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The Video Game Issue: *The Case*

In *Schwarzenegger v. Entertainment Merchants Association*, the Supreme Court will decide whether the state can impose criminal penalties for selling or renting violent video games to minors. It may seem inconsequential to non-gamers, but it poses a critically important issue even for people who will never play a video game: whether representations of violence will continue to be protected by the First Amendment.

The case pits those who claim that kids are harmed by exposure to fictional violence and that government regulation is necessary against millions of video game players, scientists, journalists, civil libertarians and others who reject the claim that kids are harmed by video games and warn of the risk to free expression if government is able to regulate fictional violence. More than 30 *amicus* briefs representing 180 organizations and individuals have been filed with the Court. (See the brief on behalf of the ACLU, NCAC and the National Youth Rights Association here: ncac.org/video-game-brief.)



Legally, the dispute comes down to two narrow questions: can the government restrict the sale of otherwise legal expression to minors and, if so, under what circumstances? California argues that violent video games should be treated like obscenity – by definition explicit sexual content that lacks social value – which is not protected by the First Amendment for either adults or minors. Whatever one's views on the relative merits of sexual and violent content, obscenity is a historical and narrowly drawn exception to the general rule that speech is protected. Creating a new exception for a completely different type of content will open a Pandora's Box.

Indeed, in 1948 the Supreme Court invalidated a New York law banning the sale of "criminal news...or pictures, or

stories of deeds of bloodshed, lust or crime," which the state argued were "vehicles for inciting violence and depraved crime." The Court held that "[t]hrough we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." Five federal courts of appeals and numerous other courts have since recognized that violent content is fully protected. As one appeals court judge observed: "Violence has always been a central interest and a recurrent theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales

collected by Grimm, Andersen, and Perrault is aware." Consider, also, *Titus Andronicus*, *The Odyssey*, Gustave Doré's illustrations of *Dante's Inferno*, Rodin's *The Gates of Hell*, and countless images of crucifixion and martyrdom.

The same judges have repeatedly rejected the contention that minors are harmed from exposure to violent video

games, citing a lack of credible scientific evidence. Some social scientists even think violent video game players may "develop an enhanced sensitivity to what is going on around them, and this may help with activities such as multitasking, driving, reading small print..." Others observe that "violent video games may be used by minors to help them 'work through angry feelings or relieve stress, and ...explore different roles that may be unacceptable in daily life."

As California admits, it is asking the Court to "boldly [go] where no court has gone before." Let's hope the Justices decline the invitation. After all, if the state can restrict minor's access to violent video games, why not violent movies and books?

NCAC PARTICIPATING ORGANIZATIONS

Actors' Equity Association
American Association of School Administrators
American Association of University Professors
American Association of University Women
American Booksellers Foundation for Free Expression
American Civil Liberties Union
American Ethical Union
American Federation of Teachers
American Federation of Television & Radio Artists
American Jewish Committee
American Jewish Congress
American Library Association
American Literary Translators Association
American Orthopsychiatric Association
American Society of Journalists & Authors
Americans United for Separation of Church & State
Association of American Publishers
Authors Guild
Catholics for Choice
Children's Literature Association
College Art Association
The Creative Coalition
Directors Guild of America Inc.
The Dramatists Guild of America
First Amendment Lawyers Association
Educational Book & Media Association
International Reading Association
Lambda Legal
Modern Language Association
National Center for Science Education
National Communication Association
National Council for the Social Studies
National Council of the Churches
National Council of Jewish Women
National Council of Teachers of English
National Education Association
The Newspaper Guild/CWA
Office of Communication, United Church of Christ
PEN American Center
People For the American Way
Planned Parenthood Federation of America
Screen Actors Guild
Sexuality Information & Education Council of the U.S.
Society of Children's Book Writers & Illustrators
Speech Communication Association
Student Press Law Center
Union for Reform Judaism
Union of Democratic Intellectuals
Unitarian Universalist Association
United Methodist Communications, United Methodist Church
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The Other Cases

Every lower federal court to consider state or local laws restricting minors' access to violent content has found them unconstitutional. Here's a brief rundown:

Video Software Dealers' Ass'n v. Webster (8th Cir. 1992). Statute restricting minors' access to violent video games invalidated: "unlike obscenity, violent expression is protected by the First Amendment."

