village of Pleasantville, New York.<sup>279</sup> He regularly litigated zoning disputes against the Village and claimed that the Village selectively enforced laws against him and otherwise harassed him.<sup>280</sup> Rattner was a member of the local Chamber of Commerce and used the Chamber’s newspaper to express his views.<sup>281</sup> He placed an ad, formatted as an interview with him, in the paper criticizing the expenses incurred by the village in the litigation he filed.<sup>282</sup> In the same issue, on the front page, the Chamber published an article containing the results of a questionnaire indicating public dissatisfaction over the expenditures.<sup>283</sup>

In response, Netburn, a village trustee, and others involved in village government offered their own criticism of Rattner.<sup>284</sup> Netburn wrote the directors of the Chamber, other than Rattner, saying that the Chamber appeared to have “crossed the line between being a supportive, nonpartisan, and nonpolitical local organization to one that has a political agenda and purpose.”<sup>285</sup> He also asked the directors whether the entire membership had supported the decision to run the article, for a list of those supporting the decision, whether the Chamber had a political purpose and, if so, what it was, and whether members were using their

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277. *Id.*

278. 930 F.2d 204 (2d Cir. 1991).

279. *Id.* at 205-06.

280. *Id.* at 205.

281. *Id.* at 205-06.

282. *Id.* at 205.

283. *Id.*

284. *Id.*

285. *Id.* at 206.

Chamber offices to support political activity.<sup>286</sup> The letter finished with: “I believe—and many of my neighbors believe—that the recent [issue of the paper] raises significant questions and concerns about the objectivity and trust which we are looking for from our business friends. I would appreciate a reply at your earliest convenience.”<sup>287</sup> In response, the Chamber stopped publishing its paper, after one last scheduled issue, and it prevented Rattner from publishing anything in that last issue.<sup>288</sup> Rattner filed suit claiming a violation of his First Amendment rights in forcing the paper to cease publishing.<sup>289</sup> The district court granted summary judgment for the defendants, holding that Rattner had not shown any violation of his constitutional rights.<sup>290</sup>

Since the appeal was from a grant of summary judgment, the appellate court had to take all the plaintiff’s allegations as true.<sup>291</sup> Among those allegations was one, supported by depositions of the directors of the Chamber, stating that they took Netburn’s letter and other statements as threats of boycotts or of retaliatory action by the village.<sup>292</sup> The court held that summary judgment was improper.<sup>293</sup> “[T]he record, taken in the light most favorable to Rattner, reveals statements by Netburn that a reasonable factfinder could, in the words of *Hammerhead*, ‘interpret[] as intimating that some form of punishment or adverse regulatory action w[ould] follow’ if the [paper] continued to air Rattner’s views.”<sup>294</sup> Although the district court relied on *Hammerhead*, the Second Circuit distinguished the cases.

[T]he district court in *Hammerhead* found that the Brezenoff letter had no coercive impact, and we noted that “not a single store was influenced by Brezenoff’s correspondence.” Here, in contrast, a threat was perceived and its impact was demonstrable. Several Chamber directors testified at their depositions that they viewed the letter as reminiscent of

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286. *Id.*

287. *Id.*

288. *Id.* at 206-07.

289. *Id.* at 207. Compare *Rosignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003) (raising the issue of buying out as much of the run of a particular issue as possible rather than shutting down the operation of a paper). Sheriff’s deputies went from store to store and newspaper box to newspaper box buying all the available copies of the election day edition of the local newspaper. *Id.* at 520. The paper contained articles critical of the sheriff and a candidate the sheriff supported for state’s attorney. *Id.* The court found a violation of the First Amendment because some of the store clerks recognized the off-duty and out-of-uniform purchasers as deputies. *Id.* at 526. At least one clerk claimed to have been intimidated. *Id.* The operation was held to be a constitutional violation because the newspaper’s expression was suppressed in reaction to its criticism of government actors, and those actors used their government status in the purchases. *Id.* at 526-27.

290. *Netburn*, 930 F.2d at 207.

