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IS VIOLENCE REALLY JUST FUN AND GAMES?: A PROPOSAL FOR A VIOLENT VIDEO GAME ORDINANCE THAT PASSES CONSTITUTIONAL MUSTER

The extreme violence and sex that have saturated our culture is hurting us in profound ways and are having an especially harmful impact on the youngest and most impressionable in our society. This is more than prevalent in violent video games, and right now, nothing stops a young child from walking into an arcade and watching or playing a game that would shock and horrify most people.¹

I. INTRODUCTION

On April 20, 1999, after habitually playing “point and shoot” violent video games such as *Doom*®, a game “licensed by the United States military to train soldiers to effectively kill,” teenagers Eric Harris and Dylan Klebold carried out one of the most heinous and infamous school shootings in the United States, killing thirteen and injuring twenty-three at Columbine High School in Littleton, Colorado.² Although it would undoubtedly be difficult to prove a direct causal connection between the violent video games Harris and Klebold spent hours playing and the killings they actually carried out in real life,³ this incident illustrates that

¹ Bart Peterson, *Restricting Violent Video Games* (May 9, 2000), available at <http://www.indygov.org/mayor/vvg> (last visited Sept. 15, 2002).

² Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCHOL. 772, 772-74 (2000) (discussing the Columbine shooting at length). In fact, once the investigation into the Columbine shooting commenced, authorities pulled off of Harris’ internet web-site a modified version of *Doom*®. *Id.* at 772-73. In this modified version of the game, there are two shooters, thought to be Harris and Klebold, each with extra weapons and unlimited ammunition, gunning down victim after victim without retaliation, since the game was developed in such a way that the people the shooters encounter are unable to fight back. *Id.*; see also David C. Kiernan, Note, *Shall the Sins of the Son Be Visited Upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 208 (2000).

³ E.g., *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1276 (D. Colo. 2002) (holding, inter alia, that the conduct of defendant video game manufacturers and movie producers in manufacturing games and producing movies could not be considered superseding or intervening causes in the death of William David Sanders, a teacher at Columbine High School who was shot and killed on April 20, 1999, by Harris and Klebold); see also *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 171-74 (D. Conn. 2002) (holding that Midway Games, Inc., the designer and marketer of the video game *Mortal Kombat*®,

games such as these can be interpreted as having the effect of shaping the perceptions of their minor players by portraying violence as a natural form of expression or retaliation.⁴

Video games have clearly become a permanent and prevalent fixture in the life of a staggering number of children in the United States. Studies have indicated that an estimated seventy-nine percent of American children play computer or video games an average of eight hours per week.⁵ Although there is a system of self-regulation created by the video game industry,⁶ horrendous acts such as the one at Columbine High School have raised concern among parents, educators, child advocates, medical professionals, and, more importantly, policymakers.⁷ Those concerned believe that there is a need for greater regulation in the video game industry.⁸

could not be held liable under the Connecticut Product Liability Act because the game did not constitute a product for purposes of the Act); *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 819 (W.D. Ky. 2000), *aff'd*, 300 F.3d 683 (6th Cir. 2002) (holding, *inter alia*, that defendant video game manufacturers could not be held liable under negligence and strict liability for the death of a school-shooting victim). *Meow Media* involved an action brought by the parents of a student who was killed in the December 1997 school shooting by Michael Carneal in Paducah, Kentucky. *Meow Media, Inc.*, 90 F. Supp. 2d at 800. The *Meow Media* court based its holding regarding the game manufacturers' lack of negligence on three main reasons: (1) the manufacturers could not have reasonably foreseen that a minor playing its video games would murder fellow students; (2) game users' actions supersede any violations on the part of game manufacturers; and (3) the intangible thoughts, ideas, and messages contained within video games are not "products" for purposes of strict product liability. *Id.* at 819.

⁴ Anderson & Dill, *supra* note 2, at 779-81 (finding that repeated exposure to violent video games increased players' aggressive thought patterns, which in some cases led to increased aggressive behavior); John Charles Kunich, *Natural Born Copycat Killers and the Law of Shock Torts*, 78 WASH. U. L.Q. 1157, 1165-66 (2000) (discussing how children emulate the thoughts and images that appear in the video games); Tara C. Campbell, Comment, *Did Video Games Train The School Shooters to Kill?: Determining Whether Wisconsin Courts Should Impose Negligence or Strict Liability in a Lawsuit Against the Video Game Manufacturers*, 84 MARQ. L. REV. 811, 818 (2001) (noting that violent video games allow impressionable children to participate in violence every day).

⁵ David Walsh, *Video Game Violence and Public Policy*, at <http://culturalpolicy.uchicago.edu/conf2001/papers/walsh.html> (last visited Sept. 15, 2002). Although studies such as Walsh's are based on video games in general, the focus of this Note is on the regulation of video games located in arcades and other places of business.

⁶ See *infra* note 173 and accompanying text (discussing the American Amusement Machine Association system of self-regulation).

⁷ Walsh, *supra* note 5.

⁸ *Id.*

In light of these concerns, several jurisdictions proposed new laws aimed at curbing minors' access to violent video games.⁹ However, the legality of such ordinances was not questioned until the year 2000, when the City of Indianapolis, Indiana,¹⁰ drafted and enacted an ordinance aimed at restricting minors' access to violent video games in arcades and other establishments.¹¹ The purpose of the Indianapolis Ordinance, as indicated in its recitals, was to deal with the psychological and harmful effects of violent video games on minors.¹²

⁹ See generally S. 696, 15th Leg., Reg. Sess. (Fla. 1998) (prohibiting persons who operate places of business where video games containing graphic violence are shown, displayed, or exhibited from knowingly permitting or allowing any person under eighteen years of age to patronize, visit, or loiter in such places of business); H.R. 2394, 81st Leg., 1st Sess. (Minn. 1999) (prohibiting any person from selling or distributing a video game containing graphic violence to a person under eighteen years of age); Kate Clements, *Carpentersville Ban on Violent Video Games is Dropped—For Now*, CHI. DAILY HERALD, Nov. 10, 1999, at F2, M1 (noting the decision of the city council of Carpentersville, Illinois, not to draft a proposed ordinance banning children from playing violent video games in movie theaters, restaurants, and bowling alleys); Jason Leopold, *The Safety Zone: Moving to Curb Graphics Violence, Stanton Is Now One of Few Cities in Nation to Prohibit Arcade Games*, L.A. TIMES, Jan. 25, 1999, at B2 (discussing a proposed Stanton, California, city ordinance aimed at restricting persons under eighteen from playing violent and sexually explicit video games in arcades and entertainment centers). All of the preceding measures either failed to pass through the legislative process in their respective jurisdictions or were merely proposed but never acted upon.

¹⁰ Indianapolis, Ind., Ordinance No. 72, 2000 (July 17, 2000) ("Indianapolis Ordinance"). The main provisions at issue for the purposes of this Note are the ordinance's definitions of the terms "graphic violence" and "harmful to minors," which state:

Graphic violence means an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration.

Harmful to minors means an amusement machine that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years, and:

- (1) Contains graphic violence; or,
- (2) Contains strong sexual content.

Id. at section 1.

¹¹ For an in-depth discussion of the Indianapolis Ordinance, see discussion *infra* Part II.C.3.

¹² Indianapolis, Ind., Ordinance No. 72, 2000. The ordinance stated in its recitals:

WHEREAS, Marion County and the City of Indianapolis have compelling interests in protecting the well-being of minors, in

432 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

Unfortunately, the Indianapolis Ordinance never went into effect because of a successful First Amendment challenge by the video game industry in *American Amusement Machine Ass'n v. Kendrick*.¹³ As a result, no court in the United States has upheld a regulation aimed solely at violent video games available for use in arcades and other places of business.¹⁴ Regardless of the unfortunate and costly demise of the

protecting parents' authority to shield their minor children from influences that the parents find inappropriate or offensive, and in reducing juvenile crime; and

WHEREAS, our courts have recognized that minors are affected by and may be protected from patently offensive sex-related material; and

WHEREAS, recent academic literature corroborates the finding of earlier studies that violent video games produce psychological effects in minor children and that prolonged exposure to violent video games increases the likelihood of aggression in minor children . . . ; and . . .

. . . ;

WHEREAS, producers and retailers of video games agree that "the best control is parental control"; . . . and . . . ;

WHEREAS, parents are less able in public places than in the home to control the level of violence and sexual content to which their minor children are exposed; . . .

Id. (citations omitted); see also City of Indianapolis, Office of the Mayor, *Restricting Violent Video Games*, available at <http://www.indygov.org/mayor/vvg> (last visited Sept. 14, 2002). Initially developed as just one of many platforms in 1999 Indianapolis mayoral candidate Bart Peterson's "Peterson Plan," the Indianapolis Ordinance was designed to modify Indianapolis' Municipal Code sections regarding the licensing of operators of "amusement" locations. City of Indianapolis, Office of the Mayor, *Restricting Violent Video Games*, available at <http://www.indygov.org/mayor/vvg> (last visited Sept. 14, 2002). Once elected, the Indianapolis Ordinance became the first proposal of Peterson's term in early 2000. *Id.*

¹³ 244 F.3d 572, 580 (7th Cir. 2001), *cert. denied*, 531 U.S. 994 (2001) (holding the Indianapolis Ordinance violative of the First Amendment rights of video game manufacturers and minors).

¹⁴ But see *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 200 F. Supp. 2d 1126, 1141 (E.D. Mo. 2002) (upholding a St. Louis County Ordinance prohibiting making available violent video games for establishment or home use). St. Louis County Ordinance No. 20,193 (Oct. 26, 2000), the ordinance upheld in *Interactive Digital Software Ass'n*, is aimed at minors' access to violent video games in arcades and other business establishments as well as use of games for home use by way of purchasing or renting the games at a retail establishment. *Id.* at 1129-30 (discussing the provisions of the St. Louis County Ordinance). However, the future of the St. Louis County Ordinance still remains uncertain and unresolved at the time this Note is being published. See, e.g., David Hudson, *Judge Upholds Video Game Restriction: St. Louis County Case Doesn't Jibe With 7th Circuit Decision*, 17 A.B.A. J. E-REPORT 5 (May 3, 2002) (discussing *Interactive Digital Software Ass'n* and quoting many in the game industry who believe that the district court's decision was incorrect for the primary reason that it did not recognize games as protected speech under

ordinance,¹⁵ the Indianapolis model can be viewed as a catalyst for other jurisdictions in their attempts to enact similar legislation.¹⁶

This Note proposes that an ordinance aimed at restricting minors' access to violent video games in arcades and other establishments can be enacted and pass constitutional muster under the First Amendment if it recognizes video games as "speech" under the First Amendment, if it is aimed at restricting only minors' access to games, and if it has a clear definition of what constitutes a "violent" video game harmful to

the First Amendment); Mark Jurkowitz, *Appeals Court Holds Key in Battle Over Regulation of Violent Video Games*, BOSTON GLOBE, Oct. 2, 2002 at D1 (noting that the future of the St. Louis County Ordinance is "on hold" and will be predicated on the outcome of a decision by the United States Court of Appeals for the Eighth Circuit, which will be rendered in Spring 2003); Jeff Wagener, Letter to the Editor, *Enforce Video Game Ordinance*, ST. LOUIS POST DISPATCH, June 22, 2002, at A36 (arguing, in his capacity as the former St. Louis County councilman who introduced and secured passage of the county's ordinance, that the county officials need to enforce the ordinance as soon as possible in light of the district court's ruling as well as the continuing harm children face at the hand of violent video games). Regardless of the legal uncertainty of the St. Louis County Ordinance, the latter portion of the St. Louis County Ordinance (i.e., provisions regulating a minors' purchase or rental of games in retail stores) is a feature that the Indianapolis Ordinance did not contain, which thereby means that the ordinance proposed by this Note does not contain it either, given that this Note corrects the two fatal flaws of the Indianapolis Ordinance (i.e., its definitions of "violent video games" and "harmful to minors"), and the Indianapolis Ordinance would have likely been upheld by the Seventh Circuit but for its definitions of "violent video games" and "harmful to minors." *Am. Amusement Mach. Ass'n.*, 244 F.3d at 580 (noting, in dicta, that "a more narrowly drawn ordinance might survive a constitutional challenge"). Thus, while the St. Louis County Ordinance, the Indianapolis Ordinance, and the proposed ordinance of this Note all contain the common element of attempting to regulate video games, the methods and means, as well as the reach of the ordinances, vary significantly. See *infra* Part IV.B; see also VAT = Violent Arcade-Game Tax?, at <http://www.eurogamer.net/news.php?id=5697> (last visited Sept. 14, 2002). In May 2001, the Karlsruhe Court in Germany upheld a Goettingen, Germany, city ordinance imposing a 700% higher tax rate on violent video games than for non-violent games in city arcades in an effort to protect minors from playing such games as well as to discourage local arcade owners from having the games in their establishments. *Id.*

¹⁵ Maureen Groppe, *Video Game Judgment to Cost City*, INDIANAPOLIS STAR, Jan. 4, 2002, at A1. In December 2001, Indianapolis, in a consent judgment, agreed to pay the video game industry \$318,000 for lawyers' fees and other costs incurred in its challenge. *Id.* On top of the legal fees, Indianapolis spent an estimated \$400,000 in drafting and defending the ordinance, which raised sharp criticism in the city. See, e.g., Mike Redmond, *Dear Mayor Bart: You're Having a Cow Over the Wrong Stuff*, INDIANAPOLIS STAR, Nov. 1, 2001, at E1.

¹⁶ Maureen Groppe, *City Loses Video Game Case*, INDIANAPOLIS STAR, Oct. 30, 2001, at A1. After the ordinance was struck down, Mayor Peterson stated that he had hoped passing the ordinance raised awareness of violent video games throughout the nation and that other local and state governments would try to enact similar laws. *Id.*

434 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

minors.¹⁷ Part II of this Note will provide a brief history of First Amendment jurisprudence, an in-depth examination of the Supreme Court's jurisprudence regarding the protection of children, and the development of case law concerning video games in general.¹⁸ Part II will also provide an in-depth discussion of the Indianapolis Ordinance from its inception until its demise in the courts.¹⁹ Part III will analyze the key issues that a jurisdiction will need to address in the proposal and enactment of such an ordinance.²⁰ Part IV will propose portions of a model ordinance to be used by jurisdictions attempting to deal with the effects of violent video games on minors.²¹

II. HISTORY AND DEVELOPMENT OF PROTECTION OF CHILDREN
REGULATIONS CONFLICTING WITH FIRST AMENDMENT RIGHTS

The Framers of the Constitution intended the First Amendment's Free Speech Clause²² to serve their deeply held ideal of individual autonomy in the United States.²³ They sought to further this ideal by

¹⁷ See *infra* Part IV.

¹⁸ See *infra* Part II.A-C.1-2.

¹⁹ See *infra* Part II.C.3-4.

²⁰ See *infra* Part III. The key issues are as follows: (1) whether video games constitute "speech" under the First Amendment; (2) what standard of review the ordinance should be tailored under in order to be successful in potential legal challenges; and (3) what type of definition of "violence" can pass constitutional muster. See *infra* Part III.

²¹ See *infra* Part IV. Since the only major challenge to such an ordinance will be its definition of what constitutes a "violent video game harmful to minors," the proposal will focus solely on that portion of an ordinance. For a discussion of the problems with the "violence" definition in the Indianapolis Ordinance, see *infra* Part II.C.4.

²² U.S. CONST. amend. I (providing that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."). The First Amendment's free speech protection also applies to the states through its incorporation into the Due Process Clause of the Fourteenth Amendment. See *generally* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that freedom of speech and of the press are among the fundamental personal rights and liberties protected by the Due Process Clause of the Fourteenth Amendment from impairment by the states).

²³ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 892-902 (2d ed. 2002). In fact, the First Amendment was regarded as the Framers' reaction to the suppression of speech and of the press that developed in the English common law. *Id.* Therefore, the motivating notion for the Framers in enacting the First Amendment was to eliminate the prior restraints on publication, as well as the restrictions on the speech of individuals that were punishable as crimes (e.g., speech in England was restricted by the law of seditious libel that made criticizing the government a crime). *Id.* Nevertheless, following its inception and until the nineteenth century, the First Amendment was interpreted under William Blackstone's logic of what was regarded as free speech. *Id.*; see also DAVID M. O'BRIEN,

preserving the essential right of individuals to participate in free and open discussion.²⁴ For the most part, the First Amendment stemmed from the Framers' view that freedom of speech and the press was the "great bulwark of Liberty."²⁵ The influential writings of English legal and political commentators largely influenced the Framers, particularly James Madison, thereby prompting them to press for the Constitution to include a provision that would establish the rights that would be enjoyed by free speech.²⁶ However, the Framers provided little documentation regarding the reason why this right was essential to a democratic and open society, leaving the purpose and effect of the Amendment to be developed over time.²⁷

CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 355-63 (1997). Blackstone's commentary on the notion of a right to free speech provides that

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying on *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

Id. at 355 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 151-52 (1766)).

