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U.S. Supreme Court Begins Debate on "Schwarzenegger v. EMA"

On election day, of all days, the U.S. Supreme Court took on a California case challenging a law prohibiting the sale and promotion of violent games to minors.

The court agreed to hear the case of *Schwarzenegger v. EMA* back in April of this year, after a flurry of lawsuits challenged a California law, signed by Governor Arnold Schwarzenegger in 2005, prohibiting sales of violent video games to minors. An angry video-gaming industry insisted the law is an unconstitutional infringement of the First and 14th Amendments, as it would criminalize the sale or rental of interactive entertainment labeled to minors as "Mature."

Before the act even took effect in California, the Entertainment Software Association (ESA), a video-game industry trade group, challenged the legislation in the U.S. District Court for the District of California, arguing that it violated the two amendments by unconstitutionally restricting *freedom of expression*, a term not stated that way per se in either amendment. Soon the Entertainment Merchants Association (EMA) had weighed in; it too had a stake in creating and selling as many games as possible.

The Supremes have their hands full in the case against violent video games, as a long list of amicus ("friend of the court") briefs has been filed, both in support of, and challenging, Governor Schwarzenegger's prohibition.

Ever since 1999's horrific shootings at Columbine High School touched off a nationwide wave of copycat, mass-killings and sadistic rampages by both youthful gangs and even solitary adolescents, some perpetrators have told authorities outright that they got their murderous intentions from a violent video game (e.g., "Teen boys admit to murder of Victoria girl – CBC," and "Teens moved from online violence to real-life murder," publicized both on CTV and in the *Ottawa Citizen*).

Even if parents don't know about specific admissions from child testimonies, it is obvious to most adults that children who get hold of today's deceptively marketed "Mature" video games are at once repulsed and transfixed by the graphic displays they encounter. These "toys" go way beyond early fare like "Dungeons and Dragons" (1974) or even later varieties like the crime-glorifying game "Grand Theft Auto" (1997). "Soldier of Fortune," released in 2000 for the personal computer, was among the first of the super-realistic interactive violent video games. It provided each character with 26 "kill zones," or areas on which a character could be hit by a bullet. The game also employed a first-person perspective, making it seem as though the player was actually seeing *through the eyes* of the in-game character.

Moreover, modern video games are a far cry from the cartoonish caricatures of yesteryear's "Pac-Man," "Space Invaders," and "Shootout" (two cowboys dueling) played on Atari sets by the whole family. They

are powerful, realistic scenes of horror: spinal cords being ripped out; vicious rapists stalking and/or sexually mutilating terrified, often nude girls and women; appalling abductions, and graphic torture scenarios of every kind.

The technical questions in *Schwarzenegger v. EMA* include, first, whether the First Amendment permits any limits on offensive content in violent video games sold to minors; and second, whether a state regulation for displaying offensive, harmful images to children is invalid if it fails to satisfy the exacting "strict scrutiny" standard of review. If one looks past the legalese, such questions are "no-brainers" among average parents. But worded as they are, two questions in the 10th Amendment stand out: states' rights, and the rights of the "people." In other words: Does a State of the Union have a right to satisfy the wishes of its own population regarding questions that are not specifically addressed in the U.S. Constitution? The Tenth Amendment says it does. Obviously, interactive video games did not exist in 1787, or 1887 — or even 1987 in the terms we think of today. To complicate matters, the label "Mature" is intended to entice, not discourage, young viewers.

Another question, in reading the various amicus briefs, turns on the definitions of "captive audience" and "giving consent." Does a State have a compelling interest to protect minors who are not yet capable of "giving their consent" when confronted with prurient materials? Just as it has been determined that a four-year-old cannot "give consent" to sexual relations with an adult, young children who face disturbing and prurient images often see them as images that simply materialize — over the Internet, on a cable station at a friend's house, in a DVD left in a machine. Sometimes simple curiosity — and certainly snappy advertising, especially on the cover art of a video game — will provoke a child to click the mouse or flip the switch that leaves the youngster with an indelible imprint of some sickening scene or lascivious spread that he or she will not soon forget.

The fact is, in today's world parents simply cannot shelter their offspring from every setting at every hour of the day in which it is possible to see a revolting or despicable image. Parents know that Mature-rated labels are really enticements to children. Consequently, the kind of parent whom Child Protective Services agencies would deem "highly responsible" might purchase every kind of filter imaginable for TV and Internet; spare no expense for tracking devices; screen all their kids' friends and even the parents and pals of those friends; monitor every non-school activity, film, and music selection — and still come up short. Even two stay-at-home parents with extended family (such as grandparents) at beck and call are no match for today's plethora of technologies and the phalanxes of marketers who take special aim at kids. The best adults can do *is restrict their child's access to money; to inculcate moral and ethical principles*, early and often; and above all, *to keep the kids so busy* with wholesome activities that their little ones have no opportunity to deviate from a pre-selected set of options. In other words, a parent's best defense is to strip all the joy (and certainly the freedom) out of childhood until they have turned their kids into detached, isolated beings leading demanding, hectic lives filled with an ever-present prospect of terror.