291. *Id.* at 209.

292. *Id.* at 209-10.

293. *Id.* at 210.

294. *Id.* at 209.

McCarthyism, threatening them with boycott or discriminatory enforcement of Village regulations . . . . [T]he Chamber member who had been “in charge of” the [paper] testified . . . he had actually lost business and had been harassed by the Village.<sup>295</sup>

The court found summary judgment improper because the above statements raised genuine issues of fact.<sup>296</sup>

The question again arises whether effect is sufficient or whether there must be a threat of negative official action of some sort. The court points to both as alleged; that is, there was a claim of perceived threat, and there was an effect.<sup>297</sup> Is the threat necessary, or will the effect suffice? Here, the case was remanded for further proceedings because “there are genuine issues of fact to be tried.”<sup>298</sup> If effect was sufficient, there would be no real issue of fact to be tried. It was undisputed that, after Netburn’s letter, the paper ceased publication and avoided any material from Rattner in its last issue scheduled. What remained unclear was the nature of Netburn’s comments: Could they be taken as a threat of some retaliatory official action? That governmental coercion remains the hallmark of any violation of the First Amendment to be found in government speech seems clear.

That is not the end of the Second Circuit’s analysis of this field. Eight years later the issue arose again in *X-Men Security, Inc. v. Pataki*.<sup>299</sup> X-Men Security had been providing security at Ocean Towers, a privately owned housing complex that received financial support from the federal and state government.<sup>300</sup> Ocean Towers had been quite dangerous, but when X-Men received the contract for security, safety improved rapidly.<sup>301</sup> A majority of the employees of X-Men were adherents of the Nation of Islam, the religious organization with which Louis Farrakan is affiliated.<sup>302</sup> A state legislator and U.S. Congressman criticized the award of the contract to X-Men because of their perceptions of the teachings of the Nation of Islam.<sup>303</sup> When the contract period expired Ocean Towers did not renew the contract with X-Men. X-Men brought a legal action claiming that the failure to renew was the result of racially and religiously biased statements by the legislators.<sup>304</sup>

The court refused to find the legislators liable.<sup>305</sup> The court noted that the legislators did not make the decision, did not have authority to supervise the

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295. *Id.* at 210 (citations omitted).

296. *Id.*

297. *Id.*

298. *Id.*

299. 196 F.3d 56 (2d Cir. 1999).

300. *Id.* at 60.

301. *Id.* at 61.

302. *Id.* at 60.

303. *Id.* at 61-62.

304. *Id.* at 62.

305. *Id.* at 72.

contracting process, and had no control over awarding or renewing the contract.<sup>306</sup> Although the legislators made accusations, asked for government investigations, questioned X-Men's eligibility, and advocated that the company not be retained, the court said:

We are aware of no constitutional right on the part of plaintiffs to require legislators to refrain from such speech or advocacy.

The First Amendment guarantees all persons freedom to express their views. . . .

One does not lose one's right to speak upon becoming a legislator. . . .

. . . The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.<sup>307</sup>

The court could find no cases providing a right on the part of an individual to prevent a legislator from expressing his or her views.<sup>308</sup> While the expression of views together with threats or coercion could be a violation of the First Amendment, critical speech, even by a government speaker, is protected. Here, the critical speech was coupled with an effect, so coercion, the necessary factor in finding a violation of the First Amendment, was missing.<sup>309</sup>

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306. *Id.* at 68.

307. *Id.* at 69-70.

308. *Id.* at 70.

309. *Id.* at 71. In a more recent case, the Second Circuit made it clear that "a public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights even if the public-official defendant lacks direct regulatory or decisionmaking authority over the plaintiff or a third party that facilitates the plaintiff's speech." *Okwedy v. Molinari*, 333 F.3d 339, 340-41 (2d Cir. 2003). The court held it error to have dismissed the plaintiffs' free speech claim where a jury could find that the official's statements to a third party could be construed as threats to use official power to retaliate against the owner of billboards on which plaintiffs' messages were posted unless the owner removed the signs. *Id.* at 344. The court distinguished *X-Men* by noting that in *X-Men* there was no allegation of pressure other than disapproving speech with no allegations of threats to actual decisionmakers of any coercive or intimidating conduct. *Id.* at 343-44.