²⁴ O'BRIEN, *supra* note 23, at 354-55.

²⁵ *Id.* at 354-63.

²⁶ *Id.*; see also, *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). In *Thomas*, Justice Jackson, in his concurrence, noted that the very purpose of the First Amendment can be derived from the "forefathers" (i.e., Framers) lack of trust and reluctance in conferring upon the government the right to separate the true from the false for individuals. *Id.* Therefore, from the logic of the Framers, Justice Jackson stated that the very purpose of the First Amendment was to "foreclose public authority from assuming a guardianship of the public mind through regulating . . . speech." *Id.* He also noted that "[i]n this field every person must be his own watchman for [the] truth." *Id.*

²⁷ CHEMERINSKY, *supra* note 23, at 892-96. Commentators have noted that this lack of finding an explicit intent is directly attributable to there being nothing in the historical record shedding light on free speech issues at the time of the Amendment's ratification, as well as the myriad of free speech issues facing modern society today. *Id.* But see O'BRIEN, *supra* note 23, at 354-56. Another group of commentators, however, have noted that a clearer understanding of the Framers' intent can be found implicitly through a series of drafts of the First Amendment, primarily written by Madison. *Id.* In these proposed drafts, Madison's main argument was that individual autonomy and the rights to liberty in the United States could only be achieved if individuals had the freedom to speak and express their sentiments. *Id.* at 356. Because of these arguments, Madison proposed the following draft for the First Amendment: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." *Id.*

A. *Overview of General First Amendment Standards*

As a result of the Framers' ambiguity, the First Amendment has developed into one of the most widely reaching and pervasive constitutional provisions.²⁸ The Framers recognized the need for the protection of the citizenry against the suppression of free speech in order to have a free-flowing and lively democracy.²⁹ Justice Oliver Wendell Holmes observed that, when presented with a regulation aimed at the suppression of speech, courts have to be "eternally vigilant" against attempts to check the expression of "unpopular" or "immoral" opinions, unless they serve as "immediate breaches of the peace."³⁰ Consequently, Justice Holmes noted that the ultimate goal of having a robust and free-flowing society would require an uninhibited "marketplace of ideas" protected by the First Amendment.³¹ In light of Holmes' guidance, the Court has noted that the government must remain neutral in the marketplace of ideas.³² Also, the First Amendment has oftentimes been interpreted by the Court as conferring upon the citizenry a right to receive and discern information in the free-flowing marketplace.³³

Regardless of the need for a "marketplace" and free flow of ideas, the Supreme Court has repeatedly emphasized that the right to free speech is not absolute.³⁴ The Court has noted that there are certain well-defined examples of speech that might, to varying degrees, be

²⁸ JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION 204 (1999) (noting the reach and ubiquitous nature of the First Amendment in the United States). In light of the fact that the First Amendment covers such a vast amount of people, events, and concerns, it would be beyond the scope of this Note to discuss each in turn.

²⁹ CHEMERINSKY, *supra* note 23, at 892-96.

³⁰ *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

³¹ *Id.* at 630-631. With the "marketplace of ideas" concept, Justice Holmes' reasoning was premised on the notion that the free trade of ideas is the ultimate goal desired and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market[place of ideas], and . . . truth is the only ground upon which [the citizenry's] wishes safely can be carried out." *Id.*

³² *Madison Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.").

³³ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (noting that the Court has referred to a First Amendment protected right to receive information and ideas in a variety of contexts).

³⁴ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). The Court noted that "the right of free speech is not absolute at all times and under all circumstances." *Id.*

suppressed.³⁵ In general, these types of speech include the lewd and the obscene,³⁶ the profane,³⁷ the libelous,³⁸ and “fighting” words.³⁹ The Court has noted that these forms of speech are not essential to the exposition of ideas and are of such slight social value that any benefit that could possibly be derived from them is outweighed by the social interests in order and morality.⁴⁰

The Court first articulated its modern standard for assessing the constitutionality of a regulation aimed at the suppression of speech in *Boos v. Barry*.⁴¹ In *Boos*, the Court noted that regulations focused on the direct impact speech has on its audience are content-based regulations.⁴²

³⁵ *Id.* at 571-72.

³⁶ *Miller v. California*, 413 U.S. 15 (1973). *Miller* set forth the Court’s modern-day obscenity standard. *Id.* at 24. Under the obscenity standard, there are three issues to assess to determine whether a particular form of speech is obscene, and thus afforded no First Amendment protection: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.*

³⁷ *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940) (noting that the “profane” is typically speech that is provocative language held to amount to a breach of the peace consisting of profane, indecent, or abusive remarks directed towards an audience). The Court regards such words as “not in any proper sense communication of information or opinion safeguarded by the First Amendment.” *Id.*

³⁸ *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964) (stating that words published concerning a person are libelous if they tend to injure a person in his or her reputation in the public).

³⁹ *Chaplinsky*, 315 U.S. at 572-73. With regards to “fighting words” in particular, the Court in *Chaplinsky* noted that fighting words are speech that is likely to provoke an audience into using illegal force. *Id.* But see *Cohen v. California*, 403 U.S. 15, 20 (1971) (limiting the fighting words doctrine by holding that the use of generally provocative words will not always justify use of a fighting words/disorderly conduct regulation); see also Christine Egan, *Fighting Words Doctrine: Are Police Officers Held to a Higher Standard, or Per Bailey v. State, Do We Expect No More From Our Law Enforcement Officers Than We Do From the Average Arkansan?*, 52 ARK. L. REV. 591, 591-92 (1999). As commentators have noted, in the time since the *Chaplinsky* doctrine was established, society has become “much coarser,” and, therefore, the fighting words doctrine set forth in 1942 by *Chaplinsky* is not viewed as stringent in modern society as it was at the time of its inception. Egan, *supra*.

⁴⁰ *Chaplinsky*, 315 U.S. at 572.

⁴¹ 485 U.S. 312, 333 (1988) (holding that the provisions of a District of Columbia ordinance aimed at regulating the location of individuals who wished to carry signs critical of foreign governments on the public sidewalks near the embassies of those governments were content-based restrictions on political speech in a public forum and not narrowly tailored to serve a compelling state interest).

⁴² *Id.* at 321-22.

The Court further noted that content-based regulations and restrictions on non-commercial speech are analyzed under the "strict scrutiny" test.⁴³ Therefore, under the *Boos* standard, the government must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.⁴⁴ The Court reaffirmed the *Boos* standard four years later in *Burson v. Freeman*.⁴⁵ In *Burson*, the Court noted that, as a general matter, content-based restrictions on speech are "hostile" to the First Amendment and that it is the government's burden to prove why the regulation is necessary and proper.⁴⁶

Aside from this standard the government must adhere to in drafting and enacting regulations, the Court has often noted the "familiar principle of constitutional law" that the Court is not a "super-legislature," and, therefore, it will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.⁴⁷ Rather, the Court grants deference to the legislative branch and does not judge the motivating notions of the legislative branch unless they are clearly arbitrary.⁴⁸

Typically, the question of whether speech is protected by the First Amendment depends on the content and type of speech.⁴⁹ For example, in *Young v. American Mini Theatres*,⁵⁰ four Justices of the Court asserted that, although it is the Court's duty to defend the right to speak, there is a hierarchy of speech and certain forms of speech are not worth

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 504 U.S. 191, 211 (1992) (holding a Tennessee statute prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of the entrance to a polling place constitutional under the First Amendment and the *Boos* standard because it was narrowly tailored to serve the compelling state interest of preventing voter intimidation and election fraud).

⁴⁶ *Id.* at 197-98. The Court in *Burson* further noted that this "hostility" of the First Amendment extends, not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic. *Id.* at 197.

⁴⁷ E.g., *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). In *O'Brien*, the Court upheld a congressional statute prohibiting the burning of a selective service registration certificate (i.e., a "draft card"). *Id.* at 386.

⁴⁸ *Id.* at 383-84.

⁴⁹ *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 72-73 (1976) (upholding city ordinances prohibiting operation of any "adult" movie theater, bookstore, and similar establishments within 1000 feet of any other "adult" establishment or within 500 feet of a residential area).

⁵⁰ *Id.*

"march[ing] our sons and daughters off to war to preserve."⁵¹ In light of this hierarchy, certain types of speech are recognized as being highly valued, others are of a slightly lower value, while still other forms are of little or no value and fall within the "outer ambit of First Amendment Protection."⁵²

In assessing the suppression of speech, the Court has also crafted a distinction between content-based and content-neutral regulations.⁵³ On the one hand, the Court has noted that regulations enacted for the purpose of restraining speech based on its content presumptively violate the First Amendment.⁵⁴ In order for the government to support its content-based regulation of speech, it must satisfy strict scrutiny review by asserting a compelling interest with means narrowly tailored to accomplish that interest.⁵⁵ Unless the means chosen are the only effective means by which the government's interest can be effectively achieved, the government will be forced to choose a plausible, less restrictive alternative.⁵⁶ On the other hand, the Court has noted that content-neutral regulations, which typically involve a restriction on the time, place, and manner of the speech, are acceptable so long as they are designed to serve a substantial governmental interest and do not

⁵¹ *Id.* at 70-71. The Court noted that although it will not tolerate total suppression of a type of speech, there exists this "hierarchy" of sorts in which protecting a certain type of expression (e.g., sexually explicit material) is of a wholly different and lesser magnitude than forms of speech viewed as "fundamental" and "necessary" to a free-flowing democracy. *Id.* at 64-70. Accordingly, the Court held that the government may legitimately use the content of certain materials as a basis for placing them in a different classification from other forms of speech. *Id.* at 70-71.

⁵² *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (upholding a state statute prohibiting the knowing or intentional appearing in a public place in a state of nudity); *see also City of Erie v. PAP'S A.M.*, 529 U.S. 277, 296-302 (2000) (upholding a city ordinance relying on the *Barnes* decision).

⁵³ *See generally Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding a zoning ordinance that prohibited adult motion picture theaters from locating within 1000 feet of any residential zone, single or multiple-family dwelling, church, park, or school).

⁵⁴ *Id.* at 46-47.

⁵⁵ *Id.* Strict scrutiny requires the following in order for a content-based regulation to be upheld: (1) a compelling state interest; (2) a narrowly tailored fit between the means and end; and (3) no available less restrictive alternatives. *Id.* However, the Court has noted that a regulation can still meet strict scrutiny without being the least-restrictive or least-intrusive means of regulation "so long as the regulation promotes a substantial governmental interest that would be achieved less effectively, absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989).

⁵⁶ *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815-16 (2000); *Boos v. Barry*, 485 U.S. 312, 320-21 (1988).

unreasonably limit alternative avenues of communication.⁵⁷ Such regulations are generally subject to intermediate scrutiny.⁵⁸ Lastly, regulations on speech that are aimed at serving a legitimate government purpose and do not directly deal with the content or effect of the speech are subject to a rational basis standard of review, requiring that the government establish only a legitimate purpose.⁵⁹

Despite these general distinctions, there is not a bright-line rule for courts to follow when reviewing a regulation suppressing speech.⁶⁰ Many types of regulations do not fit neatly into one of these three broad categories.⁶¹ Therefore, the First Amendment analysis of regulations aimed at either speech itself, the primary effects of speech, or the "secondary effects" of speech,⁶² is an extremely fact-specific inquiry that

⁵⁷ *Renton*, 475 U.S. at 47; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

⁵⁸ *Renton*, 475 U.S. at 47. Under intermediate scrutiny, a law will be upheld if it is substantially related to an important government purpose. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

⁵⁹ *Red Lion Broad. v. FCC*, 395 U.S. 367, 390-92 (1969). Under rational basis, a law will be upheld if it is rationally related to the legitimate government purpose. *Id.* In fact, the purpose need not be the actual goal of the litigation, rather any conceivable legitimate purpose is sufficient so long as the means chosen are a reasonable way to accomplish the objective. *Id.*

⁶⁰ See generally Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 81-84 (1978).

⁶¹ *Renton*, 475 U.S. at 47-49. The Court dealt squarely with this issue in *Renton*. *Id.* The Court noted that the ordinance at issue did not fit neatly into the "'content-based' or 'content-neutral' category." *Id.* at 47. Rather, the Court noted that, while the ordinance on its face appeared to be aimed at regulating the content of the speech, it was nevertheless more akin to a content-neutral regulation, since the "predominate concern" of the government in suppressing the speech was to deal chiefly with the "secondary effects" the speech at issue in the ordinance would cause if it was absolutely "free." *Id.* at 47-48.

⁶² *Id.* In general, secondary effects involve the government's predominate concern being not with the content of the speech regulated but rather with the effect that the speech will have on its surrounding area, as well as through individuals "hearing" the speech. *Id.* at 47-48. Particularly in *Renton*, the Court noted that the ordinance was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the 'quality' of the city's neighborhoods, commercial districts, and the quality of urban life." *Id.* at 48. The "secondary effects" logic also illustrates that the government is not predominately concerned with suppressing speech because if they were, the regulation would try to close the establishment engaged in the speech or restrict their number rather than "circumscribe their choice as to location." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 82 (1976) (Powell, J., concurring). The Court has held that the "secondary effects" approach does not apply to content-based regulations. See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000) (holding that the "lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no

often results in different outcomes for ordinances that appear similar in their aim but deal with different areas of protected speech.⁶³

Furthermore, a regulation aimed at suppressing speech must be explicitly clear in its reach and parameters in order to avoid being struck down for vagueness⁶⁴ or overbreadth.⁶⁵ There are three factors for courts to consider when deciding whether a law is unconstitutionally vague under the First Amendment: (1) whether the law is of sufficient clarity to "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly;" (2) whether the law provides "explicit standards for those who apply them;" and (3) whether the law "abuts upon sensitive areas of basic First Amendment freedoms."⁶⁶ With regard to overbreadth, the Court has held that, in order for a statute to be declared unconstitutional, there must be "substantial overbreadth."⁶⁷ Substantial overbreadth occurs when a law is: (1) excessive in regulation and (2) substantially excessive in relation to the statute's plainly legitimate sweep.⁶⁸

B. Overview of the Supreme Court's Jurisprudence Regarding First Amendment Regulations Aimed at the Protection of Children

Under First Amendment jurisprudence, the Court has repeatedly noted that the government, depending on the type of speech, has either a compelling interest or an exceedingly persuasive justification in protecting children from obscene, harmful, and other types of speech.⁶⁹

application to content-based regulations targeting the primary effects of protected speech").

⁶³ See generally Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Cass R. Sunstein, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555 (1989).

⁶⁴ See generally *Grayned v. City of Rockford*, 408 U.S. 104, 107-108 (1972) (holding that "an enactment is void for vagueness if its prohibitions are not clearly defined").

⁶⁵ See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973) (holding that an overbroad statute, by its very existence, may prevent parties from uttering constitutionally protected speech or expression).

⁶⁶ *Grayned*, 408 U.S. at 108-09.

⁶⁷ *Broadrick*, 413 U.S. at 612-15 (emphasis added).

⁶⁸ *Id.* at 615.

⁶⁹ See generally *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1403 (2002) (recognizing the government's ability to place restrictions on speech in order to protect children, but noting that the "speech ban" must be narrowly drawn); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570-71 (2001) (recognizing the government's compelling interest in protecting children but noting that it is not absolute); *Denver Area Educ. Telecomm.*

442 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

Moreover, several jurisdictions have enacted “harmful to minor” laws.⁷⁰ In these laws, the government’s primary goal is to protect minors from certain forms of low-value speech that the government has found detrimental to the mental growth and development of minors.⁷¹

Courts have long recognized that parents have a strong and vital role in the upbringing of their children. In order to supplement this role, the government has a legitimate and sometimes compelling interest in the upbringing of “its” children.⁷² The most common method of promoting these strong interests is the enactment of laws aimed at shielding children from materials and speech that are deemed offensive on their face, have a peculiar element that could warp children’s minds, or have a substantial effect on their upbringing in the formative years of their lives.⁷³

Bearing in mind this legitimate and sometimes compelling interest of the government in protecting children, the Court has recognized “three

Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1996) (recognizing the need to protect children from exposure to patently offensive sex-related material); *Sable Communications of Cal., Inc., v. FCC*, 492 U.S. 115, 126 (1989) (recognizing that there is a “compelling interest in protecting the physical and psychological well-being of minors”); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (noting that the government is entitled to greater leeway in the regulation of pornographic depictions of children); *FCC v. Pacifica Found.*, 438 U.S. 726, 735-37 (1978) (noting that the unique accessibility and pervasiveness of materials can entitle governmental regulation of material in order to protect children); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (noting that the well-being of “its” children is a subject within the government’s constitutional power to regulate).