Is this the definition we want to give to "responsible parenting"? Should society have to pay this kind of price simply to get its upcoming generation to an age where they are actually capable of "consenting" to fare that is labeled "mature"? This is the question that average parents wish that the Supreme Court were debating. Sadly, it will not. That is why the court's choice of election day to begin this debate is both important and slightly ironic. This election day, and all subsequent ones, will decide what kinds of justices sit on that court and whether they contemplate the true ramifications of their decisions, which parents and the rest of the public will have to live with.

A Washington, D.C.-based, self-described video-game creator, Daniel Greenberg, who chairs the anti-censorship and social issues committee of the International Game Developers Association, took on this high-profile case in a column published in the *Washington Post* on, appropriately enough, Halloween. Right up front, Greenberg made clear which side of the argument he and his software-savvy colleagues were going to come down on": I express myself through the creation of video games, including violent ones…." He wanted to know just how government bureaucrats were supposed to assess the "artistic value" of any particular video game "to a 17-year-old."

The term "artistic value," applied to violent video gaming, is a bit of a stretch. But it is the age Greenberg selected — 17 years old — that reflects his level of marketing and advertising savvy. Notice he did not choose ages such as 10 or 12 or 14, much less 7 or 8. Yet, his gory products will no doubt be seen by those age groups. Public relations, marketing, and advertising are majors steeped in heavy doses of behavioral psychology.

Greenberg's arguments and justifications concerning the *benefits* — yes, ***benefits*** — to children of violent video games are breathtaking in their audacity: Children can "build original worlds"; they can "cooperate with or compete against friends, acquaintances or strangers"; they can "tell their own stories"; violent videos "give players meaningful consequences for the choices that they make" and allow for "a truly meaningful moral choice [such as whether] to save his family from death or save thousands of innocent people — but not both" (as per the game "Fable 2"). Also, "make-believe violence" can "relieve stress," "release anger," and "help children cope with difficult feelings such as powerlessness and fear of real violence"; violent games can "actually reduce violent tendencies and … be used as a therapy tool for teens and young adults." Why, he writes, even Governor Schwarzenegger himself, the Terminator, for heaven's sake, "should understand the thrill of a good fake explosion."

Greenberg didn't say how old the "Governator" might have been when he discerned that "thrill." Twenty-six? Three? Guess the writer didn't think to ask the question. Or maybe he didn't think it mattered.

Unsurprisingly, Greenberg didn't refute a single study in the avalanche of contradicting research: for example, the finding that during adolescence there is a general increase in the aggression (Lindemann, Harakka, & Keltikangas-Jaervinen, *Journal of Youth and Adolescence*, vol. 26, 339-351, 1997); or that such aggression combined with the exposure to violent media tends to "reinforce and increase aggressive cognitions, affects and arousal"; or that the interactive nature of super-realistic games "have a negative affect on the internal state, leading to increased aggression"; and that the effects of this exposure are greater during early adolescence than in mid- to-late adolescence due to the amount of physiological arousal being greatest during this time (L. P. Spear: "The adolescent brain and age-related behavioral manifestations," *Neuroscience and Biobehavioral Reviews*, vol. 24, 417-463, 2000). Then there was the research study, published exactly two years ago in the journal *Pediatrics*, and subsequently reported in none other than the same publication in which Greenberg's article appeared, that brought together three longitudinal studies, one from the United States and two from Japan, examining the content of violent video games, how often they are played, and links to aggressive behavior later in a school year. The study concluded that children and teens who played violent video games demonstrated increased physical aggression even months afterward, a finding particularly significant in that Japan, which experiences a generally lessened crime-aggression than in America, is a hugely popular consumer of video games, yet when it comes to violent video games, the outcomes in both countries were the same.

Greenberg and his EMA colleagues clearly take the view that if parents do not have to give approval for minors to play bingo, then children don't need their parents' consent to play video games depicting violent decapitation, torture, or rape. Greenberg, of course, does not say how many psychologists and psychiatrists oppose his various justifications for violent video games. And, in truth, it may be just as well if the Supreme Court leaves psychiatrists out of the debate, inasmuch as attorneys always manage to find "child experts" who will defend just about any position, and assign either positive or negative motives to any action.

That leaves, basically, the issue of states' rights, certain provisions in Section 1 of the 14th Amendment; plus a determination with respect to the expression "free speech." The First Amendment says that "Congress shall make no law … abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble"; it does *not* use the term "free expression" or mention anything about the right of the people to "violently assemble." Thus, terminology may be everything in this instance.

Whether or not the Justices of the Supreme Court uphold the State of California's right to legislate against unscrupulous creators of a mode of entertainment deceptively marketed to children under the moniker of "Mature," society knows it has a compelling interest in this case — every time they or their offspring "peaceably assemble" in a classroom, in a church sanctuary, or in a pizza parlor. Ethically- and morally-challenged marketing moguls can cover themselves in the trappings of constitutional idealism (anti-censorship) and psychology (therapeutic tools) all they like, but even the Terminator-turned-"Governator" gets it.

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