

9-1-2005

CRIMES AND OFFENSES Offenses Against Public Health and Morals: Provide That a Video Game Retailer Shall Display a Sign Explaining Each Rating System Which Appears on a Video Game Offered by Such Retailer; Provide That it Shall Be Unlawful for Any Person Knowingly to Sell, Rent, or Loan for Monetary Consideration an Excessively Violent Video Game or a Video Game Containing Material Which Is Harmful to Minors; Provide for Penalties; Repeal Conflicting Laws; and for Other Purposes

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Recommended Citation

W. A. Pequignot, *CRIMES AND OFFENSES Offenses Against Public Health and Morals: Provide That a Video Game Retailer Shall Display a Sign Explaining Each Rating System Which Appears on a Video Game Offered by Such Retailer; Provide That it Shall Be Unlawful for Any Person Knowingly to Sell, Rent, or Loan for Monetary Consideration an Excessively Violent Video Game or a Video Game Containing Material Which Is Harmful to Minors; Provide for Penalties; Repeal Conflicting Laws; and for Other Purposes*, 22 GA. ST. U. L. REV. (2005).

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CRIMES AND OFFENSES

Offenses Against Public Health and Morals: Provide That a Video Game Retailer Shall Display a Sign Explaining Each Rating System Which Appears on a Video Game Offered by Such Retailer; Provide That it Shall Be Unlawful for Any Person Knowingly to Sell, Rent, or Loan for Monetary Consideration an Excessively Violent Video Game or a Video Game Containing Material Which Is Harmful to Minors; Provide for Penalties; Repeal Conflicting Laws; and for Other Purposes

CODE SECTION:	O.C.G.A. § 16-12-103 (amended)
BILL NUMBERS:	SB 105, SB 106
ACT NUMBER:	392
GEORGIA LAWS:	2005 Ga. Laws 1261
SUMMARY:	The Act requires video game retailers to display a sign explaining each rating system that appears on video games the retailers offer. SB 105 would have made it unlawful to knowingly sell, rent, or loan for monetary consideration any excessively violent video game or video game containing material which is harmful to minors.
EFFECTIVE DATE:	July 1, 2005

History

SB 105 and SB 106 follow a recent trend by states to address media violence and its role in high school shootings such as those that occurred at Columbine High School.¹ Video games have become a prime target of parents and legislators primarily because many of the minors who have committed high school shootings frequently played violent video games such as *Doom* and *Grand Theft Auto*.²

1. See Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 S.M.U. L. REV. 139, 141 (2004).

2. See *id.*; see also Scott A. Pyle, *Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance That Passes Constitutional Muster*, 37 VAL. U. L. REV. 429 (2003);

Although concerns regarding violence in television programming and motion pictures have persisted for years, the interactive nature of video games has caused additional concerns.³

Bill Tracking

SB 105

Consideration by the Senate

Senators Doug Stoner, William Hamrick, Curt Thompson, Chip Rogers, and J.B. Powell, of the 6th, 30th, 5th, 21st, and 23rd districts, respectively, sponsored SB 105.⁴ The Senate first read the bill on February 2, 2005 and referred it to the Science and Technology Committee on the same day.⁵

SB 106

Consideration by the Senate

Senators Doug Stoner, William Hamrick, Curt Thompson, Chip Rogers, and J.B. Powell, of the 6th, 30th, 5th, 21st, and 23rd districts, respectively, sponsored SB 106.⁶ The Senate first read the bill on February 2, 2005, and the Science and Technology Committee favorably reported the bill, by substitute, on February 24, 2005.⁷

The Bill, As Introduced

The bill required both video game retailers and arcade owners to post a sign explaining the rating system that appears on video games

Bonnie B. Phillips, Note, *Virtual Violence or Virtual Apprenticeship: Justification for the Recognition of a Violent Video Game Exception to the Scope of First Amendment Rights of Minors*, 36 IND. L. REV. 1385 (2003).

3. See Garry, *supra* note 1, at 142; see also Matthew Hamilton, *Graphic Violence in Computer and Video Games: Is Legislation the Answer?*, 100 DICK. L. REV. 181, 181-82 (1995).

4. See SB 105, as introduced, 2005 Ga. Gen. Assem.

5. See State of Georgia Final Composite Status Sheet, SB 105, Feb. 2, 2005 (May 11, 2005).

6. See SB 106, as introduced, 2005 Ga. Gen. Assem.

7. See State of Georgia Final Composite Status Sheet, SB 106, Feb. 2, 2005 (May 11, 2005); State of Georgia Final Composite Status Sheet, SB 106, Feb. 24, 2005 (May 11, 2005).

offered for sale.⁸ Initially, the penalty for violating the bill was a misdemeanor.⁹

Committee Substitute

The Senate Science and Technology Committee made two amendments to SB 106.¹⁰ First, the Committee changed the penalty for violating the bill from criminal to civil, resulting in a fine between \$250 and \$500 for each violation.¹¹ In addition, the Committee exempted coin operated amusement machines—arcade owners—from compliance with the bill.¹²

Floor Debate and Amendments

The Senate did not debate the bill and accepted the Committee substitute.¹³

Consideration by the House

The House removed the exemption for coin operated amusement machines (arcade owners), which the Senate Science and Technology Committee had added.¹⁴ The House also corrected a small typographical error by inserting a quotation mark.¹⁵

Signature by the Governor

The Governor signed SB 106 on May 10, 2005, and it became effective on July 1, 2005.¹⁶

8. *See* SB 106, as introduced, 2005 Ga. Gen. Assem.