Eclipse Enterprises v. Gulotta (2nd Cir. 1997). Absent evidence of harm, the effort to restrict minors' access to violent content is "presumptively unconstitutional."

American Amusement Machine Ass'n v. Kendrick (7th Cir. 2001). Violent video games are protected expression; the claim that they harm minors is highly speculative. "To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped

to cope with the world as we know it."

Interactive Digital Software Ass'n v. St. Louis (8th Cir. 2003). Rejected effort to regulate violent video games because there was no evidence that "the recited harms are real, not merely conjectural."

Entertainment Software Ass'n v. Hatch (8th Cir. 2008). Enjoined a law that barred minors' access to M-rated video games because of lack of evidence of a causal relationship "between the exposure to such violence and subsequent psychological dysfunction."

For a detailed timeline of video game controversies, visit ncac.org/video_game/timeline.

Praise for Violent Video Games

"Grand Theft Auto IV is a violent, intelligent, profane, endearing, obnoxious, sly, richly textured and thoroughly compelling work of cultural satire disguised as fun.... [I]t sets a new standard for what is possible in interactive arts." Seth Schiesel, *NY Times*, 4/28/08

Grand Theft Auto III "was whatever game you wanted it to be and each and everyone one of those games was ... intuitive and gripping....GTA IV doesn't have to be 'Moby Dick' or 'Beloved' to be the Greatest Game of a Lifetime or even to be worthy of discussion." Junot Díaz, *Wall Street Journal*, 6/28/08

"Call of Duty ... is faster and more thrilling than its Hollywood competitors.... [G]ames might converge on art ... through the beauty and detail of their imagined worlds, combined with the freedom they give the player to wander around in them." John Lanchester, *London Review of Books* 1/29/09

Grand Theft Auto IV "turns narrative into

an active experience, which film is simply unable to do in the same way." Tom Bissell, *The Observer*, 3/21/10

"Red Dead Redemption [is] a convincing, cohesive and enthralling reimagining of the real world ... Like our own, this is a complex world of ethical range and subtlety where it's not always clear what the right thing is." Seth Schiesel, *NY Times*, 5/16/10

Video games "arrest the eye and they occupy the mind...[They are] more consuming and intellectually interesting than a lot of novels I've read. There's no question they're art. [The way] they pay homage to the real world thrills me. It's very similar to my own desire to describe something in words." Nicholson Baker, *The New Yorker*, 8/2/10

"At the beginning of the second decade of the 21st century, video games are taken more seriously as a form of entertainment than ever before, even by the priests of high culture." Chris Suellentrop, *NY Times Magazine*, 9/12/10

Food for thought...

"Violence isn't learned from mock violence. There is good evidence – causal evidence, not correlational – that it's learned in personal violent encounters, beginning with the brutalization of children by their parents or their peers.... Violence is on the decline in America, but if we want to reduce it even further, protecting children from real violence in their real lives – not the pale shadow of mock violence – is the place to begin."

Richard Rhodes, *NY Times*, September 17, 2000

The Ratings Game

Many of you are familiar with our concerns about ratings. They're highly subjective, they reflect value judgments about content, and they reduce complex material to a few letters and numbers. Still, they serve a useful purpose for some consumers. The ratings developed by the Entertainment Software Rating Board let people know something about the game in the box before they buy it. The MPAA ratings help movie-goers decide which films they want to see. The age guidelines are just that – guidelines. Consumers are free to disagree with or ignore both.

However, there's a catch: ratings also invite censorship. The California video game case discussed at length in this issue is a case in point. Once something is rated as adult fare, as most violent video games are, many legislators develop an apparently irresistible urge to criminalize its sale to minors. When this happens, the rating is no longer informational, voluntary and benign; once it becomes mandatory, enforced by criminal penalties, there's a serious threat to core First Amendment principles, which prohibit the state from suppressing speech because of hostility to its content or message.