⁷⁰ See, e.g., Jim McCormick, *Protecting Children From Music Lyrics: Sound Recordings and “Harmful to Minors” Statutes*, 23 GOLDEN GATE U. L. REV. 679, 693-98 (1993) (arguing that “harmful to minor” laws have the potential to, if drafted correctly, reach a countless and wide range of speech); see also *supra* note 10 (providing a typical definition of “harmful to minors” in the Indianapolis ordinance); *infra* notes 90-155 (discussing at length a series of “harmful to minor” laws and the judicial decisions regarding them).

⁷¹ McCormick, *supra* note 70, at 679-81.

⁷² See *infra* notes 74-81 and accompanying text.

⁷³ Catherine J. Ross, *Anything Goes: Examining The State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 436-46 (2000) (noting that the political and social environment in which parents must today raise their children is an environment in which “anything goes” given that profanity, vulgarity, sex, and violence are pervasive in television programming, movies, and other forms of entertainment that appeal to the interests of children as well as the populace at large). As a result of this “anything goes” attitude, Ross notes that this popular concern about children’s exposure to harmful material has resulted in the spear-heading of a great deal of legislative enactments and measures geared toward protecting children from “harmful” forms of entertainment, with varying degrees of success. *Id.*

reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: (1) the peculiar vulnerability of children; (2) children's inability to make critical decisions in an informed, mature manner; and (3) the importance of the parental role in child rearing."⁷⁴

First, the Court's concern for the vulnerability of children is typically demonstrated in its decisions dealing with minors' claims to constitutional protections of liberty or property interests by the state.⁷⁵ Although the courts have recognized some parity between adults and minors in an area where minors may be vulnerable, the courts have also noted that the government is entitled to adjust its legal system to account for children's vulnerability as well as children's needs for "concern, . . . sympathy, and . . . parental attention."⁷⁶

Second, the Court has held that the government may limit the freedom of minors to choose for themselves when such a choice may have potentially serious consequences.⁷⁷ The jurisprudence in the "choices of children" realm has typically been premised on the notion that, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," which thereby allows the government to treat them on a different plateau from adults.⁷⁸

Third, the compelling and guiding role of parents and guardians in the upbringing of their children justifies limitations on the freedom of minors, given that the government "commonly protects its youth from

⁷⁴ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (holding that a statute requiring a minor seeking an abortion to obtain the consent of her parents, or to obtain judicial approval following notification to her parents, unconstitutionally burdened the right of the pregnant minor to seek an abortion).

⁷⁵ See, e.g., *In re Gault*, 387 U.S. 1, 13 (1967) (holding that the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings).

⁷⁶ *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971); see also *In re Gault*, 387 U.S. at 30 (noting that in order to preserve the "separate avenues" of dealing with juvenile adjudication, hearings in juvenile delinquency cases need not necessarily "conform with all of the requirements of an [adult] criminal trial or even of the usually administrative hearing"). *Id.*

⁷⁷ See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) ("[A] child-like someone in a captive audience-is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.").

⁷⁸ *Bellotti*, 443 U.S. at 635 (quoting *Ginsberg*, 390 U.S. at 649).

444 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.”⁷⁹ Additionally, and perhaps more importantly, the government gives deference to parents and guardians because, as the Court has noted, “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁸⁰ Therefore, the Court has come to the conclusion that the tradition of parental authority is that legal restrictions on minors, especially those supportive of the parental role, may be important to a child’s chances for full growth and maturity that make eventual participation in a free society meaningful and rewarding.⁸¹

Regardless of the state’s compelling interest in protecting and treating children differently in these three broad and distinct contexts, the Court has also noted that children are nevertheless entitled to similar rights as adults under the Constitution.⁸² With a certain degree of parity, the Court has noted that a regulation with the goal of protecting children will not be upheld when it restricts minor and adult access equally and thereby reduces adults’ speech to only what is fit for children.⁸³ With this framework in mind, an in-depth examination of the crucial cases in

⁷⁹ *Id.* at 637.

⁸⁰ *Pierce v. Soc’y of Sister of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) (holding that parents’ duty to prepare their children for “additional obligations” must be given due deference and can be expanded to include such things as the inculcation of moral standards, religious beliefs, and elements of good citizenship). Further, the Court noted that the primary function of parents is to prepare their children for obligations that the state can neither supply nor hinder. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

⁸¹ See, e.g., *Ginsberg*, 390 U.S. at 639 (noting that under the Constitution, the state can properly conclude that parents and others who have the primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility).

⁸² See *generally* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults are protected by the Constitution and possess constitutional rights.”); *In re Gault*, 387 U.S. 1, 13 (1967) (noting that a child, merely on account of his minority, is not beyond the protection of the Constitution).

⁸³ *Butler v. Michigan*, 352 U.S. 380 (1957) (striking down a statute making it an offense to make available to the general reading public a book having “potentially deleterious influence” on youth). The Court further reasoned that the legislation aimed at protecting minors was not reasonably restricted to that particular “evil,” and it thereby violated First Amendment rights by reducing the adult population to reading only that which was fit for children. *Id.* at 383.

the Court's modern-day jurisprudence concerning the protection of minors from harmful materials must be conducted.

In *Prince v. Massachusetts*,⁸⁴ the Court noted for the first time that a state has a compelling interest in the protection of children from "harmful" speech.⁸⁵ The Court reasoned that various types of speech create difficult circumstances for adults and are "wholly inappropriate" for children of "tender years."⁸⁶ Further, the Court established that the government has the authority to "control the conduct of children" and that such authority can at times, "reach beyond the scope of its authority over adults" without raising Fourteenth Amendment Equal Protection Clause concerns or other similar differentiating class problems that typically arise when groups of people are treated unequally.⁸⁷

⁸⁴ 321 U.S. 158 (1944).

⁸⁵ *Id.* at 170. In *Prince*, the Court upheld the conviction of Sarah Prince, a Jehovah's Witness and mother of two children, under a Massachusetts protection of children law. *Id.* at 171. Prince had taken her two children with her to distribute religious and political pamphlets at a late hour of the night to pedestrians on a street in downtown Brockton, Massachusetts. *Id.* at 161-62.

⁸⁶ *Id.* at 170; see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 116 (2001) (citing *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985), *overruled by*, *Agostini v. Felton*, 521 U.S. 203 (1997)) (noting that children of "tender years" are children whose experience in the real-world is limited and their beliefs are the function of "environment as much as of free and voluntary choice").

⁸⁷ *Id.* Aside from First Amendment-type settings, another common area in which the courts have dealt with treating children differently in "harmful to minors" areas has most notably occurred in the Court's jurisprudence involving state abortion laws that prohibit minors' access to abortions without certain formalities being met by the minor seeking the abortion. See, e.g., *Bellotti v. Baird*, 433 U.S. 622 (1979); *Danforth*, 428 U.S. at 52. In *Danforth*, the Court struck down a section of a Missouri law that required parental consent for minors seeking an abortion. *Danforth*, 428 U.S. at 74-75. Regardless of the outcome, the Court re-affirmed the basic premise of *Prince* that the "State has somewhat broader authority to regulate the activities of children than of adults." *Id.* It just so happens that in *Danforth* there was not a "significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that was not present in the case of an adult." *Id.* at 75. Along the same lines, the Court, three years later in *Bellotti*, re-affirmed the position of *Prince* and its progeny that minors can be treated differently than adults. *Bellotti*, 443 U.S. at 633-39. The Court held that a Massachusetts statute requiring a minor seeking an abortion to obtain the consent of her parents, or to obtain judicial approval following notification to her parents, unconstitutionally burdened the right of the pregnant minor to seek an abortion. *Id.* As discussed above, the *Bellotti* Court examined the three areas in which the constitutional rights of minors cannot be equated with that of adults and found that neither a minor's vulnerability, inability to make critical decisions, nor the importance of the parental role in child rearing were sufficient to place the undue burden on minors'

446 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

The 1968 case of *Ginsberg v. New York*⁸⁸ is the only case where the Court has dealt squarely with the issue of a state regulation aimed at suppressing *only* children's access to harmful or indecent speech, while leaving adult access unfettered.⁸⁹ At issue in *Ginsberg* was Sam Ginsberg's conviction under a New York state law regulating exposure of minors to harmful materials ("section 484-h"), which prohibited the sale of obscene magazines to minors under seventeen years of age.⁹⁰

access to abortion under the scheme of Massachusetts' abortion statute. *Id.* at 639-50; see also *supra* notes 74-81 and accompanying text.

⁸⁸ 390 U.S. 629 (1968).

⁸⁹ See, e.g., Petitioners' Petition for a Writ of Certiorari at 15-16, *Kendrick v. Am. Amusement Mach. Ass'n*, 534 U.S. 994 (2001) [hereinafter *Certiorari Petition*] (Petition on file with Law Review) (arguing that deep confusion exists because the Court has not discussed the issue of restricting youth access while leaving adult access unfettered since *Ginsberg*).

⁹⁰ *Ginsberg*, 390 U.S. at 629-33. New York Penal Law section 484-h as enacted by L. 1965, c. 327 is as follows:

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

Ginsberg's charges and conviction were the result of a mother's complaint to local authorities that Ginsberg had sold inappropriate "girlie" magazines to her sixteen-year-old son on two separate occasions at Ginsberg's convenience store.⁹¹ The Court held that it was

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

Id. at 646-47 (Appendix A to Opinion of the Court) (emphasis added).

⁹¹ *Id.* at 631. After the boy's mother had brought forth this information to the authorities and also confronted and scolded Ginsberg for selling the magazines to her son, the youth and the local police sergeant set up a "sting" operation in which the youth would purchase three magazines from Ginsberg's store that fell under the definitions of section 484-h as "harmful to minors" and, if sold to the minor, would result in the sergeant charging Ginsberg with a misdemeanor for his section 484-h violation. *Id.* With this scenario in place, the youth entered Ginsberg's store, brought three "girlie" magazines to the cash register and informed Ginsberg that he was only sixteen years of age. *Id.*; see also Samuel Krislov, *From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153, 169-70 (1968) (discussing the factual scenario under which Ginsberg arose). Even though he was provided with this information, Ginsberg still proceeded to

448 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

constitutionally permissible for New York "to accord minors under seventeen a more restricted right to judge and determine for themselves what sex material they may read or see than that assured to adults."⁹²

The *Ginsberg* Court's analysis and reasoning was premised on the Court's reasoning in *Prince*.⁹³ However, unlike *Prince*, the Court in *Ginsberg* dealt squarely with an area of speech that created different standards of what was "obscene" or "harmful" for adults and children. The Court noted that, although the magazines under the purview of section 484-h were "obscene" only by a child's standard, this did not necessarily mean that adult access to these materials would be hindered by the statute.⁹⁴ Rather, the Court asserted that section 484-h did not bar *Ginsberg* from stocking the magazines and selling them to persons seventeen years of age or older, which meant that adult access to these magazines would remain unfettered.⁹⁵

With the issue of adult access decided, the Court's reasoning then shifted to an analysis of whether children and adults could be held to different standards when the legislature determined the material at issue was harmful to minors.⁹⁶ The Court reasoned that a dichotomy allowing adult access to materials, while prohibiting access to minors, did not violate a minor's First Amendment rights.⁹⁷ The Court reasoned that material that is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children.⁹⁸ The Court further noted that the government "can exercise its power to protect the health, safety, welfare and morals of its community

sell the three magazines to the minor, and the sergeant then charged *Ginsberg* with the section 484-h violation. *Krislov, supra*, at 169. The main premise of *Ginsberg's* argument in his case before the Supreme Court relied on the fact that section 484-h was beyond the scope of the state's legislative power to adopt a *Roth*-type obscenity formulation to define the material's obscenity on the basis of its appeal to minors. *Ginsberg*, 390 U.S. at 635. With the gravamen of *Ginsberg's* claim in place, the Court affirmed *Ginsberg's* conviction, finding that section 484-h was within the purview of a state's power to regulate, given a state's compelling interest in protecting children from activities and materials that can be particularly harmful to minors but not necessarily to adults. *Id.*

⁹² *Id.* at 637.

⁹³ *Id.*

⁹⁴ *Id.* at 634-35.

⁹⁵ *Id.*

⁹⁶ *Id.* at 636-39.

⁹⁷ *Id.* at 636.

⁹⁸ *Id.* The Court further noted that the concept of obscenity or of unprotected matter may vary according to the group to whom it is "quarantined." *Id.*

by barring the distribution" of materials to children that are recognized as suitable for adults.⁹⁹ This is primarily because of the states' "exigent interest" in preventing distribution and availability of objectionable or harmful material to children.¹⁰⁰ Ginsberg argued that section 484-h deprived minors of their constitutionally protected freedoms to read the protected materials under an adult obscenity standard.¹⁰¹ The Court rejected this argument by noting that the State had simply adjusted the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in term[s] of the sexual interests . . . of such minors."¹⁰² The remainder of the Court's discussion, as well as the major premise of its logic, was that a state statute aimed at protecting children is oftentimes a constitutional exercise of a state's power and that the well-being of children residing in the state is a subject within the state's constitutional power to regulate.¹⁰³

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 638.

¹⁰² *Id.* (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1962)). The Court further noted that, even where there is an alleged invasion of minors' "protected freedoms, the power of the state to control the conduct of children can reach beyond the scope of its authority over adults." *Id.*; see also Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963). The *Ginsberg* Court relied on Emerson's article for the following argument:

'Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults.'

Ginsberg, 390 U.S. at 639 (citing Emerson, *supra*).

¹⁰³ *Id.* at 639-40 (noting that with society's "transcendent interest" in protecting the welfare of children, it is "fitting and proper for a State to include in a statute designed to regulate the sale of pornography to children special standards broader than those embodied in legislation aimed at controlling dissemination of such material to adults"). The Court also expanded on this point by noting that a statute aimed at restricting only children's access to materials or activities, while leaving adult access unfettered, for morality or protectionist reasons, is "better" than a blanket-type prohibition of the materials or activities for all members in the community. *Id.*; see also Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 n.68 (1963) (noting that, by leaving adult access unfettered and allowing parents to make the decision as to whether they will allow such harmful materials or activities in their household, "one can

The last point addressed by the Court was whether a state could assert a legislative finding that the material condemned by the statute was a "basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state" without an accepted scientific fact.¹⁰⁴ To this point, the Court noted that obscene or near-obscene speech "may be suppressed without a showing of the circumstances which lie behind the clear and present danger in its application to protected speech."¹⁰⁵ The Court concluded by noting that, in assessing a state's legislation, it does not demand of the legislatures "scientifically certain criteria of legislation."¹⁰⁶ Rather, a rational relation to the objective of safeguarding minors from harm will often be sufficient, and the state can even rely on studies that merely purport, but do not explicitly demonstrate, a causal connection between the activity and the harm caused.¹⁰⁷

The subsequent cases regarding legislation protecting children have not always resulted in the favorable outcome in *Ginsberg*.¹⁰⁸ Although the Court recognizes the state's compelling interest in protecting children, it frequently may not be enough for the state to rely on this when enacting such legislation.¹⁰⁹ The Court's next major case dealing with the protection of children was *Erznoznik v. Jacksonville*.¹¹⁰ The legislation at issue in *Erznoznik* was a Jacksonville, Florida, city ordinance prohibiting the display of films containing nudity by a drive-in theater when its screen was visible from a public street.¹¹¹ The case

well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit").

¹⁰⁴ *Ginsberg*, 390 U.S. at 641-43.

¹⁰⁵ *Id.* at 641 (quoting *Roth v. United States*, 354 U.S. 476, 486-87 (1957)). The Court further noted that in order to "sustain the State power to exclude material defined as obscenity by section 484-h, the Court must be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute was harmful to minors." *Id.*

¹⁰⁶ *Id.* at 643.

¹⁰⁷ *Id.* On this last point, the Court noted that a legislature can rely on "imperfect" studies that do not show a direct causal link between the activity and the harm because, while the studies do not demonstrate a causal link, a causal link is not disproved either. *Id.*

¹⁰⁸ See *infra* notes 109-57 and accompanying text (discussing the Court's jurisprudence following *Ginsberg*).

¹⁰⁹ See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-14 (2000) (noting that the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative).

¹¹⁰ 422 U.S. 205 (1975).

¹¹¹ *Id.* at 206. Section 330.313 of the Jacksonville Municipal Code was as follows:

arose after the manager of a drive-in theater was charged for violating the ordinance by exhibiting a motion picture that contained nudity and was visible from the public streets.¹¹²

The Court held that the ordinance did not satisfy the rigorous constitutional standards that apply when the government attempts to regulate expression.¹¹³ The Court premised its reasoning on four main points, two of which related to the protection of children.¹¹⁴ First, the Court noted that the ordinance discriminated among movies solely on the basis of content (i.e., distinguishing non-nudity from nudity) and had the effect of deterring drive-in theaters from showing movies containing any nudity, however innocent or educational.¹¹⁵ On this first point, the Court further noted that censorship of otherwise constitutionally permissible speech could not be justified on the basis of the limited privacy interest of persons, in particular children, who, if offended, could easily look the other way since they were not a captive audience

Drive-In Theaters, Films Visible From Public Streets or Public Places.