In an older billboard case, the Third Circuit refused to find a violation of speech rights in a similar request to remove billboards. *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 86 (3d Cir. 1984). *R.C. Maxwell Co.* involved a historic town that had tried for several years to pass an ordinance barring billboards. *Id.* The Borough then made an informal request to the billboard owner that the billboards be removed. *Id.* The letter mentioned the proposed ordinance and the possibility of legal proceedings if the billboards remained. *Id.* The owner removed the billboards, and the entity that had been advertising on the billboards sued the Borough for violation of its First Amendment rights. *Id.* at 87. It was noted that the owner had plans to develop land in the Borough, and that while denying any quid pro quo, the owner did want to stay in the Borough's good graces. *Id.* The court, noting the owner's statements that it did not feel coerced or intimidated, found no violation. *Id.* at 87.

A web site listing stores selling games to children younger than the ratings for the game and malls with arcades allowing similar play would not contain the sort of threat or coercion required by the courts before a violation of the game makers', store owners', malls', or arcade operators' First Amendment rights may be found. The web site would be informative. If stores or malls decided that they did not like the information being disseminated and chose to change their sales policies or rental agreements, that would not violate game makers' expression rights. If the owners or operators did so, because they would have done so all along, but only now are aware of the problem, there is certainly no issue. If they change policies and practices because of concern over public reaction, that too is not a violation. The only potential violation from government speech, such as an informative web site, is if the speech contains threats or is otherwise coercive. There is no such threat or coercion to be found in the simple posting of information.

### C. *Due Process Issues*

Assuming that the courts find no infringement of First Amendment rights in posting the results of violent video game stings on a web site, the second line of attack on the proposal is likely to be a claim that it violates due process. The program proposes simply to attempt purchases by underage buyers or attempt to play such games in arcades and then post the results. The suggested program does not include hearings or even notice to the merchant with a chance to respond. The increased costs and delays in providing such procedure might make the system too expensive to implement and the web notice could be significantly delayed.

The basis for the due process claim would be that the merchants' reputations are affected by the stigma of being listed on the web site. Fortunately, for the proposed program, such stigmatization is usually not sufficient to invoke the Due Process Clause of the Fourteenth Amendment. That result was made clear by the Supreme Court in *Paul v. Davis*.<sup>310</sup> Prior to that decision, however, it might have seemed that stigmatization was sufficient to invoke the Constitution's procedural guarantees.

In the earlier case, *Wisconsin v. Constantineau*,<sup>311</sup> the Court found unconstitutional a Wisconsin law that authorized, without notice and the opportunity to be heard, the posting of the names of persons determined to be

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The two cases might be distinguished by the fact that in the first the cause of concern was the message against homosexuals, while in the second the concern was over the billboards generally. In the second case, however, there was also a concern expressed that the ads on the billboard had nothing to do with the historic town and advertised businesses outside the community. *Id.* at 86. It was the lack of coercion in the second case that made the difference. *Id.* at 87. The court refused to find private actions that conform to civic sentiment to be coercive for purposes of finding a First Amendment violation. *Id.* at 89.

310. 424 U.S. 693, 712 (1976).

311. 400 U.S. 433 (1971).

hazardous to themselves, their families, or the community due to excessive drinking.<sup>312</sup> Those whose names were posted could not buy liquor or receive it as a gift, with criminal penalties possible against the seller or donor.<sup>313</sup> There was language in that opinion indicating that the injury to reputation caused by posting the name required the safeguards of due process. For example, the Court stated that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”<sup>314</sup>