The state and its supporters urge the Court to make an exception in this case. The brief filed by Common Sense Media, an organization that promotes ratings for everything from video games to books and advocates for restrictive laws like California's, sets out the argument: "juvenile minds are different" and society's interest in "the development of their character supports shielding them

from negative influences." Violent video games are such a "negative influence," the brief claims, because they "can increase aggression" and are "related to increases in aggressive thoughts."

Pseudo-scientific arguments about children's immaturity and vulnerability are familiar in the history of censorship. In the 19th Century, Anthony Comstock sought to ban "dime novels," which he claimed would lead youth into a "career of crime." In the 1950's, Fredric Wertham claimed "a significant correlation between crime-comics reading and the more serious forms of juvenile delinquency." Movies, television, and popular music became the subject of similarly exaggerated claims about children's susceptibility to dangerous and corrupt influences. The latest culprit: video games.

Are kids really at risk from violent video games? Scores of appellate judges and the 82 scientists and media scholars who filed a brief in this case say there's no evidence of it. Are parents so out of touch with their kids that ratings enforced by criminal penalties are necessary? Not according to the FCC, which found that 85% of parents are involved in the decision to purchase a video game, and that video game hardware includes controls that are 100% effective in blocking access to rated material.

There is, as Justice Brandeis observed, a fundamental "right to be let alone." To grow into thinking adults, children need to explore the world, be exposed to a variety of ideas, and learn from experience. Pity the children who are so protected from "negative influences" that they can't even read about being bad, or play a game that allows them to imagine what it's like to do something they'd never do in real life.

— Joan Bertin

THE LONG AND THE SHORT OF IT

- An invitation to young adult novelist Ellen Hopkins to speak at Teen Lit Fest 2011 in Humble, Texas was revoked because some parents complained about the content of Hopkins' novels. Other scheduled authors dropped out in protest and the Festival was canceled.
- In response to one elementary school parent complaining about the book's content, the School Board in Stockton, Missouri decided to remove Sherman Alexie's *The Absolutely True Diary of a Part-Time Indian* from school classrooms and from the high school library.
- The Senate recently passed legislation that will protect American authors and publishers from foreign libel judgments that undermine First Amendment free speech rights. The SPEECH act allows American authors and publishers to go into court and seek a declaration that such a foreign judgment is not enforceable in the US, even if no attempt has been made to enforce it.

- Earlier this year we reported on YouTube's removal and subsequent restoration of videos by dance-artist Amy Greenfield. In response to NCAC's and the Electronic Frontier Foundation's jointly voiced concerns, YouTube has instituted an appeals process and changed its community guidelines to include "artistic" purpose as justifying an exception to its "no nudity" policy.
- In September, the Ninth Circuit Court of Appeals struck down an Oregon "harmful to minors" law, which sought to criminalize the dissemination to minors of material containing descriptions or depictions of sexual activity. This would have included material from a sex education book or a Judy Blume novel.

- What began as a heated protest over Enrique Chagoya's artwork at the Loveland Museum in Colorado has ended in vandalism. A disgruntled woman ripped his controversial lithograph "The Misadventures of the Romantic Cannibals" after the Loveland City Council decided not to remove the work, as requested by residents, religious groups and some council members.
- Student journalists in Illinois have enhanced press rights under a new state law, according to a recent court ruling. The case involves claims that Chicago State University had retaliated against the editor and faculty advisor of the student newspaper because of articles critical of the administration. The Illinois law was passed to negate the effects of an earlier appeals court decision restricting student press rights.



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New and noteworthy: *Wartime Dissent in America* by Robert Mann tracks dissent in every American war since the Revolution. Palgrave Macmillan, August 2010.