It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare public [sic] areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense.

Id. at 206-07.

¹¹² *Id.* at 206. The movie *Erznoznik* showed at the theater had received an "R" rating by the Motion Picture Association of America ("MPAA"). *Id.* For a more in-depth discussion of media self-regulation, including the MPAA, see *infra* notes 163-66 and accompanying text. When *Erznoznik* brought a separate action challenging the validity of the ordinance, the city asserted two primary justifications for enacting the ordinance: (1) suppressing the public nuisances caused by drive-ins showing films with nudity that are visible from public streets and (2) protecting children from indecent or obscene films. *Id.* at 207. The trial court and state court of appeals upheld the ordinance as a legitimate exercise of the municipality's police power and ruled that it did not infringe upon *Erznoznik's* First Amendment rights. *Id.* *Erznoznik* appealed the ruling, arguing that the ordinance swept too broadly and was "shutting off" a form of discourse solely to protect others from hearing it, even though they were not a captive audience but were parties on the street with diminished expectations of privacy. *Id.*

¹¹³ *Id.* at 217 (noting that where First Amendment freedoms are at stake, the Court has repeatedly emphasized that precision of drafting and clarity of purpose are essential).

¹¹⁴ *Id.* at 214-17. The Court's other two main premises of reasoning involved nuisance and disruption of traffic issues. *Id.*

¹¹⁵ *Id.* at 208-12.

and did not have the high expectation of privacy that they would in the sanctity of their own home.¹¹⁶ As to the second point, the Court reasoned that the ordinance could not be justified as an exercise of the city's police power for the purpose of protecting children from viewing these films.¹¹⁷ Regardless, the Court still took this opportunity to reaffirm the central holding of *Ginsberg* by noting that, if the ordinance were more narrowly tailored, it would pass constitutional muster because the government may adopt more stringent controls on communicative materials available to youths than on those available to adults.¹¹⁸

Following *Erznoznik*, the Court dealt with the issue of protecting children from harmful material in *FCC v. Pacifica Foundation*.¹¹⁹ In *Pacifica*, the Court upheld the Federal Communications Commission's ("FCC") right to restrict and regulate "patently offensive," though not necessarily obscene, speech.¹²⁰ *Pacifica* arose after a New York radio station, owned by the Pacifica Foundation, broadcasted, on a weekday afternoon, a pre-recorded monologue by comedian George Carlin entitled "Filthy Words" in which Carlin referred to and uttered a series of "dirty words".¹²¹

¹¹⁶ *Id.* at 210-12; see also *Cohen v. California*, 403 U.S. 15, 21-22 (1971) (noting that "'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech'" and that "[t]he ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner").

¹¹⁷ *Erznoznik*, 422 U.S. at 212-14 (noting that the ordinance, in light of its goal of protecting children, was broader than permissible, given that it sweepingly forbid *any* nudity and not just "obscene" or "indecent" nudity, which the Court seems to suggest would have allowed the ordinance to be upheld in light of *Ginsberg* had this error been corrected).

¹¹⁸ *Id.* at 212.

¹¹⁹ 438 U.S. 726 (1978).

¹²⁰ *Id.* at 751.

¹²¹ *Id.* at 729-30. A few weeks after the Carlin broadcast, the Federal Communications Commission ("FCC") received a letter from a man who complained of the station's broadcast of the Carlin monologue, stating that, when the station aired the piece, he was driving in his car with his young son. *Id.* The FCC then forwarded the complaint to the station for comment, and Pacifica defended the playing of the Carlin monologue by noting that the show playing it was about "contemporary society's attitude toward language" and that prior to the broadcast, the station had issued a warning that the program included "sensitive language which might be regarded as offensive to some." *Id.* The FCC then issued a declaratory order granting the complaint and holding that Pacifica could have been the subject of administrative sanctions. However, the FCC merely put the incident on

Agreeing with the FCC's logic regarding the protection of children and "nuisance channeling," the Court affirmed the FCC's power to regulate the airwaves from such "indecent" material.¹²² Aside from a focus on the time of the broadcast, the content of the program, and the ineffectiveness of a warning prior to the broadcast, the main portions of the Court's reasoning relating to the protection of children pointed to the pervasiveness of broadcasting in our society and its unique accessibility to children.¹²³ The Court noted that even those too young to read would have access and that society has a special interest in protecting children from such speech during the impressionable years of development.¹²⁴ The Court once again reaffirmed the central holding of *Ginsberg* and noted that the government's interest in the "well-being of its youth" and

the station's record and noted that, should the station engage in such activity again, formal sanctions could be a possibility. *Id.* By issuing this order, the FCC was reaffirming the power that Congress granted to it to: (1) revoke a station's license; (2) issue a cease and desist order; (3) impose a monetary forfeiture for a station's violation of 18 U.S.C. § 1464; (4) deny license renewal; or (5) grant a short term renewal. *Id.* at 730 n.1. Section 1464 of the United States Code referred to by the FCC provides that: "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both." *Id.* at 731 (quoting 18 U.S.C. § 1464 (1976)). The FCC also used this opportunity to note that, under the powers conferred upon it by Congress, the FCC could regulate "patently offensive" and other "harmful to minor"-type speech in a manner comparable to nuisance law, where the FCC could require licensed stations to "channel" the broadcast of such materials to times during which exposure to children would be unlikely. *Id.* The FCC suggested in its ruling that, if an offensive broadcast had literary, artistic, political, or scientific value and was preceded by warnings, it might not be indecent in the late evening, but would be so during the day when children are more likely to be in the audience. *Id.* at 732 n.5. *Pacifica* appealed the FCC's order, and the court of appeals reversed the FCC's declaratory order on overbreadth and First Amendment grounds as a form of FCC censorship, to which the FCC appealed to the Supreme Court. *Id.* at 733-34.

¹²² *Id.* at 751.

¹²³ *Id.* at 748 (noting that because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content).

¹²⁴ *Id.* The Court noted that each medium of expression presents special First Amendment problems and that of all the forms of communication, broadcasting has received the most limited First Amendment protection due to its pervasiveness and unique accessibility. *Id.* at 748. The Court further noted that patently offensive, indecent material presented over the airwaves "confronts the citizen," not only in public, but also in the privacy of the home, where the individual has a higher expectation of privacy (thereby distinguishing this case from *Erznoznik*). *Id.*

454 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37

in supporting parents' authority in their own households justified the regulation of otherwise protected expression.¹²⁵

Aside from shielding children from the speech at issue in the preceding cases, the Court's jurisprudence has also tackled the issue of children's rights when dealing with the controversial issue of child pornography.¹²⁶ In *New York v. Ferber*,¹²⁷ the Court upheld the conviction of a bookstore proprietor under a New York statute that prohibited persons from knowingly promoting a sexual performance by a child under the age of sixteen by distributing material that depicted such a performance.¹²⁸ Although *Ferber* is not directly on point with the previously discussed and subsequent protection of children cases in which the government's aim was to shield children from a form of expression, the Court in *Ferber* provides an example of how far the government's protection of children can reach. The Court used *Ferber* as another opportunity to recognize that the state's interest in safeguarding the physical and psychological well-being of a minor is a compelling interest.¹²⁹ Relying on *Prince* and *Ginsberg*, the Court in *Ferber* noted that the government may shut off all channels of child pornography because it directly undermines the government's interest in protecting children.¹³⁰

¹²⁵ *Id.* at 749. The Court further noted that the ease with which children may obtain access to broadcast, coupled with the concerns recognized in *Ginsberg*, amply justified special treatment of indecent broadcasting. *Id.*

¹²⁶ See, e.g., L. Steven Grasz & Patrick J. Pfaltzgraff, *Child Pornography and Child Nudity: Why and How States May Constitutionally Regulate the Production, Possession, and Distribution of Nude Visual Depictions of Children*, 71 TEMP. L. REV. 609, 612-20 (1998) (discussing how the physical and psychological effects child pornography has on children allows courts and legislatures to regulate child pornography with a broad stroke of discretion under the protection of children's interest).

¹²⁷ 458 U.S. 747 (1982).

¹²⁸ *Id.* at 774. Article 263 of the New York Penal Law, cited by the Court, provided that
A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

Id. at 750-51 (citing N.Y. PENAL LAW § 263.05 (McKinney 1980)).

¹²⁹ *Id.* at 756-57. The Court noted that the prevention of sexual exploitation and abuse of children constituted a government objective of surpassing importance. *Id.*

¹³⁰ *Id.* at 757. The Court, relying heavily on *Prince*, stated, "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity

Following *Ferber*, the Court's jurisprudence returned to governmental attempts to shield children from a medium of expression detrimental to their upbringing in *Sable Communications v. FCC*.¹³¹ *Sable* involved the power of the FCC to regulate sexually oriented prerecorded telephone messages (popularly known as "dial-a-porn").¹³² Once again, the Court reaffirmed the compelling governmental interest in protecting children.¹³³ However, the Court also noted that protection of children in and of itself will not give the government *carte blanche* when it comes to

as citizens." *Id.* But see *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1401-02 (2002) (holding that a government ban on virtual child pornography is distinguishable, and thereby impermissible, from a ban on "regular" child pornography (i.e., the type of pornography at issue in *Ferber*) since "regular" child pornography may be banned without regard to whether it depicts works of value, whereas the virtual child pornography at issue in *Ashcroft* is in a different category of speech).

¹³¹ 492 U.S. 115 (1989) (providing a first glimpse of the Court's current logic regarding the protection of children jurisprudence as well as what the Court will expect of a regulation aimed at protecting children).

¹³² *Id.* at 117-18. The statute at issue in *Sable* was 47 U.S.C. § 223(b), an amendment to the 1934 Communications Act, which provided that

(2) Whoever knowingly –

(A) in the District of Columbia or in interstate or foreign communications, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes or any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for [obscene or indecent communication], shall be fined not more than \$ 50,000 or imprisoned not more than six months, or both.

Id. at 123 n.5 (citing 47 U.S.C. § 223(b) (1988)). *Sable*, arguing First Amendment and overbreadth issues, challenged the FCC's power to regulate "dial-a-porn" under § 223(b) and sought declaratory and injunctive relief against the FCC's enforcement of such prohibitions. *Id.* at 118. *Sable* argued "that § 223(b) created an impermissible national standard of obscenity," unlike the local standards called for in *Miller*, and "that it placed message senders in a 'double bind' by compelling them to tailor all their messages to the least tolerant community." *Id.* at 124. The FCC defended the prohibitions on "dial-a-porn" as necessary to limit access of minors to such messages. *Id.* The district court upheld the "dial-a-porn" prohibition against obscene interstate telephone communications for commercial purposes but enjoined enforcement of amendments of the regulation insofar as they applied to indecent messages. *Id.* at 118-19. On appeal, the Court held that, although the FCC's prohibition of obscene telephone messages was constitutional in light of *Miller*, the denial of adult access to "dial-a-porn" that was indecent but not obscene under the *Miller* standard far exceeded that which was necessary to limit access of minors to such messages and could not survive strict scrutiny with protection of children as its sole basis for suppressing otherwise protected speech. *Id.* at 131 (holding that indecent communications are protected by the First Amendment, unlike obscenity, which is altogether unprotected).

¹³³ *Id.*

suppressing and regulating otherwise protected speech that adults may want to access.¹³⁴ The Court noted that the government must narrowly draw its regulations without unnecessarily interfering with First Amendment freedoms.¹³⁵ Therefore, *Sable* represents the foundation for modern jurisprudence regarding the protection of children because it is the first in a line of cases to note that such regulations must typically survive the most stringent form of constitutional scrutiny.¹³⁶

In fact, the Court in recent times has been extremely reluctant to uphold legislation aimed at the protection of children.¹³⁷ Many of the new child protection laws have such broad and all-encompassing reaches that, if upheld, they would not only shield children from access but would also place substantial burdens on adult access as well, thereby reducing the level of discourse to that which is fit for children only.¹³⁸

The Court's reluctance to uphold legislation designed to protect children was again displayed in *Reno v. ACLU*.¹³⁹ In *Reno*, the Court struck down portions of the 1996 Communications Decency Act ("CDA"), which attempted to prohibit any person or business from using the Internet to display patently offensive material that could be easily accessible to minors.¹⁴⁰ The American Civil Liberties Union, on behalf of

¹³⁴ *Id.* (noting that while the government has a legitimate interest in protecting children from exposure to obscene and indecent "dial-a-porn" messages, § 223(b) was not sufficiently narrowly drawn to serve that purpose and, thus, violated the First Amendment).

¹³⁵ *Id.* (noting that it is not enough to show that the government's ends are compelling—the means must be carefully tailored to achieve those ends).

¹³⁶ See *infra* Part III.B (analyzing the proper level of scrutiny to employ when dealing with content-based regulations aimed at protecting children). As discussed in Part III.B below, the reason for the uncertainty as to what level of scrutiny to use when confronted with a "protection of children" piece of legislation is attributed in large part to the fact that the circuit courts have often relied on pre-*Sable* cases to reach their results and that the pre-*Sable* cases, such as *Ginsberg*, were decided long before the Court had refined and formulated its explicit levels of strict, intermediate, and rational basis scrutiny.

¹³⁷ See *infra* notes 139-54 (discussing the Court's holdings and reasoning in *Reno* and *Playboy*).

¹³⁸ See, e.g., *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

¹³⁹ 521 U.S. 844 (1997).

¹⁴⁰ *Id.* at 885. The portions of the Communications Decency Act ("CDA") at issue, 47 U.S.C. § 223(a) (Supp. II 1994), were known as the "indecent transmission" and "patently offensive display" provisions and provided the following:

Whoever—

(1) in interstate or foreign communications—

(A) by means of a telecommunications device knowingly—

a number of civil rights and computer groups, challenged the CDA on First Amendment grounds.¹⁴¹

-
- (i) makes, creates, or solicits, and
 - (ii) initiates the transmission of,
- any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;
- (B) by means of a telecommunications device knowingly-
- (i) makes, creates, or solicits, and
 - (ii) initiates the transmission of,
- any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;
- (C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;
- (D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or
- (E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or
- (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,
- shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223 (Supp. II 1994).

¹⁴¹ *Reno*, 521 U.S. at 861-62. The challenges occurred literally moments after President Bill Clinton signed the CDA into law on February 8, 1996, and, in essence, these groups argued that the inability of Internet users and providers to verify the age of information recipients effectively prevented them from engaging in indecent speech, which traditionally has received significant First Amendment protection. *Id.*; see also Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 141-43 (1997) (providing the context under which the American Civil Liberties Union ("ACLU") and the various groups tailored and based their claims upon). In response to the ACLU's charges, the government, relying heavily on *Ginsberg*, argued that the government's compelling interest in protecting children allowed the CDA to pass constitutional muster. *Reno*, 521 U.S. at 864. After a lengthy evidentiary hearing that included many on-line demonstrations, a special three-judge district court (which was created by the CDA to hear the expected constitutional challenges) agreed with the groups and ruled that the provisions violated the First Amendment. *Id.* at 861-62. The three-judge panel struck

458 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

The Supreme Court applied strict scrutiny to the CDA's content-based restrictions and held that it abridged the First Amendment rights of individuals on the Internet, notwithstanding the legitimacy and importance of the compelling congressional goal of protecting children from harmful Internet materials.¹⁴² First, the Court emphasized that the regulation of such an elusive and amorphous entity as the Internet, unlike the regulation or restriction of the "girlie" magazines in *Ginsberg*, could not be justified with the protection of children as its primary or sole basis.¹⁴³ The Court noted that the suppression of speech on the Internet poses a problem, since it is undoubtedly difficult, if not impossible, to discern whether a minor or an adult is accessing the questionable material.¹⁴⁴

The government argued that the CDA was comparable to the *Ginsberg* statute because both were aimed at the protection of children, but the Court did not accept this argument and instead held that the overlapping similarity between the two was minimal at best.¹⁴⁵ Thus, the Court in *Reno* suggested that the reach of *Ginsberg* is viewed rather strictly and cannot be extended arbitrarily to any and all regulations aimed at the protection of children.¹⁴⁶ Rather, the current Court will probably require a regulation relying on *Ginsberg* for justification to be nearly identical to the statute upheld in *Ginsberg*.¹⁴⁷

down the CDA on vagueness and overbreadth grounds and also noted that the CDA swept more broadly than necessary for the government's protection of the interests of children, which thereby "chill[ed] the expression of adults." *Id.* at 862.

¹⁴² *Id.* at 874.