*Paul v. Davis*, at first blush, seems similar to *Constantineau*. In *Paul v. Davis*, law enforcement authorities in Kentucky sent to some 800 local merchants a flyer with the names and photos of active shoplifters.<sup>315</sup> Davis was included on the list, with his photo, on the basis of a shoplifting arrest and a charge that was later dismissed.<sup>316</sup> Davis felt that he had been stigmatized and argued that doing so without adjudicating the charge was a violation of due process.<sup>317</sup> The Court denied the claim and held that injury to reputation alone is never sufficient to invoke the Constitution’s procedural protections.<sup>318</sup> The Court distinguished *Constantineau* by noting that the individual in that case also lost a right protected by state law, the right of adults to purchase or be given alcohol.<sup>319</sup> In *Paul v. Davis*, there was no accompanying loss, only the damage to reputation. That damage was normally the subject of a defamation action under state law, and the plaintiff was to be left to that remedy.

In *Block v. Meese*,<sup>320</sup> the District of Columbia Circuit recognized this rule when considering the propaganda label put on the films from the National Film Board of Canada.<sup>321</sup> The court said that the word “propaganda” was not

312. *Id.* at 436-39.

313. *Id.* at 439 n.2.

314. *Id.* at 437. The Court also referred to reputation in other cases. *Id.* (citing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Peters v. Hobby*, 349 U.S. 331 (1955) (Douglas, J., concurring); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *United States v. Lovett*, 328 U.S. 303 (1946)). In *Board of Regents v. Roth*, 408 U.S. 564, 573-75 (1972), the Court refused to find a right to due process in the failure to rehire a teacher on a one year contract. The Court noted that

[t]he State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community.

. . . Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.

*Id.* at 573.

315. *Paul*, 424 U.S. at 699-95.

316. *Id.* at 695-96.

317. *Id.* at 697-98.

318. *Id.* at 706.

319. *Id.* at 708-09.

320. 793 F.2d 1303 (D.C. Cir. 1986).

321. *Id.* at 1314.

necessarily stigmatizing, but instead had a neutral reading.<sup>322</sup> The court went on, however, to say that even if “propaganda” were stigmatizing, “‘stigmatization’ alone, ‘divorced from . . . effect on the legal status of an organization or person, such as the loss of a tax exemption or loss of government employment,’ does not constitute a deprivation of liberty for due process purposes.”<sup>323</sup>

*Doe v. Department of Public Safety ex rel. Lee*,<sup>324</sup> a particularly enlightening case on this issue also involving a web based list, was a challenge to Connecticut’s sex offender list. Under Connecticut law, those convicted of certain offenses were required to register with the state annually, provide any changes of address, provide DNA and fingerprints, and submit to having his photo taken at least once every five years.<sup>325</sup> The names and addresses of registrants were placed on a web site searchable by zip code or town name.<sup>326</sup> Doe had been convicted of a crime that came within the scope of the statute and was required to register, but he claimed that he was not a dangerous sexual offender and posed no threat.<sup>327</sup> Since his name’s presence on the list would indicate dangerousness, Doe argued that he had a due process right to contest in some manner his individual dangerousness.<sup>328</sup> The court recognized the validity of his claim, and in doing so, the court explained the requirements of due process in this area.<sup>329</sup>

The court in *Doe* explained the requirements that result from *Paul v. Davis*. A plaintiff complaining of defamation by the government must show

(1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement.<sup>330</sup>

The test was characterized as a “stigma plus” test; that is, not only must there be stigma, there must also be some other loss.<sup>331</sup>

Oddly, the court devoted some time to whether or not the plaintiff had been stigmatized, a seemingly easy question.<sup>332</sup> This is best explained by the existence of a disclaimer on the web site that the list included both dangerous and nondangerous offenders, but the court determined that the inference likely to be drawn from the list is that those listed are more likely to be dangerous than those

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322. *Id.* at 1311-12.

323. *Id.* at 1314 (quoting *Paul*, 424 U.S. at 705).

324. 271 F.3d 38 (2d Cir. 2001), *rev’d*, 538 U.S. 1 (2003).

325. *Id.* at 42-44.

326. *Id.* at 44.

327. *Id.* at 45.

328. *Id.* at 45-46.

329. *Id.* at 47.