Plato's Pop Culture Problem, and Ours

by Alexander Nehamas

In 1935, Rudolf Arnheim called television “a mere instrument of transmission, which does not offer any new means for the artistic representation of reality.” He was repeating, unawares, Plato’s ancient charge that, without a “craft” or an art of his own, Homer merely reproduces “imitations,” “images,” or “appearances” of virtue and, worse, images of vice masquerading as virtue. Both Plato and Arnheim ignored the medium of representation, which interposes itself between the viewer and what is represented. And so, in Achilles’ lament for Patroclus’ death, Plato sees not a fictional character acting according to epic convention but a real man behaving shamefully. And since Homer presents Achilles as a hero whose actions are commendable, he seduces his audience into enjoying a distorted and dismal representation that both reflects and contributes to a distorted and dismal life.

We will never know how the ancient Athenians reacted to poetry. But what about us? Do we, as Plato thought, move immediately from representation to reality? If we do, we should be really worried about the effects of television or video games.

Or are we aware that many features of each medium belong to its conventions and do not represent real life?

To answer these questions, we can no longer investigate only the length of our exposure to the mass media; we must focus on its quality: are we passive consumers or active participants? Do we realize that our reaction to representations need not determine our behavior in life? If so, the influence of the mass media will turn out to be considerably less harmful than many suppose. If not, instead of limiting access to or reforming the content of the mass media, we should ensure that we, and especially our children, learn to interact intelligently and sensibly with them. Here, again, philosophy, which questions the relation between representation and life, will have something to say.

Even if that is true, however, though, to compare the *Iliad* or *Oedipus Rex* to *Grand Theft Auto*, *CSI: NY*, or even *The Wire* may seem silly, if not absurd. Plato, someone could argue, missed something serious about great art, but there is nothing to miss in today’s mass media. Yet the fact is that Homer’s epics and, in particular, the 31 tragedies that have survived intact (a tiny

proportion of the tens of thousands of works produced by thousands of ancient dramatists) did so because they were copied much more often than others — and that, as anyone familiar with best-selling books knows, may have little to do with perceived literary quality. For better or worse, the popular entertainment of one era often becomes the fine art of another. And to the extent that we still admire Odysseus, Oedipus, or Medea, Plato, for one, would have found our world completely degenerate — as degenerate, in fact, as we would find a world that, perhaps two thousand years from now, had replaced them with Tony Soprano, Nurse Jackie, or the Terminator.

And so, as often in philosophy, we end with a dilemma: If Plato was wrong about epic and tragedy, might we be wrong about television and video games? If, on the other hand, we are right, might Plato have been right about Homer and Euripides?

Alexander Nehamas is professor of philosophy at Princeton University. This is an excerpt from a longer article that appeared as an online opinion piece in *The NY Times*'s philosophy series, *The Stone*, on August 29th, 2010: <http://opinionator.blogs.nytimes.com/2010/08/29/platos-pop-culture-problem-and-ours/>.

Revisiting the Culture Wars and Looking Ahead

Using the occasion of the 20th anniversary of the NEA “decency clause,” NCAC initiated a conversation about the arts and their place in society today. Two panels, organized in collaboration with the Vera List Center for Art and Politics, brought together survivors of the culture wars and culture workers who are coming to creative maturity today. The story went like this: once

upon a time artists and arts organizations could depend on government grants that gave them room to experiment and explore ideas, perhaps even to try and change the world, but public arts funding was relentlessly attacked. Conservative legislators crucified the work of controversial artists on the Senate floor, and the NEA was forced to become an agency funding mainly “safe” programs. The good news is artists today still believe they are changing the world and they still create work that questions certainties (albeit with the awareness that it may be attacked, even censored). They no longer, however, have public funding as an option, and institutions that depend on public funding are all too much aware of the strings attached. As the “decency” clause targeted primarily work dealing with sexuality, the live events concluded with a screening and discussion of



Wafaa Bilal, Carolee Schneemann, and Trevor Paglen at New School's Tishman Auditorium, September 22, 2010

films challenging taboos around the representation of sex (co-sponsored by the BFA Department of Visual & Critical Studies at the School of Visual Arts). The conversation continues online through an ongoing series of video interviews with artists and curators worldwide, *Power, Taboo* and the *Artist* at ncac.org/powertaboo.



Audience at SVA Theatre screening, September 27, 2010