¹⁴³ *Id.* at 855-57.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 864-66. The Court cited four main reasons why *Ginsberg* and *Reno* could not be compared: (1) unlike in *Ginsberg*, where the prohibition against the sales to minors did not bar parents who so desired to purchase the "girlie" magazines for their children, the CDA did not contain such a "loop-hole;" (2) the *Ginsberg* statute applied only to commercial transactions, whereas the CDA contained no such limitation; (3) the *Ginsberg* statute's definition of "harmful to minors" was narrowed to materials "utterly without redeeming social importance for minors," whereas the CDA was vague in terms of what the "indecent" and "patently offensive" material was that it attempted to regulate; and (4) the age in the *Ginsberg* statute for what constituted a "minor" was seventeen, whereas the CDA defined a minor as anyone under eighteen. *Id.*

¹⁴⁶ *Id.* at 864-68.

¹⁴⁷ *See id.*

Finally, in *United States v. Playboy Entertainment Group, Inc.*,¹⁴⁸ the Court considered provisions of the Telecommunications Act of 1996, which required cable television operators to “fully scramble or otherwise fully block the video and audio portion” of channels that provide primarily “sexually explicit adult programming” in order to avoid the problem of “signal bleeds” occurring on non-subscribers’ televisions.¹⁴⁹ Playboy brought suit challenging the constitutionality of section 505 on the grounds that it was a content-based law violative of the First Amendment.¹⁵⁰

The Court, applying strict scrutiny, held that section 505 was an invalid content-based regulation that was not the least restrictive means of protecting children from “signal bleeds.”¹⁵¹ The crux of the Court’s reasoning was that, when the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails even if a less restrictive alternative does not exist.¹⁵² Further, the Court noted that the objective of shielding children did not suffice to allow a “blanket” ban on indecent programming, since the government had little or no hard evidence

¹⁴⁸ 529 U.S. 803 (2000).

¹⁴⁹ *Id.* at 827-28. In the Appendix to the Court’s opinion, the Court cited the following portions of section 505 of the Telecommunications Act of 1996:

(a) Requirement

In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) Implementation

Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming . . . by not providing such programming during the hours of the day (as determined by the [FCC]) when a significant number of children are likely to view it.

47 U.S.C. § 561 (Supp. III 1994).

¹⁵⁰ *Playboy*, 529 U.S. at 807. In response to Playboy’s challenge, the government argued that section 505 was enacted under the government’s compelling interest of protecting children from indecent broadcasts of this sexually-oriented programming. *Id.* The district court agreed with Playboy and held that section 505 violated the First Amendment. *Id.* at 810.

¹⁵¹ *Id.* at 827.

¹⁵² *Id.* at 813.

regarding the impact “signal bleeds” have on the upbringing of children.¹⁵³ Regarding the potential for future regulations aimed at suppressing otherwise protected speech, the Court noted that “[i]t is rare that a regulation restricting speech because of its content will ever be permissible,” even when the protection of children is the government’s compelling interest.¹⁵⁴

The framework established by the Court in these cases clearly demonstrates that strict scrutiny applies to content-based regulations aimed at protecting minors.¹⁵⁵ Nevertheless, some have argued that the circuits have divided into three groups regarding the proper standard to employ.¹⁵⁶ Regardless, as these key cases in the Court’s jurisprudence have illustrated, the government faces an uphill battle when it attempts to justify its compelling interest in protecting children by suppressing speech that would otherwise be permissible.¹⁵⁷

C. *The Regulation of Entertainment Industries and the First Amendment*

1. The Regulation of Entertainment Under the First Amendment and Self-Regulation by the Entertainment Industry

The Court has noted that certain forms of “entertainment expression” can convey a speech message, although the “speech” is typically presented for leisure and enjoyment purposes only.¹⁵⁸

¹⁵³ *Id.* at 819.

¹⁵⁴ *Id.* The Court further added that “[t]he history of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.” *Id.* at 826.

¹⁵⁵ *See, e.g., id.* at 813.

¹⁵⁶ *See infra* Part III.B (assessing the alleged disagreement on the standard of review used among the circuits). The standard of review discussion in Part III.B of this Note clearly illustrates that the advocates’ and commentators’ arguments that there is a “circuit split” is misplaced and misguided. *See infra* Part III.B.

¹⁵⁷ *See, e.g., Playboy*, 529 U.S. at 847 (Breyer, J., dissenting) (noting that where the protection of children is at issue, the First Amendment poses a barrier that properly is high, but not insurmountable).

¹⁵⁸ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 496, 501 (1952) (concluding that motion pictures are afforded First Amendment protection since they are “organ[s] of public opinion” as well as a “significant medium for the communication of ideas” with the potential of affecting public attitudes and behavior in political and social discourse). *Joseph Burstyn, Inc.* represents one of the Court’s first, and often relied upon, statements regarding the assessment of whether a form of entertainment is afforded First Amendment protection and considered “speech” under the clause. *Id.* In *Joseph Burstyn, Inc.*, the Court also noted

Regardless, there is no type of blanket protection afforded to all of the different entertainment genres.¹⁵⁹ Instead, each form of entertainment must be assessed based on its own particular form and content.¹⁶⁰ This is because "[t]he line between the informing and the entertaining is [generally] too elusive for the protection of [First Amendment rights] . . . [w]hat is one man's amusement, teaches another's doctrine."¹⁶¹ Thus, in order for the government to determine whether it will have to meet First Amendment standards when regulating a particular form of entertainment in the interest of protecting children, it must first determine whether the entertainment at issue is regarded as "speech" within the meaning of the First Amendment.¹⁶²

In addition to the government being cognizant of the need to regulate forms of entertainment that may be harmful to minors, many entertainment industries have also imposed self-regulation systems.¹⁶³ In general, a self-regulation system consists of three components: (1) legislation that defines appropriate rules; (2) enforcement, such as initiating actions against violators; and (3) adjudication that decides whether a violation has taken place and imposes an appropriate sanction.¹⁶⁴ However, imposition of a self-regulation scheme by an industry does not mean that the government may not interject and

that there is a "blurred line" between what can be considered "purely entertainment" (which would be afforded no First Amendment protection) and "protected speech." *Id.*

¹⁵⁹ See generally *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (stating broadly that entertainment speech is protected and that "motion pictures, programs broadcast by radio and television, and live entertainment, such as musicals and dramatic works, fall within the First Amendment guarantee").

¹⁶⁰ *Joseph Burstyn, Inc.*, 343 U.S. at 501.

¹⁶¹ *Id.*

¹⁶² *Id.*; see also *infra* Part III.A (discussing whether video games should be regarded as a form of speech under the First Amendment).

¹⁶³ See Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 714-20 (1999). Campbell notes that in order to devise a definition of what constitutes self-regulation, one has to break apart the term "self-regulation." *Id.* at 714-15. In breaking self-regulation apart, Campbell states,

The word "self" refers to the actor. It could mean a single company. More commonly, however, . . . it is used to refer to a group of companies acting collectively, for example, through a trade association. The word "regulation" refers to what the actor is doing. . . .

Thus, the term "self-regulation" means that the industry or profession rather than the government is doing the regulation.

Id. (footnotes omitted).

¹⁶⁴ *Id.*

462 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

impose regulations of its own on the industries.¹⁶⁵ Instead, the government and an industry can work collectively on these three components, or the government can sometimes mandate that an industry adopt and enforce a code of self-regulation.¹⁶⁶

As these regulatory parameters indicate, regulation of the entertainment industry by either the government, the industry, or the government and the industry collectively, depends on whether the content is regarded as speech under the First Amendment and, if so, under what type of regulatory system it operates.

2. History of the Regulation of Video Games

In examining the regulation of video games, it becomes apparent that this is an area of the law that has evolved in conjunction with technological developments.¹⁶⁷ Regulation of video games did not predominantly arise until the early 1980s.¹⁶⁸ During this time, the reviewing courts noted that such regulations did not involve First

¹⁶⁵ *Id.* at 715-16.

¹⁶⁶ *Id.* at 715. Campbell notes, for example, that "an industry may be involved at the legislation stage by developing a code of practice, while leaving enforcement to the government, or the government may establish regulations, but delegate enforcement to the private sector." *Id.* See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 103-05 (1992). Ayres and Braithwaite view self-regulation as a form of "sub-contracting" regulatory functions to private actors. *Id.* at 103. The classic example of self-regulation on entertainment is the rating system the Motion Picture Association of America ("MPAA") has in order to provide clear parameters of what films are suitable for particular age groups. Campbell, *supra* note 163, at 750-52; see also Richard P. Salgado, *Regulating a Video Revolution*, 7 YALE L. & POL'Y REV. 516, 519-20 (1989) (describing the MPAA rating scheme and how films are rated).

¹⁶⁷ John E. Sullivan, Note, *First Amendment Protection of Artistic Entertainment: Toward Reasonable Municipal Regulation of Video Games*, 36 VAND. L. REV. 1223, 1225-27 (1983). Video games in their early forms with primitive graphics and story lines in games such as *Pong*®, an electronic version of table tennis created in 1972, were not sought to be regulated by jurisdictions. *Id.* at 1225-26. Rather, local governments did not attempt to exert their influence over video games until the early 1980s, when the video game industry became a billion-dollar industry and the games had developed into colorful, graphic, and thematic displays of moving images. *Id.* at 1226-27.

¹⁶⁸ William Dobreff, *Video Games Wars: Arcades v. City Licensing Laws*, 1983 DET. C. L. REV. 103, 104-05 (1983) (illustrating that as a result of the video game industry becoming one of the most profitable forms of entertainment in the 1980s, local governmental officials responded resoundingly by enacting or amending municipal ordinances so that video games could come within their reach of regulation).

Amendment protections.¹⁶⁹ A majority of these regulations in the 1980s and early 1990s were blanket, content-neutral bans in which the government prohibited the use of the games during certain time periods for delinquency and truancy reasons wholly unrelated to any speech element of the games.¹⁷⁰

However, the courts eventually began to recognize the possibility that video games may have evolved and developed enough to fall within the ambit of protected expression under the First Amendment.¹⁷¹

¹⁶⁹ *Am.'s Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 173-74 (E.D.N.Y. 1982) (concluding that video games were "pure entertainment" not protected by the First Amendment because there was no "element of information or some idea being communicated"); *Kaye v. Planning & Zoning Comm'n, Westport*, 472 A.2d 809, 810-12 (Conn. Super. Ct. 1983) (noting that, "although entertainment may come within the ambit of First Amendment protection, to gain protected status, the entertainment must be designed to communicate or express some idea or some information," which video games do not); *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 609-10 (Mass. 1983) (rejecting plaintiffs' First Amendment challenge to town's total prohibition on coin-activated amusement device, including video games in particular); *Warren v. Walker*, 354 N.W.2d 312, 316-17 (Mich. Ct. App. 1984) (noting that the communicative elements of playing video games are not entitled to First Amendment protection since "any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential"); *St. Louis v. Kiely*, 652 S.W.2d 694, 697 (Mo. Ct. App. 1983) (holding that coin-operated video games, being pure entertainment with no informational element, cannot be "characterized as a form of speech protected by the First Amendment").

¹⁷⁰ *Rothner v. City of Chicago*, 929 F.2d 297, 303-04 (7th Cir. 1991) (upholding a city ordinance prohibiting minors under seventeen years of age from playing video games during school hours as a valid content-neutral time, place, and manner regulation); *Shorez v. City of Dacono*, 574 F. Supp. 130, 133 (D. Colo. 1983) (holding that an ordinance providing that no person under the age of sixteen shall be allowed by a licensee to play or operate any coin-operated game, machine, or device during school hours, unless accompanied by a parent or guardian, was specifically tailored to achieve asserted interest in preventing truancy and, thus, did not violate Due Process or Equal Protection Clauses); *Pecoraro v. City of Buffalo*, 447 N.Y.S.2d 842, 845 (N.Y. Sup. Ct. 1982) (holding that a municipal ordinance prohibiting persons under sixteen from entering an amusement arcade did not deprive those sixteen and under from equal protection of the laws under the Fourteenth Amendment).

¹⁷¹ See *infra* Part III.A (discussing whether the Supreme Court would hold that video games are afforded First Amendment protection); see also *Caswell v. Licensing Comm'n*, 444 N.E.2d 922, 926-927 (Mass. 1983) (noting that, in the future, video games could possibly be afforded First Amendment protection if they contain sufficient communicative and expressive elements); *Tommy & Tina Inc. v. Dep't of Consumer Affairs*, 459 N.Y.S.2d 220, 226-27 (N.Y. Sup. Ct. 1983) (stating that, although the games at issue in the case were not protected speech, "games . . . of a different nature" may one day be entitled to First Amendment protection as "speech" and not "pure entertainment"); see also David B. Goroff, Note, *The First Amendment Side Effects of Curing Pac-Man Fever*, 84 COLUM. L. REV.

464 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

Nonetheless, the Supreme Court has yet to face the issue squarely, and many lower courts and judges regard video games as falling into a "gray area" of speech that may have some First Amendment protection but is nevertheless an "outer ambit" of speech, allowing the government greater freedom to regulate.¹⁷²

Although there is no consensus on whether regulating video games must satisfy First Amendment standards, the coin-operated video game industry has implemented an intricate system of self-regulation for games placed in arcades and other establishments based largely on the type of video game and the content of the message that the game conveys.¹⁷³ Of particular importance in the regulation of video games are those regulations aimed at the violent content in video games.

744, 764-65 (1984) (arguing that video games are "imbued with elements of communication" since they employ plots, themes, and characters).

¹⁷² See, e.g., *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1098-99 (7th Cir. 1990) (en banc) (Posner, J., concurring). In his opinion in *Miller*, Judge Posner noted that

There are some clearly expressive activities and some clearly nonexpressive ones but there is also a vast gray area populated by . . . creators of video games, . . . and so on without end. The government has a greater scope for regulation in the gray area. Maybe, indeed, that area could be regarded as outside the boundaries of the First Amendment (*de minimis non curat lex*), in which event the only constitutional constraints would be those very loose ones that the Due Process Clause places on harmless liberties not involving the exercise of freedom of expression.

Id.

¹⁷³ American Amusement Machine Association, *Coin-Operated Video Game Parental Advisory System*, available at <http://www.coin-op.org/pas.htm> (last visited Sept. 2, 2002) [hereinafter *Coin-Operated Video Game Parental Advisory System*]. In response to a request by the United States Congress, the coin-operated industry implemented regulations based on a "sticker" system in which video games in arcades and other places of business have one of three types of colored stickers affixed to the video machine that serve as a "Disclosure Message" regarding the content of the game: (1) red stickers for games containing strong animated violence, strong life-like violence, strong language, or strong sexual content; (2) yellow stickers for games containing mild animated violence, mild life-like violence, mild language, or mild sexual content; and (3) green stickers for games whose content is appropriate for game players of all ages. *Id.* This sticker system is primarily a parental advisory system, thereby leaving the ultimate determination of whether a minor will play a particular game to the parent. *Id.* Therefore, the system is primarily advisory in nature and is the video game industry's attempt to curb the potential harmful effects video games can have on children. *Id.*; see also American Amusement Machine Association, *Guidelines for Game Ratings*, available at http://www.coin-op.org/guidelines_for_game_ratings.htm (last visited Sept. 2, 2002). The American Amusement Machine Association also provides a

nine-step process to determine whether a game should be regulated under the green, yellow, or red categories stated above:

GUIDELINES FOR RATING GAMES

LANGUAGE

1. Does the game contain strong four-letter expletives?

If YES, this game should have a Disclosure Message of "Language-Strong" [a red sticker game]; proceed to question #3.

If NO, proceed to question #2.

2. Does the game contain commonly used four-letter words (e.g. hell, damn, etc)?

If YES, this game should have a Disclosure Message of "Language-Mild" [a yellow sticker game]; proceed to question #3.

If NO, proceed to question #3.

SEXUAL CONTENT

3. Does the game contain depictions of sexual behavior and/or the human body?

If YES, this game should have a Disclosure Message of "Sexual Content-Strong" [a red sticker game]; proceed to question #5.

If NO, proceed to question #4.

4. Does the game contain sexually suggestive references of material?

If YES, this game should have a Disclosure Message of "Sexual Content-Mild" [a yellow sticker game]; proceed to question #5.

If NO, proceed to question #5.

VIOLENCE

5. Does this game contain scenes involving human-like characters engaged in combative activity, which results in bloodshed, serious injury and/or death to depicted character(s)?

If YES, this game should have a Disclosure Message of "Life-Like Violence-Strong" [a red sticker game]; skip questions 6-8 and fill in the appropriate Disclosure Message in Section III.

If NO, proceed to question #6.

6. Does this game contain scenes involving human-like characters engaged in combative activity such as martial arts or sports activities with violent elements that do *[not]* result in bloodshed, serious injury and/or death to the depicted character(s)?

If YES, this game should have a Disclosure Message of "Life-Like Violence-Mild" [a yellow sticker game]; skip questions 7-8 and fill in the appropriate Disclosure Message in Section III.

If NO, proceed to question #7.