330. *Id.*

331. *Id.*

332. *Id.* at 47-50.

in the general population.<sup>333</sup>

Turning to the “plus” factor, the court first noted that the additional burden must be independent of the alleged defamation.

Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff’s reputation, it may be recoverable under state tort law but it is not recoverable in a [constitutional] action.<sup>334</sup>

The imposition of the plaintiff’s additional burden must be “governmental in nature” in order to distinguish the case from the ordinary defamation action.<sup>335</sup> In *Doe*, the registration requirements constituted an adequate “plus” factor because they altered the legal status of the plaintiff and were governmental in nature since they could not be imposed by a private actor.<sup>336</sup> Therefore, the plaintiff was due a hearing before being placed on the list.<sup>337</sup> While the Supreme Court reversed the holding that a hearing was required, it did not contradict the “stigma plus” analysis. Instead, the Court noted that the statute did not require dangerousness, so a hearing was not relevant to placement on the list. It would be a “bootless exercise.”<sup>338</sup>

The web site list proposed here would not impose anything approaching the degree of stigmatization present in *Doe*, especially if the site notes that it is not illegal for the stores to sell the games to those below the rated age or for arcades to allow similar play. Even more important, there is no “plus” factor. There is no imposition of a burden that is governmental in nature. There is no burden in the sense that no legal rights are altered. Whatever effect on legal rights may result from the posted web list is not uniquely governmental in its genesis. Although only a government actor could have required *Doe* to register with the State of Connecticut, anyone may run the same sort of sting suggested and post the results on a web site.

Any resulting injury to the stores or arcades listed is the sort of injury that, if the statements were false, would be the proper subject of a state law defamation action. The stigma, if there is any, is pure defamation. Any burden on business from consumers who may choose not to shop at stores that sell violent video games to those younger than the games’ ratings or who choose not to frequent malls with arcades allowing such play is exactly the same sort of burden that would grow out of statements by private individuals. If a store, arcade, or mall wishes to contest its inclusion on the list, the defamation suit is the proper route; however, if the compilation is accurate, that route will be of no avail.

With regard to any defamation suit, it is important to note that the *X-Men*

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333. *Id.* at 49.

334. *Id.* at 54 (quoting *Siebert v. Gilley*, 500 U.S. 226, 234 (1991)).

335. *Id.* at 56.

336. *Id.* at 56-57.

337. *Id.* at 57-60.

338. *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003).

court addressed the standard to be applied and held that the *New York Times* actual malice standard must be met.<sup>339</sup> As the Court in *New York Times* recognized, an uninhibited, robust, and open debate requires the breathing space, and the *New York Times* standard affords even erroneous statements.<sup>340</sup> The court in *X-Men* saw no reason not to extend this protection to statements by government officials, saying “[t]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators.”<sup>341</sup>

#### IV. LESSONS FROM THE CASES

##### A. *Content of the Web Site*

It is clear from the cases that a governmental entity may constitutionally maintain the proposed web site listing stores and arcades, or the malls containing them, that make violent video games rated beyond the age of the children available to children. The most important aspect of the web site, other than the information on child access, is carefully to avoid any threat, explicit or implied, of state coercion. That is, there can be no hint of the imposition of governmental sanction. While there is likely to be, and indeed the aim of the list is to bring about, public pressure, that is a far cry from government sanction. The list provides information that individuals may use to focus their concerns over children and violent video games. It is not a list of merchants who may be brought into court on any sort of charges to face criminal or civil sanction.

To assure that there is no perceived threat of governmental sanction, the site should make it clear that it is legal to allow children access to the games in question. That statement of legality may, however, be accompanied by a variety of other statements. Among those statements should probably be a recount of the video games industry’s ESRB rating system, noting that the ratings are not legally enforceable, and that the stores, arcades, and malls on the list are allowing children access to games the industry itself says are inappropriate.