7. Does this game contain scenes involving cartoon-life [sic] characters in fantasy or life-like settings, which results in bloodshed, serious injury and/or death to the depicted character(s)?

If YES, this game should have a Disclosure Message of "Animated Violence-Strong" [a red sticker game]; skip question 8 and fill in the appropriate Disclosure Message in Section III.

If NO, proceed to question #8.

8. Does this game contain scenes involving cartoon-like characters in fantasy or life-like settings engaged in combative activity such as

466 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

3. The Regulation of Violent Video Games: An In-Depth Examination of the Indianapolis Ordinance

In general, regulation of video games and other forms of entertainment based on their violent content has not fared well in the courts. This is primarily owed to vague or overbroad definitions of "violence."¹⁷⁴ Typically, the courts are presented with a regulation aimed at restricting violent material based on a statutory scheme patterned after the *Miller* obscenity standard.¹⁷⁵ These regulations will typically substitute the obscenity-tailored language of *Miller* to meet their regulation of violence.¹⁷⁶

The Indianapolis Ordinance was drafted precisely in this manner.¹⁷⁷ If it had gone into effect, the Indianapolis Ordinance would have forbidden any operator of five or more video game machines in one place to allow a minor unaccompanied by a parent, guardian, or other

martial arts or sports activities with violent elements that do not result in bloodshed, serious injury and/or death to the depicted character(s)? If YES, this game should have a Disclosure Message of "Animated Violence-Mild" [a yellow sticker game]; skip question #9 and fill in the appropriate Disclosure Message in Section III.

If NO, proceed to question #9.

SUITABLE FOR ALL AGES

9. If the answers to all questions above have been NO, your game should have a Disclosure Message of "Suitable for All Ages" [a green sticker game].

Guidelines for Game Ratings, supra.

¹⁷⁴ See generally *Winters v. New York*, 333 U.S. 507, 519-20 (1948) (striking down as vague a complete ban on adults' and children's stories involving "bloodshed," "lust," or "crime"); *Sovereign News Co. v. Falke*, 448 F. Supp. 306 (N.D. Ohio 1977) (holding unconstitutional on overbreadth grounds a statute restricting the depiction of extreme or bizarre violence, cruelty, or brutality); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993) (holding unconstitutional and void for vagueness a state statute restricting display of "excess violence" materials for the protection of minors).

¹⁷⁵ See, e.g., *Sovereign News Co.*, 448 F. Supp. at 394 (noting that "only material that depicts or describes sexual conduct can be regulated because it is obscene" and that material "containing violence, brutality or cruelty cannot be considered obscene unless it also contains depictions or descriptions of sexual conduct").

¹⁷⁶ *Id.*; see also *Miller v. California*, 413 U.S. 15, 24 (1973). Such a flawed system is clearly in need of evaluation and redirection, which is precisely what this Note does. See *infra* Part III.C.

¹⁷⁷ Indianapolis, Ind., Ordinance No. 72, 2000 (July 17, 2000). The ordinance's "harmful to minors" and graphic violence definitions are clearly patterned after *Miller*. *Id.*; *supra* note 10; see also *Miller*, 413 U.S. at 24.

custodian to use a video game machine that is harmful to minors.¹⁷⁸ Further, it would have required appropriate warning signs, that the violent video games be separated by a partition from the other machines in the location, and that their viewing areas be concealed from persons on the other side of the partition.¹⁷⁹ Operators of fewer than five games in one location, referred to as “exhibitors” in the ordinance,¹⁸⁰ were to be subject to all but the partitioning restriction.¹⁸¹ Monetary penalties, as

¹⁷⁸ Indianapolis, Ind., Ordinance No. 72, 2000; *supra* note 10 (quoting the ordinance’s definition of “harmful to minors”).

¹⁷⁹ Indianapolis, Ind., Ordinance No. 72, 2000, § 2.

(i) It shall be unlawful for a registrant to operate an amusement location unless each amusement machine that is harmful to minors in the amusement location displays a conspicuous sign indicating that the machine may not be operated by a minor under eighteen (18) years of age unless the minor is accompanied by his or her parent, guardian, or custodian. If amusement machines that are harmful to minors are displayed together in an area separate from amusement machines that are not harmful, a single conspicuous sign in that area or at the entrance to that area may be used to mark the group of machines for purposes of this subsection.

(j) It shall be unlawful for a registrant to make available to patrons any amusement machine that is harmful to minors within ten (10) feet of an amusement machine that is not harmful. It shall further be unlawful for a registrant not to separate amusement machines that are harmful to minors from other machines by some form of partition, divider, drape, barrier, panel, screen, or wall that completely obstructs the view of persons outside the partitioned area of the playing surface or display screen of the machines that are harmful to minors. It shall be unlawful for a registrant, registrant’s agent, or employee of an amusement location to allow a minor who is not accompanied by his or her parent, guardian, or custodian into the partitioned area.

Id.

¹⁸⁰ *Id.* § 1.

Exhibitor means a person who owns or operates a place of business in the city where four (4) or fewer amusement machines are located; however, the provisions of this chapter shall not apply to an exhibitor’s place of business which is licensed ... for the sale of alcoholic beverages and where entry is limited to persons who are eighteen (18) years of age or older.

Id.

¹⁸¹ *Id.* § 3.

(f) It shall be unlawful for an exhibitor, an exhibitor’s agent, or an exhibitor’s employee knowingly to allow a minor who is not accompanied by the minor’s parent, guardian or custodian to operate in the exhibitor’s place of business an amusement machine that is harmful to minors.

well as suspension and revocation of the right to operate the machines, were specified as penalties for violations of the ordinance.¹⁸²

Other jurisdictions followed Indianapolis' lead and proposed, and continue to propose, the enactment of similar ordinances.¹⁸³ Regardless

(g) It shall be unlawful for an exhibitor to make available to patrons in his or her place of business amusement machines that are harmful to minors unless each amusement machine that is harmful to minors displays a conspicuous sign indicating that the machine may not be operated by a minor under eighteen (18) years of age unless the minor is accompanied by his or her parent, guardian, or custodian. If amusement machines that are harmful to minors are displayed together in an area separate from amusement machines that are not harmful, a single conspicuous sign in that area or at the entrance to that area may be used to mark the group of machines for purposes of this subsection.

(h) It shall be unlawful for an exhibitor to make available to patrons any amusement machine that is harmful to minors within ten feet of an amusement machine that is not harmful. It shall further be unlawful for an exhibitor, exhibitor's agent, or exhibitor's employee to allow a minor who is not accompanied by his or her parent, guardian, or custodian to view, with the exception of an incidental view, the playing surface or screen of a game that is harmful to minors.

Id.

¹⁸² *Id.* § 6.

A person who violates any provision of this chapter shall be punishable as provided in section 103-3 of the Code; provided, however, the fine imposed for such violation shall not be less than two hundred dollars (\$200.00), that for the purpose of assessing fines no more than one violation shall be deemed to have occurred on any one day, and that each day that an offense continues shall constitute a separate violation. The fines assessed for violations of this chapter shall be deposited with the law enforcement agency that caused the violation to be filed, if any.

Id.

¹⁸³ See generally H.B. 1025, 83d Gen. Assem., Reg. Sess. (Ark. 2001) (requiring the rating of interactive video games and establishing a criminal offense for the selling or furnishing of violent interactive video games to minors); A.B. 40, 2001-02 Assem., Reg. Sess. (Cal. 2002) (requiring that each amusement machine in arcade facilities be labeled with a rating category indicating the notice of its content and that machines with graphic violence be located in a separate area in the arcade); S. 119, 2001 Gen. Assem., Reg. Sess. (Conn. 2001) (prohibiting certain business owners from allowing people under eighteen to operate a "violent point and shoot video simulator"); H.B. 663, 18th Gen. Assem., Reg. Sess. (Fla. 2002) (restricting the use of video games rated for mature audiences to adults or minors accompanied by an adult); H.B. 1378, 146th Gen. Assem., Reg. Sess. (Ga. 2002) (establishing the "Violent Video Game Protection Act" prohibiting the sale or rental for use for a charge any video game to a minor which contains scenes or depictions of graphic violence); H.B. 1649, 112th Gen. Assem., Reg. Sess. (Ind. 2001) (requiring an establishment that possesses

of the current interest by legislators in regulating violent video games in a similar manner as Indianapolis. These legislators cannot follow the Indianapolis model in “lock-stop” fashion, given that the Seventh Circuit ultimately struck down the Indianapolis Ordinance.¹⁸⁴

amusement machines harmful to minors to conspicuously post signs on each machine stating that minors may not operate the machine unless accompanied by a parent, guardian, or custodian and separate, by at least ten feet, amusement machines harmful to minors from other amusement machines); S. 530, 91st Leg., Reg. Sess. (Mich. 2001) (prohibiting any person from selling or renting a “restricted” violent video game to a person who is less than seventeen years of age); H.B. 2310, 82d Leg., Reg. Sess. (Minn. 2001) (banning the sale or rental of violent video games to people under seventeen and prohibiting the public showing, display, or other exhibition of violent video games); S. 2048, 2002 Reg. Sess. (Miss. 2002) (prohibiting the dissemination of violent video games to people under eighteen); A. 09019, 224th Leg., Reg. Sess. (N.Y. 2001) (restricting persons under eighteen from operating a violent point and shoot video simulator on premises where video games are provided for entertainment); A. 2849, 209th Leg., Reg. Sess. (N.J. 2001) (restricting persons seventeen and under from operating video game machines that display harmful and violent graphics); S. 1745, 209th Leg., Reg. Sess. (N.J. 2001) (requiring that businesses that sell and rent violent video games at retail do so in accordance with the age-based ratings of the Entertainment Software Ratings Board); S. 757, 48th Leg., 1st Sess. (Okla. 2001) (prohibiting selling or renting video games with high-violence content to persons under seventeen); H.R. 21, 71st Leg., Reg. Sess. (Or. 2001) (requiring that rating stickers produced for coin-operated amusement industry’s Coin-Operated Video Game Parental Advisory system be prominently displayed on video game machines); H.B. 2363, 57th Leg., Reg. Sess. (Wash. 2002) (providing that a “person who sells, rents, or permits to be sold or rented, any violent video or computer game to any minor is guilty of a misdemeanor, punishable under [state law]”); Honolulu, Haw., Bill 89, 2000, A Bill for an Ordinance Relating to Violence (regulating the availability of an interactive electronic game that is excessively and realistically violent to a person under eighteen); St. Louis County, Mo., Ordinance No. 20,193 (Oct. 26, 2000) (imposing criminal penalties on the distribution of certain video games, including both arcade-style and home games, based solely on their alleged “graphically violent” content). As was the case with the ordinances prior to Indianapolis, these ordinances are either awaiting approval by their respective legislators or have not been acted upon further. *See supra* note 9 and accompanying text.

¹⁸⁴ *See supra* note 14 and accompanying text. As this Note discussed previously, St. Louis County, Mo., Ordinance No. 20,193 (Oct. 26, 2000) was recently upheld by the United States District Court for the Eastern District of Missouri. *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 200 F. Supp. 2d 1126, 1141 (E.D. Mo. 2002). At the time this Note is being published, the St. Louis County Council members have not reached a consensus as to whether they will enforce the ordinance in light of the appeal being filed by the Interactive Digital Software Association in the action. *See supra* note 14 and accompanying text (discussing, *inter alia*, the uncertainty and reluctance of the St. Louis County Council with regards to the future of their ordinance).

470 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

4. *American Amusement Machine Ass'n v. Kendrick*: The "Test Case" for How Ordinances Aimed at Restricting Minors' Access to Violent and Sexually Explicit Video Games Have Faired in the Courts

In applying the above-mentioned principles and premises for violent video game regulations, video game and entertainment industry advocates brought a First Amendment challenge to the Indianapolis Ordinance before the statute took effect in *American Amusement Machine Ass'n v. Kendrick*.¹⁸⁵ The district court upheld the ordinance as a constitutionally permissible exercise of police power based on the government's compelling interest in protecting children.¹⁸⁶ At the outset, the district court held that at least some modern video games, including those at issue in the case, should be afforded First Amendment protection.¹⁸⁷ The district court, in a lengthy discussion based heavily on *Ginsberg*, examined the ordinance in light of the competing interests of children, video game manufacturers, and the city's compelling interest in protecting children and ultimately arrived at the conclusion that the balance tipped in the city's favor.¹⁸⁸

When the manufacturers and trade association appealed the denial of the preliminary injunction, the Seventh Circuit, in a unanimous opinion, struck down the ordinance as violating both the game manufacturers' and the affected children's First Amendment rights.¹⁸⁹ The Seventh Circuit agreed with the district court and found that video games, including violent ones, are speech protected by the First Amendment.¹⁹⁰ One of Indianapolis' main arguments was that violence

¹⁸⁵ 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001). The plaintiff video game manufacturers and their trade association brought an action in federal district court and moved for a preliminary injunction to prevent the enforcement of the Indianapolis Ordinance. *Id.* at 945-46.

¹⁸⁶ *Id.* at 955-76.

¹⁸⁷ *Id.* at 954. "Based on the evidence in this record, the court finds that at least some contemporary video games include protected forms of expression." *Id.*

¹⁸⁸ *Id.* The District Court further noted that

It would be an odd conception of the First Amendment and "variable obscenity" that would allow a state to prevent a boy from purchasing a magazine containing pictures of topless women . . . as in *Ginsberg*, but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission.

Id. at 981.

¹⁸⁹ *Am. Amusement Mach. Ass'n*, 244 F.3d at 572, 580.

¹⁹⁰ *Id.* at 574.

should be treated like obscenity.¹⁹¹ The Seventh Circuit dismissed this argument rather easily and noted that, instead of the obscenity standard, the appropriate method of review was strict scrutiny.¹⁹² The Seventh Circuit further reasoned that exposure to violent images is something that minors should not be shielded from until they turn eighteen since it would “not only be quixotic, but deforming” to leave a minor unequipped to cope with the harsh reality of a culture in which violence has become a permanent fixture.¹⁹³ Additionally, the Seventh Circuit noted that violent video games in arcades and other establishments are only “a tiny fraction of the media violence to which minors are exposed.”¹⁹⁴ As a last point, the Seventh Circuit resoundingly rejected Indianapolis’ argument that the ordinance could be upheld in light of *Ginsberg* by concluding that the two cases are different because *Ginsberg* involved “adult invasion” of children’s culture with the “girlie” magazines, whereas violent video games are accepted as a form of speech in the “age-old children’s literature on violent themes.”¹⁹⁵

Following the Seventh Circuit’s decision, Indianapolis filed a petition to the Supreme Court for a writ of certiorari.¹⁹⁶ Ultimately, however, the Supreme Court denied certiorari.¹⁹⁷ The Court’s action, coupled with the lack of explanation by the Seventh Circuit as to why these ordinances cannot pass constitutional muster, has provided little or no guidance for

¹⁹¹ *Id.*

¹⁹² *Id.* “[T]he City asks us to squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity, which is normally concerned with sex and is not protected by the First Amendment Violence and obscenity are distinct categories of objectionable depiction.” *Id.*

¹⁹³ *Id.* at 577-78. “[T]he right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary People are unlikely to become well-functioning, independent-minded adults . . . if they are raised in an intellectual bubble.” *Id.* at 577.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 578. The court expounded on this point by stating that

These games with their cartoon characters and stylized mayhem are continuous with an age-old children’s literature on violent themes. The exposure of children to the “girlie” magazines involved in the *Ginsberg* case was not. It seemed obvious to the Supreme Court that these magazines were an adult invasion of children’s culture and parental prerogatives. No such argument is available here.

Id.

¹⁹⁶ See Certiorari Petition, *supra* note 89, at 25-28.

¹⁹⁷ 534 U.S. 994 (2001).

472 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

the other jurisdictions considering such an ordinance.¹⁹⁸ Furthermore, as this historical discussion illustrates, the lack of recent case law in the area of video games has left many issues in need of clarification before such an ordinance can be crafted to withstand the constitutional challenges faced by Indianapolis.

III. CURRENT PROBLEMS FACING AN ATTEMPT TO PROTECT MINORS BY
REGULATING VIOLENT VIDEO GAMES

A. *The Threshold Issue: Are Video Games Protected Speech Under the First Amendment?*

American Amusement Machine Ass'n is the only case dealing with a violent video game ordinance that has explicitly held that video games are speech within the meaning of the First Amendment.¹⁹⁹ The Supreme Court has not dealt squarely with this issue.²⁰⁰ As a result, cases from the 1980s and early 1990s and a recent decision by the District Court for the Eastern District of Missouri in *Interactive Digital Software Ass'n v. St. Louis County, Missouri*, where video games were held to be "purely entertainment," may provide some guidance.²⁰¹ On the other hand, one

¹⁹⁸ *Am. Amusement Mach. Ass'n*, 244 F.3d at 580. The only "words of wisdom" the Seventh Circuit provided for the other jurisdictions contemplating the enactment of such an ordinance was that "a more narrowly drawn ordinance might survive a constitutional challenge." *Id.* Therefore, a statement such as this, which appears for the most part to be self-evident, provides little or no guidance for how a jurisdiction can go about drafting such an ordinance to survive a First Amendment challenge.

¹⁹⁹ *Cf. Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 179-80 (D. Conn. 2002) (noting that the interactive video game was expression protected by the First Amendment, precluding an action by a mother, whose son was murdered by a friend allegedly addicted to and obsessed with the game, against the manufacturer for negligent and intentional infliction of emotional distress under Connecticut law); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1279-80 (D. Colo. 2002) (noting that video games are entitled to full First Amendment protection). As discussed previously, *Wilson* and *Sanders* dealt with the issue of holding game manufacturers and movie producers liable as the proximate cause in the death of individuals at school-shootings at the hand of students "addicted" to video games. See *supra* note 3 and accompanying text.

²⁰⁰ *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). The Court has only remotely faced a video game ordinance once, and on that occasion, the issue was of due process and not the arcade owners' First Amendment rights. *Id.* at 286-87.

²⁰¹ See *supra* notes 14, 169-70 and accompanying text (discussing cases in which various courts have held that video games should not be subject to the rigors of the First Amendment); see also *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 200 F. Supp. 2d 1126, 1135 (E.D. Mo. 2002) (holding that video games are not protected speech under the First Amendment and that plaintiffs had failed to meet their burden of showing

can also look to the arguments raised in secondary sources for guidance²⁰² and the brief statement in *American Amusement Machine Ass'n* that construes games as protected speech.²⁰³ Either way, guidance is needed regarding which standard of review will apply. In making this determination, an examination of video games as they currently exist is helpful.

Video games have evolved immensely from their primitive days in the 1970s and 1980s when games had no story lines and were solely meant to leisurely entertain and amuse the player.²⁰⁴ Conversely, the games of the modern era, while still entertaining and amusing, include intricate plot lines and character development akin to motion pictures.²⁰⁵ Because of this, today's video games are more "imbued with elements of communication" than the video games that existed when the cases in the 1980s were decided.²⁰⁶ Further, today's game makers intend to convey a

that video games are a protected form of speech under the First Amendment). This holding by the district court in *Interactive Digital Software Ass'n* is in direct conflict with the Seventh Circuit and Southern District of Indiana's respective holdings in the *American Amusement Machine Ass'n v. Kendrick* case. See *supra* Part II.C.4 (discussing the Seventh Circuit and district court's holdings in *American Amusement Machine Ass'n*). Aside from this disagreement, the district court's opinion should not be regarded as holding much water and precedential value since its holding that games are not speech is based solely on four video games it reviewed, which were presented to the court by St. Louis County. *Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1135. Thus, the district court's holding in *Interactive Digital Software Ass'n* is making a broad and general "knee-jerk" proclamation based on four particular video games. Such a general holding should not be based on an examination of a small fraction of the entertainment industry at issue.

²⁰² See *supra* notes 171-72 and accompanying text (examining arguments as to why video games should be considered "speech" under the First Amendment).

²⁰³ *Am. Amusement Mach. Ass'n*, 244 F.3d at 574.

²⁰⁴ See, e.g., John Skow, *Games That Play People*, TIME MAG., Jan. 18, 1982, at 50-58 (describing the "plots" of the games at the time to include such things as a character scuttling about a maze eating dots (*Pac-Man*®), a space-ship shooting at asteroids in outer-space (*Asteroids*®), and a character digging underground tunnels and using an air pump to inflate and blow-up enemies (*Dig-Dug*®)).

²⁰⁵ See generally Philip Elmer-Dewitt, *The Amazing Video Game Boom*, TIME MAG., Sept. 27, 1993, at 68-72 (noting that video-makers now develop games in which the characters do such things as embark on adventures across the world or a country on a mission which develops and twists and turns as the game progresses (*The Inspector*®)); Chris Taylor, *Will I Still Be Addicted to Video Games?*, TIME MAG., June 19, 2000, at 76-77 (noting that more and more, games are going to involve complex and intricate stories, with the designers giving the players rich, open-ended environments).

²⁰⁶ See, e.g., Goroff, *supra* note 171, at 764-65 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

474 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

particularized message with the intricate story and plot lines that they have created.²⁰⁷

Therefore, adhering to the 1980s' idea that games are purely for entertainment is a futile and pointless exercise of stare decisis.²⁰⁸ Instead of following this archaic view when considering the enactment of an ordinance aimed at regulating or restricting video games, legislators should tailor their ordinances so that they clearly recognize video games as protected speech under the First Amendment. Therefore, if the Supreme Court were to hear a case involving the regulation of video games (violent or non-violent), it would likely find that video games are a form of entertainment that is no longer "pure entertainment" and, thus, should be afforded First Amendment protection.

B. What is the Proper Standard to Employ When Protection of Children is the Primary Governmental Justification?

When a reviewing court is faced with a regulation based on the content of the speech, the court presumably applies strict scrutiny.²⁰⁹ Nevertheless, some commentators and advocates have argued that the circuits are in disagreement regarding what level of scrutiny to apply when faced with content-based restrictions on minors' speech that do not materially affect adult access to the protected speech.²¹⁰ The issue of whether strict scrutiny applies where the government limits children's access to indecent or harmful speech, but leaves adult access unfettered, has not been explicitly addressed by the Supreme Court since *Ginsberg*.²¹¹ This has been one of the primary factors, but not necessarily the sole or

²⁰⁷ *Id.* Goroff argued this position in the early 1980s, at which time it was a bit of a stretch. *Id.* Nevertheless, the logic of Goroff in the following example can be applied and adapted to modern games:

When playing [the video game] *Asteroids*, the player does not actually maneuver a space ship around flying bodies, but he does get a sense of how the designer imagines space travel. A movie could give one a similar sense of fantasy, but the video game adds another dimension critical to the viewer's understanding—control.

Id.

²⁰⁸ See *supra* Part II.C.2 (discussing the history of the regulation of video games).

²⁰⁹ See *supra* notes 55-56, 136 and accompanying text.

²¹⁰ The framework for this alleged disagreement was set forth by the city of Indianapolis in its petition for a writ of certiorari to the Supreme Court in the *American Amusement Machine Ass'n v. Kendrick* case. Certiorari Petition, *supra* note 89, at 15-16. Nevertheless, the discussion did not go in-depth into the differing level of review, which this part does.

²¹¹ See *supra* notes 88-107 and accompanying text (discussing the opinion in *Ginsberg*).

decisive factor, in the disagreement among the circuits because *Ginsberg* was decided at a time before the Court had refined its scrutiny standards for the First Amendment.²¹² There are allegedly three different standards of scrutiny that the various circuits employ.²¹³ Nevertheless, this discussion will illustrate that the alleged “difference” is a mere myth.

The Second,²¹⁴ Seventh,²¹⁵ Eighth,²¹⁶ and Ninth²¹⁷ Circuits employ strict scrutiny. In other words, these circuits follow the presumptively understood view of the Court (i.e., because these are content-based regulations, they are presumptively invalid and thereby subject to the strictest level of scrutiny). Since these circuits apply the understood standard, there is no need to examine the logic and reasoning they employ, other than to note that all of the circuits in this category applied the Supreme Court’s standard subjecting a content-based regulation to strict scrutiny.²¹⁸

²¹² See *supra* notes 88-107 and accompanying text (discussing the opinion in *Ginsberg*).

²¹³ These three groups are as follows: (1) the circuits employing the traditional standard of strict scrutiny; (2) circuits applying a quasi-time, place, and manner standard with content-based regulations; and (3) a single circuit applying a traditional time, place, and manner approach.

²¹⁴ *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66-67 (2d Cir. 1997) (applying strict scrutiny to strike down a local law prohibiting the sale to minors of trading cards depicting graphic violence).

²¹⁵ *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 575-76 (7th Cir. 2001) (applying strict scrutiny to strike down the Indianapolis Ordinance regulating violent video games).

²¹⁶ *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992) (applying strict scrutiny to strike down state statute prohibiting rental or sale to minors of video cassettes depicting violence).

²¹⁷ *Crawford v. Lungren*, 96 F.3d 380, 387-88 (9th Cir. 1996) (applying strict scrutiny to strike down a local law prohibiting the sale in unattended vending machines of magazines that contain “harmful matter”).

²¹⁸ See generally *Am. Amusement Mach. Ass’n*, 244 F.3d at 575 (noting that content-based regulations are presumptively invalid and require strict scrutiny); *Eclipse Enters., Inc.*, 134 F.3d at 66 (“If speech subject to regulation is of the protected category, then the regulating statute must pass strict scrutiny if the regulation is content-based . . .”); *Crawford*, 96 F.3d at 384 (stating that as a general rule, “laws that by their terms distinguish favored speech from disfavored speech on basis of ideas or views expressed are ‘content-based’” and subject to strict scrutiny); *Video Software Dealers Ass’n*, 968 F.2d at 688 (noting that a content-based regulation is subject to strict scrutiny and must be narrowly drawn to promote a compelling state interest).

476 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

The second view is expressed by the Tenth²¹⁹ and Eleventh²²⁰ Circuits. These circuits assert that, although the regulations are content-based and presumptively invalid, they are nevertheless a quasi-time, place, and manner restriction, which moves the analysis down to an intermediate level of scrutiny and reduces the government's burden in proving its justification for enacting the regulation.²²¹ These circuits rely heavily on the reasoning in *Ginsberg* and argue that it is not inconsistent to apply a scrutiny slightly more deferential than strict scrutiny.²²² In particular, these circuits draw on the language in *Ginsberg* that the government, when regulating or restricting only minors' access to speech, can create "special standards" broader than what is typically allowed when both minors' and adults' speech is suppressed.²²³

The third view involves only the Fourth Circuit.²²⁴ The Fourth Circuit crafted a straightforward time, place, and manner approach when it upheld a municipal curfew law.²²⁵ However, the Fourth Circuit cannot be regarded as splitting from the understood strict scrutiny standard because curfew laws are content-neutral regulations not aimed directly at the minor's speech.²²⁶ Therefore, the arguments of

²¹⁹ *M.S. News Co. v. Casado*, 721 F.2d 1281, 1291 (10th Cir. 1983) (upholding a city ordinance requiring "blinder racks" be placed over the shelves on which sexually-oriented periodicals and publications appealing to a minor's interest are located).

²²⁰ *Am. Booksellers v. Webb*, 919 F.2d 1493, 1512-13 (11th Cir. 1990) (upholding a statute making it a criminal offense to display in a place accessible to minors, any material deemed "harmful to minors" under the statute).

²²¹ *Id.* at 1502 (concluding that the constitutional standards applicable to a time, place, and manner restriction govern a statute prohibiting the display of sexually explicit material deemed harmful to minors).

²²² *M.S. News Co.*, 721 F.2d at 1285-86 (noting that it is not inconsistent with the *Ginsberg* holding, which proscribed the sale of "girlie" magazines to minors, for a city ordinance to prohibit promotion of sexually-oriented material to minors).

²²³ See generally *id.* at 1291 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)) (noting that the logic of *Ginsberg* demands a lower level of scrutiny than the strictest form).

²²⁴ *Schleifer v. Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998). In *Schleifer*, the Fourth Circuit concluded that intermediate scrutiny was the most appropriate level of review for a constitutional challenge to a city's juvenile curfew ordinance, which the court upheld as a regulation substantially related to its stated purposes of reducing juvenile violence and crime and strengthening parental responsibility for children. *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 847-48 (noting that the aims of the curfew ordinance at issue were not directly related to the minor's speech).

commentators and advocates asserting that the Fourth Circuit is straying away from the traditional Supreme Court standard is misplaced.²²⁷

One factor that likely contributes to the alleged disagreement among the circuits is that a court, relying primarily on a case such as *Ginsberg*, is allowed more discretion in deciding what level of scrutiny to employ when dealing with a regulation aimed at protecting children while leaving adult access unfettered. This is because *Ginsberg*, although based on the government's compelling interest in protecting children, was decided at a time when the Court's free speech jurisprudence was not as refined and established.²²⁸ Since then, the Court has developed more concrete and formalistic standards.²²⁹ This is not to say that *Ginsberg* has been rendered a dead letter by the refined scrutiny standards. *Ginsberg* is still recognized precedent when it comes to regulating minors' access to speech. However, for the case to be used more efficiently and effectively as precedent, its logic must conform to the modern structures of scrutiny that the Court employs.

It appears that an ordinance aimed at regulating, but not absolutely suppressing minors' access to violent video games, could fall into the quasi-intermediate level of scrutiny employed by the second group of circuits discussed above.²³⁰ This is in light of the fact that much like the Tenth and Eleventh Circuits' analysis, a violent video game ordinance's primary justification comes from the *Ginsberg* holding, and, therefore, could rely heavily on the Court's language and logic in *Ginsberg*.²³¹ However, since a violent video game ordinance is a content-based regulation aimed directly at the primary effect of the speech, it is a logical precautionary measure to tailor the ordinance so that it meets strict scrutiny regardless of the circuits' allegedly diverging views on the level of scrutiny to employ.

²²⁷ See Certiorari Petition, *supra* note 89, at 16; see also *United States v. Mento*, 231 F.3d 912, 918 (4th Cir. 2000). In fact, the Fourth Circuit accepts the view that a content-based regulation is still subject to strict scrutiny, even if it is aimed at protecting children. *Id.* at 918 (holding that a regulation aimed at protecting children from pornography is content based if it is aimed at inhibiting the expression itself).

²²⁸ See *supra* notes 88-107 and accompanying text (discussing in detail the *Ginsberg* case).

²²⁹ See *supra* notes 131-55 and accompanying text (illustrating the Court's development of the strict scrutiny standard as it pertains to protection of children).

²³⁰ See *supra* notes 219-23 and accompanying text.

²³¹ See *supra* notes 219-23 and accompanying text.

478 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

Furthermore, this difference appears to be based more on the broad category of the protection of children and not on the content of speech at issue in the regulations. As established by the Court's precedent, the question of whether speech is protected by the First Amendment depends on the content and type of speech, not on what the government's compelling interest is in seeking to regulate that speech.²³² Therefore, a jurisdiction considering a violent video game ordinance should tailor the ordinance so that it can withstand the stringent demands of strict scrutiny.²³³

C. *How to Develop a Working Definition of Violence: Should Violent and Sexually Explicit Material Be Categorized and Assessed Under a Standard Similar to the Supreme Court's Obscenity Doctrine?*

As stated above, regulating material because of its "violent content" is a difficult task.²³⁴ Above all, a definition of violence in an ordinance regulating video games must be explicitly clear and limited, so as to avoid the problems of vagueness and overbreadth.²³⁵ Therefore, the definition must be of sufficient clarity to give a person of ordinary intelligence a reasonable opportunity to know what speech is prohibited so that he or she may act accordingly.²³⁶ Further, the definition must provide explicit standards for those charged with enforcing the ordinance.²³⁷ Aside from this, the definition must not "abut upon sensitive areas" of basic First Amendment freedoms.²³⁸ Lastly, to avoid

²³² *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (discussing the hierarchy of speech formulated by the Court); see also *supra* notes 51-52 and accompanying text (discussing the Court's "speech hierarchy").

²³³ See *infra* Part IV (assessing and drafting a model ordinance to satisfy strict scrutiny).

²³⁴ See *supra* notes 174-76 and accompanying text.

²³⁵ See *supra* text accompanying notes 64-68 (discussing the vagueness and overbreadth standards).

²³⁶ *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); see also *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) (noting that, in striking down an ordinance aimed at regulating violence, the determination of whether or not something constitutes "violent material" cannot be totally subjective but must give objective guidance to the affected parties and those officials charged with its enforcement).

²³⁷ *Grayned*, 408 U.S. at 108-09.

²³⁸ *Id.*

being unduly vague and overbroad, the definition must give a categorical distinction of what forms of violence it intends to cover.²³⁹

Aside from these formalities in draftsmanship, the greatest hurdle a regulation aimed at protecting minors from violent material faces is the establishment of a causal connection between its means (i.e., regulating violent material) and its end (i.e., protecting children from the material).²⁴⁰ The best source to draw upon in establishing a causal connection is the scientific research that has been conducted on the effects of violent material on minors.²⁴¹ While the courts typically do not regard these studies as dispositive on the issue, the Court in *Ginsberg* noted that scientific research is, at the very least, persuasive in justifying the government's decision to regulate.²⁴² Furthermore, although the consensus of the courts may be that these studies do not establish a sufficient causal link between the means and the ends, a causal link has not been totally disproved either.²⁴³ Rather, it appears that, in light of *Ginsberg*, a direct correlation is not essential but rather is an indication of some, albeit minimal, affirmative link to violent material, and its effect on minors' general state of well-being is sufficient.²⁴⁴

Clearly, the method employed in the prior violent video game ordinances will not work.²⁴⁵ The reason ordinances such as the one in Indianapolis failed is because an attempt to convert the *Miller* obscenity standard into a standard that also applies to violence simply complicates the matter more than needed. The Seventh Circuit viewed Indianapolis'

²³⁹ Video Software Dealers Ass'n, Inc. v. Webster, 968 F.2d 684, 689 (8th Cir. 1992) (noting that, had the ordinance at issue given a categorical distinction as to when violence would not be regulated under the ordinance, it would have likely passed constitutional muster).