The web site should also contain a summary of the research on the effects of violent video games on children, perhaps with links to further resources on the issue. It is true that the research has thus far not been sufficient to meet the strict scrutiny test necessary to justify legal restrictions on access by minors, but that does not mean the research is in any sense false. Even if the research were to turn out to be false, this is a matter of great public concern, and as long as the governmental unit does not know the material posted is false or have reckless disregard for its falsity, the statements are protected from any recovery for

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339. *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 69-70 (2d Cir. 1999) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (requiring that public official plaintiffs in a libel suit demonstrate actual malice on the part of the defendants, meaning that the defendants knew the statements made were false or had a reckless disregard for truth or falsity)).

340. *New York Times*, 376 U.S. at 271-72.

341. *X-Men Sec., Inc.*, 196 F.3d at 70 (quoting *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966)).

libel.<sup>342</sup> Nor is there any need for an exaggerated sense of fairness to the other side of the debate.<sup>343</sup> Not only is the health and psychological community rather united in its position on the issue; it is clear that a governmental entity may state its own position on an issue without providing a vehicle for presentation of alternative views as long as it employs a communication channel that is restricted solely to government use rather than a public forum.<sup>344</sup>

The government may state its belief based on scientific research that playing these games is harmful to children. Such a message would be similar to public health messages that the government conveys in a variety of contexts, such as the effects of high fat or high sugar foods on children or lack of exercise and sleep. Again, the government must be careful to avoid any perceived threat to parents. Not only do parents have a constitutional right to determine the material to which their children are exposed, at least in certain contexts,<sup>345</sup> any threat to parents resulting in pressure on stores, arcades, and malls could be construed as governmental pressure and a potential violation of the First Amendment rights of the providers. That is, although the government may constitutionally provide information from which parents and others may select the targets for their concerns over children and violent video games, any state coercion behind the public pressure can be a constitutional problem.

### *B. Concerns Over a "Ratings Creep"*

There are already those who are unhappy with the industry ratings and believe that some teen rated games should be rated for mature players.<sup>346</sup> The use of ratings suggested here may lead to a "ratings creep" in which games that formerly would have been rated M would be rated T, allowing the games to be bought or played without the retailer or arcade operator being placed on the offender list. Alternatively, the ESRB could simply go out of business. The ESRB could take the position that it provided ratings as a tool for parents, but if government is going to use the ratings to bring public pressure against those who provide the games to children, it would simply prefer not to provide the government the standard to be used.

In this regard, it is important to note that there is nothing in the case law examined, or in the analyses of those cases, requiring that the industry's own rating system provide the basis for inclusion on the web site list. A third party system or even a government rating could instead be used. A public interest

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342. See *supra* notes 339-41 and accompanying text.

343. See, e.g., *supra* notes 44-51, 55 and accompanying text.

344. See *Kidwell v. City of Union*, 462 F.3d 620, 624 (6th Cir. 2006) (finding no First Amendment violation in City's expenditure of funds to oppose citizen initiative), *cert. denied*, 127 S. Ct. 2258 (2007).

345. See, e.g., *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925) (recognizing "liberty of parents and guardians to direct the upbringing and education of children") (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

346. See *supra* notes 112-14 and accompanying text.

group could enlist psychologists to rate games. The government could not require that publishers submit the games prior to their release, but there is no prohibition against any entity, government or private, buying the game, playing it, and providing its own rating as to suitability for various ages.

To be fair to retailers, arcades, and mall operators, it should be clear to all what ages are seen as proper for each game under any nonindustry rating system. The best solution may be to invite the publishers of games rated as appropriate for a particular age to display the rating symbol of the group doing the rating. The public could then be informed when a retailer or arcade operator made available to children games rated by the alternative system as inappropriate for the children's ages. The effect would place the same public pressure on game producers to submit their games by the nonindustry evaluators for rating; but again, rating would not be legally mandated, and public pressure would not constitute a constitutional violation.

Presumably, the industry would prefer to maintain control of the rating system. Although the industry or a still existent ESRB might choose to stretch the categories, it would likely not want to do so to the point of breaking. If industry did stretch or abandon the system, the sting and web site list approach advocated here can continue to operate without the industry's cooperation.