²⁴⁰ See generally Marion D. Hefner, Note, 'Roast Pigs' and Miller-Light: Variable Obscenity in the Nineties, 1996 U. ILL. L. REV. 843, 877-78 (1996) (discussing the need for this affirmative link).

²⁴¹ See, e.g., Anderson & Dill, *supra* note 2, at 774-78 (discussing the aggressive thoughts and patterns of behavior exhibited by children who play violent video games).

²⁴² *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968); see also *supra* notes 106-07 and accompanying text (discussing the effectiveness of government reliance on scientific studies).

²⁴³ See, e.g., Hefner, *supra* note 240, at 878 (drawing this inferred logic from *Ginsberg*).

²⁴⁴ *Ginsberg*, 390 U.S. at 641.

²⁴⁵ See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001).

attempt to expand the *Miller* standard to include violence as stretching *Miller* beyond its intended and limited purpose.²⁴⁶

A jurisdiction is doing itself a disservice by using the *Miller* obscenity standard in regulations regarding the protection of children from violent material for two main reasons. First, *Miller* is a broad and general standard, intended to apply to the community at large rather than a particular segment, such as minor children.²⁴⁷ Second, it is an easy target for a reviewing court to strike down. A court can simply dismiss the argument as misapplying and stretching *Miller* beyond its intended purpose of regulating obscenity when presented with a violent video game ordinance attempting to regulate violence.²⁴⁸

Instead of utilizing *Miller* and trying to pigeonhole violence into the obscenity doctrine, a more practical and effective approach is to find a middle-ground definition of violence.²⁴⁹ In order to achieve this result, the definition must be explicit and well defined as to what type of violence it is aimed at regulating. However, it must also not be too explicit and over reaching, otherwise overbreadth problems will arise.²⁵⁰ It is for these reasons that a definition of violence that will pass constitutional muster is one that is explicit in its terms of what constitutes harmful violent material to minors and one that provides the

²⁴⁶ *Id.* "[T]o squeeze . . . violence into [the] familiar legal pigeonhole . . . of obscenity . . . is [not proper]. Violence and obscenity are distinct categories of objectionable depiction." *Id.* But see KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY 114-17 (1996) (arguing that, at least as to children, sex can stake no superior claim over hard-core graphic violence for inclusion within the definition of obscenity). Saunders' point is valid; however, the legal standard developed for obscenity is intended solely to extend to the obscene and not "other" forms of speech closely akin such as violent material. Sissela Bok, *Censorship and Media Violence*, 95 MICH. L. REV. 2160, 2165 (1997) (criticizing Saunders' approach as leading the United States down the slippery slope of "full-scale censorship").

²⁴⁷ See *supra* note 36 (discussing the *Miller* obscenity standard); see also Henkin, *supra* note 103, at 413 n.68 (arguing that honing in on the particular group an ordinance is aimed at regulating is a key factor in making it pass constitutional muster).

²⁴⁸ See *supra* note 36.

²⁴⁹ Hefner, *supra* note 240, at 879 (proposing that a legislature should draft statutory language regulating minors' access to violent material by focusing on the material's capacity to harm children and not on the technical requirements of the *Miller* obscenity standard).

²⁵⁰ See, e.g., *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329-30 (7th Cir. 1985) (striking down a municipal ordinance because its definition of "pornography subordinating women," which included "violent" pornography, was so broad that its reach could literally extend to any form of speech casting women in a subservient role).

parties affected by the regulation objective guidance so as to warn ordinary people of the affected materials under the regulation.

IV. PROPOSAL OF A MODEL ORDINANCE FOR RESTRICTING MINORS' ACCESS TO VIOLENT VIDEO GAMES THAT CAN PASS CONSTITUTIONAL MUSTER

A. *What a Violent Video Game Ordinance Must Contain: Reasons Why The Prior Ordinances Have Failed*

An ordinance attempting to restrict minors' access to violent video games in arcades and other establishments is a content-based regulation subject to strict scrutiny.²⁵¹ Thus, a jurisdiction considering adopting such an ordinance must establish that it has a compelling governmental interest; that there is a fit between the means and the end; that it is narrowly tailored; and that a plausible, less restrictive alternative is unavailable or that the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.²⁵² All of these necessary elements can plausibly be met with the regulation of violent video games in arcades and other establishments.

First, the compelling state interest is the protection of children, which has clearly been recognized by the Court's jurisprudence.²⁵³ Second, if an ordinance provides an explicit and precise definition of what constitutes a violent video game, the ordinance will be narrowly tailored to its purpose.²⁵⁴ Lastly, the fact that the games in arcades and other places of business can only be regulated if they are separated and kept away from minors' plain view illustrates that the goals of the regulation would be achieved less effectively absent the regulation.²⁵⁵

With the formalities of strict scrutiny aside, both the precision of drafting as well as the clarity of the purpose for regulating violent video games are essential for an effective ordinance.²⁵⁶ Thus, in order to have precision and clarity, the language and structure must be wholly

²⁵¹ See *supra* Part III.B (discussing why strict scrutiny is the proper standard of review).

²⁵² *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986).

²⁵³ See *supra* Part II.B (providing a synopsis of the Court's protection of children jurisprudence).

²⁵⁴ See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

²⁵⁵ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989).

²⁵⁶ See *supra* Part III.C (discussing the need for such draftsmanship in an ordinance attempting to regulate violent material).

482 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

separate from the *Miller* obscenity standard.²⁵⁷ Prior ordinances have not done so, and this oversight has been the fatal flaw in these ordinances.²⁵⁸

B. Proposed Definition Section of a Violent Video Game Ordinance

The substantive provisions and requirements of the prior violent video game ordinances are not fatally flawed. The methods and means by which they have sought to regulate minors' access to video games are not the problem the courts have had in upholding such ordinances.²⁵⁹ Rather, the only portions that need to be restructured, according to the Seventh Circuit, are the definitions of what constitutes a "violent video game" and what constitutes a "violent video game harmful to minors."²⁶⁰ Such a scheme would be as follows:

Definitions

(a) *For the purpose of this ordinance, a "Violent Video Game Machine" is defined as:*

(1) *A currency-operated gaming machine whose visual depiction or realistic representation of death or severe injury to a human or human-like being, including, but not limited to: decapitation, dismemberment, repeated instances of bloodshed, grotesque cruelty, mutilation, maiming, or disfiguration in a way such that the depiction or representation constitutes "strong animated or life-like violence" under the Coin-Operated Video Game Parental Advisory System and is also capable of shocking the conscience of persons under seventeen years of age and exceeding the boundaries of what should be tolerated in a civilized society; or*

(2) *A violent point and shoot currency-operated video simulator that involves one or more individuals firing*

²⁵⁷ See *supra* text accompany notes 247-49 (discussing why violence cannot be regulated in a similar fashion as obscenity).

²⁵⁸ See *supra* Part II.C.3-4 (discussing the various problems encountered by Indianapolis).

²⁵⁹ See Indianapolis, Ind., Ordinance No. 72, 2000 (July 17, 2000), §§ 2-6; see *supra* note 10 (providing the text of the Indianapolis Ordinance); see also *supra* notes 178-82 and accompanying text (discussing the substantive provisions of the Indianapolis Ordinance).

²⁶⁰ See Indianapolis, Ind., Ordinance No. 72, 2000 (July 17, 2000), §§ 2-6; see *supra* note 10 (providing the text of the Indianapolis Ordinance); see also *supra* notes 178-82 and accompanying text (discussing the substantive provisions of the Indianapolis Ordinance).

*simulated weapons at a video screen that depicts human silhouettes, life-like representation of human beings, or civilian transportation services, including, but not limited to, representations of cars, buses, trains, aircraft, and commercial and residential structures and contains realistic depictions of physical injury to a human silhouette or life-like representation of a human being and realistic depictions of physical injury to a human being and realistic depictions of blood, gore, mutilation, or dismemberment of such silhouettes or human beings.*²⁶¹

Commentary

These two classifications of violent video games provide narrowly-tailored definitions. Neither has the potential for an unfathomable reach because they are specific to the games they intend to regulate, nor will those affected by the ordinance be unable to discern what is and is not a “violent video game” in their establishments. As such, neither definition is vague. First, neither of the definitions encounter overbreadth problems. This is because the definitions are not excessive in regulation nor are they substantially excessive in relation to the ordinance’s plainly legitimate sweep of protecting children. The definitions are not excessive in regulation because they have honed in on a particular segment of violent video games (i.e., those that are currency operated and located in places of business as well as those games that are considered to be “red sticker” games with strong animated or life-like violence under the Coin-Operated Video Game Parental Advisory System). Along these same lines, the definitions are not substantially excessive because they focus on the particular types of games the ordinance is aimed at regulating to protect children. On the other end of the spectrum, the definitions are not so vague as to “confuse” the affected person as to what qualifies as a violent video game. Instead, the definitions set out with a certain level of precision and clarity the games that are affected by the ordinance. By doing so, the regulation provides affected individuals with certain “guide-posts” for what is considered a violent video game under the ordinance with its inclusion of the Coin-

²⁶¹ This definition of a “violent video game” is based on the proposed legislation in New Jersey and New York as well as the Coin-Operated Video Game Parental Advisory System. See generally *supra* note 183 (discussing the state legislation); *supra* note 173 (discussing the advisory system).

484 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 37]

Operated Video Game Parental Advisory System. This is a well-structured and formulaic approach that easily allows an affected person, as well as those charged with enforcing the ordinance, to determine whether particular games fall under the scope of these definitions.

(b) For the purpose of this ordinance, a "Violent Video Game Harmful to Minors" is any violent video game describing or representing, in whatever form, blood, gore, mutilation, or dismemberment, when it:

(1) predominantly appeals to morbid interest of minors seventeen years of age and younger when it comes to violent video games; and

(2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors seventeen years of age and younger; and

(3) is utterly without redeeming social importance for minors seventeen years of age and younger.²⁶²

Commentary

This "harmful to minors" definition is patterned after the state statute the Court upheld in *Ginsberg*. It may appear to the untrained eye or those taking a "casual glance" at this definition, that it is comparable to the *Miller* obscenity standard. However, that is not the case. Indeed, *Miller* and *Ginsberg* have a substantial amount of overlap; nevertheless, the standards also have several differences. Chief among these differences is that the approach utilized here applies only to minors seventeen years of age and younger. In contrast, if *Miller* were to be employed, the regulation would either apply to the entire community at large, or in the case of the Indianapolis Ordinance, apply to individuals eighteen years of age and younger. While there does not appear to be a major difference in one year of age, the Court has suggested in cases such as *Reno*, that a regulation targeting minors seventeen and younger makes more sense than those regulations that regard individuals as

²⁶² The "violent video games harmful to minors" definition is based on three sources. See generally *Ginsberg v. New York*, 390 U.S. 629, 646-47 (1968); Henkin, *supra* note 103, at 413 n.68; Hefner, *supra* note 240, at 877-78.

"minors" up until they turn eighteen.²⁶³ Aside from this main difference, the proposed definition also avoids the fatal flaw that the prior jurisdictions have faced when they attempt to "squeeze" violence into the categorical structure devoted solely to obscenity that the Court established with the *Miller* standard. Unlike *Miller*, *Ginsberg* has never been pigeonholed into one form of speech. Instead, *Ginsberg*'s reach has been interpreted as extending to varying types of speech that are harmful to minors. However, this extension is, as the Court illustrated in *Reno*, predicated on the fact that the regulation in question is tailored in the same or similar way as the regulation upheld by the Court in *Ginsberg*. The "harmful to minors" definition of this proposed ordinance clearly attempts to provide a tailored regulation, and that helps to correct the fatal flaw that prior jurisdictions possessed in their ordinances.

C. General Synopsis of the Proposed Ordinance

These portions of a proposed ordinance clarify the problems that Indianapolis faced and that the other jurisdictions contemplating such ordinances will face, if they are to rely on a vague definition of violence or the *Miller* obscenity standard. The definitions of violence are clearly not exhaustive. These definitions focus on particular types and contents of video games, thereby making them narrowly tailored to particular categorical distinctions of violence, a distinction that the prior ordinances were lacking. Also, by using the *Ginsberg* standard for the definition of "harmful to minors," rather than attempting to modify the *Miller* approach, a legislator has less of a hurdle to meet since the definition focuses on the particular group it is attempting to regulate, rather than the community at large.

As has already been established, the *Ginsberg* and *Miller* standards appear on the surface to be comparable standards in substance and structure, with both being aimed at regulating "low-value" speech.²⁶⁴ However, if one goes beneath the surface and dissects the two standards, it becomes apparent that they are not entirely similar for two main reasons. First, *Miller* applies to the community at large, whereas *Ginsberg*

²⁶³ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 864-67 (1997).

²⁶⁴ See *supra* Part IV.B (discussing how the *Ginsberg* standard employed in the model ordinance of this Note appears on its face, or at a casual glance, identical to the *Miller* standard).

is designed to restrict minors' access to the harmful speech.²⁶⁵ Second and lastly, the Court has repeatedly held that *Miller* is intended to apply solely to speech that is obscene and is not intended to apply to speech that is similar to obscene speech in terms of "social value," such as speech involving violence.²⁶⁶

With these differences established, it becomes apparent that *Ginsberg* is the correct standard to employ when the government is attempting to regulate a form of speech that is neither obscene nor harmful to adults but instead only harmful to minors. Regardless of these differences and the greater amount of discretion and deference afforded to the government when it attempts to protect children by regulating harmful speech, the Court in *Reno* illustrated its reluctance to expand *Ginsberg* into other areas of speech unless certain criteria are met.²⁶⁷ However, unlike the CDA at issue in *Reno*, a court would be unable to draw the four key distinctions that the Court did between the CDA and the statute at issue in *Ginsberg*.²⁶⁸ Therefore, the ordinance proposed in this Note appears able to overcome the reluctance the Court had in expanding the *Ginsberg* standard in *Reno*.

V. CONCLUSION

Without a doubt, the protection of children is a compelling interest that the government holds closely and regards as fundamental to maintain a decent and moralistic society for its minors free from the detrimental influence of violent speech, such as violent video games. As this Note illustrates, a narrowly tailored ordinance with clear and explicit definitions of what constitutes a violent video game harmful to

²⁶⁵ See *supra* notes 36, 88-107 and accompanying text (discussing the *Miller* and *Ginsberg* standards separately).

²⁶⁶ See, e.g., *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001) (noting that *Miller* has created a "familiar legal pigeonhole" in which only obscene speech can be regulated; other forms of speech such as violent speech cannot be "squeezed" into the *Miller* standard according to Judge Posner).

²⁶⁷ *Reno*, 521 U.S. at 864-67; see *supra* note 145 (discussing the Court's reasons regarding why *Ginsberg* and *Reno* could not be compared).

²⁶⁸ *Reno*, 521 U.S. at 864-67. With the ordinance proposed in this Note, the problems Congress faced in *Reno* with the CDA are not presented here. First, the ultimate determination of whether a minor under seventeen will play a violent video game rests with the minor's parent or guardian. Second, this ordinance applies only to commercial transactions. Third, this ordinance's definition is narrow and particular. Lastly, a "minor" for the purposes of this ordinance is any person under seventeen years of age, not eighteen.

minors, based on the *Ginsberg* precedent rather than the *Miller* obscenity standard, is the key for an ordinance regulating minors' access to violent video games to pass constitutional muster. Furthermore, although the Court denied certiorari in the case involving the Indianapolis Ordinance, this denial perhaps implicitly demonstrated the Court's reluctance to delve into the area at this current time and instead leave it to develop in the "social experiments" by legislators and the scholarly community.²⁶⁹ Nonetheless, since the Indianapolis test case, other jurisdictions have proposed similar ordinances, which illustrates that the experiment continues. This Note attempts to lend a hand to the situation by tailoring its proposed portions of the ordinance in a manner similar to the statute at issue in *Ginsberg*, rather than trying to convert the *Miller* obscenity standard into a violence and obscenity standard, which simply cannot stand.

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²⁶⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (noting that it is "one of the happy incidents of the federal system that a single courageous [jurisdiction] may . . . serve as a laboratory; and try novel social and economic experiments . . ."); *see also* *Roth v. United States*, 354 U.S. 476, 505 (Harlan, J., dissenting) (stating that one of the great strengths of the federal system is that the state and local governments serve as "experimental social laboratories," which have the capacity to introduce "novel techniques of social control").

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