9. *See id.*

10. *See* SB 106 (SCS), 2005 Ga. Gen. Assem.

11. *See id.*

12. *See id.*

13. *See* Audio Recording of Senate Proceedings, Mar. 11, 2005 (remarks by Sen. Doug Stoner), http://georgia.gov/00/article/0,2086,4802_6107103_33091490,00.html.

14. *Compare* SB 106 (SCS), 2005 Ga. Gen. Assem., with O.C.G.A § 16-12-103 (2005 Supp.).

15. *Compare* SB 106 (SCS), 2005 Ga. Gen. Assem., with O.C.G.A § 16-12-103 (2005 Supp.).

16. *See* State of Georgia Final Composite Status Sheet, SB 106, May 10, 2005 (May 11, 2005).

Analysis

The Act could face a constitutional challenge from video game manufacturers claiming that the additional cost associated with posting the rating system restricts its First Amendment right to free speech.¹⁷ But considering the extremely small burden the Act places on speech, it is unlikely that any court would accept this argument.¹⁸

SB 105, on the other hand, is extremely controversial and faces significant constitutional hurdles under the First Amendment if it re-emerges next legislative session.¹⁹ Several courts have addressed whether video games constitute speech under the First Amendment, and the prevailing view is that video games are protected speech.²⁰ While some courts have held that video games are categorically protected and others have approached the issue on an ad hoc basis, the difference is not significant when analyzing a bill such as SB 105.²¹ First and foremost, a video game with insufficient idea expression for First Amendment protection is also unlikely to contain elements sufficient to classify as an excessively violent video game or one containing material harmful to minors.²² Second, a bill drafted to target only a minor percentage of video games would inevitably fail to achieve the intended goal: to keep violent video games out of the hands of minors.²³ Therefore, while proponents of legislation such as SB 105 will continue to assert that video games are not speech under the First Amendment, it is unlikely their assertion will succeed.²⁴

If video games are protected speech, proponents of legislation such as SB 106 are left with several approaches.²⁵ First, the state could argue that portrayal of violence is an unprotected form of speech.²⁶ Second, the state could argue that portrayal of violence is a

17. See *Am. Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990) (upholding Georgia law regulating display of material deemed harmful to minors).

18. See *id.* at 1500-02.

19. See *infra* notes 20-60 and accompanying text.

20. See Anthony Ventry III, Note, *Application of the First Amendment to Violent and Nonviolent Video Games*, 20 GA. ST. U. L. REV. 1129, 1133-43 (2004).

21. *Id.* at 1147-48.

22. See generally Pyle, *supra* note 2, at 472-75.

23. See generally *id.*

24. *Id.*; see also Phillips, *supra* note 2, at 1406.

25. See *infra* notes 26-60 and accompanying text.

26. See Phillips, *supra* note 2, at 1407.

form of obscenity, and the state should govern it by the test set forth by the Supreme Court in *Miller v. California*.²⁷ Finally, the state could argue that while portrayal of violence is a fully protected form of speech, the state legislation meets a strict scrutiny test.²⁸ Each of these options poses different problems.²⁹

It is unlikely that the state would succeed by claiming that violent imagery is an unprotected form of speech.³⁰ No court has ever held that violent speech is unprotected, and the Supreme Court is extremely reluctant to carve out additional exceptions.³¹

Due to this seemingly insurmountable hurdle, some have argued that certain portrayals of violence in video games meet the *Miller* test for obscenity, one form of unprotected speech.³² The test developed by the Supreme Court in *Miller v. California* established three factors for determining if a form of expression is obscene.³³ The factors to be considered are as follows:

- (a) whether the ‘average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³⁴

Although some scholars have argued that courts should apply the *Miller* test to certain portrayals of violence in video games, this argument has not made it past the appellate court level.³⁵ There are a couple obvious reasons for this.³⁶ First, the *Miller* test clearly applies

27. 413 U.S. 15, 24 (1973) (setting forth the three factor obscenity test).

28. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (applying strict scrutiny review to Florida ordinance making it a punishable offense for a drive-in theater to show a film containing nudity, where the screen was visible from a public area).

29. See *infra* notes 30-60 and accompanying text.

30. See Phillips, *supra* note 2, at 1407.

31. *Id.*

32. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001); *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 329 F.3d 954, 958 (8th Cir. 2003).

33. *Miller v. California*, 413 U.S. 15, 24 (1973).

34. *Id.*

35. See *Am. Amusement Mach. Ass’n*, 244 F.3d at 574; *Interactive Digital Software Ass’n*, 329 F.3d at 958.

36. See *infra* notes 37-39 and accompanying text.

to depictions of sexual, not violent, conduct.³⁷ Second, the definition incorporates a community standard and applies to all mediums of expression, whereas all attempts to regulate violent video games have concentrated on one medium and one segment of the community.³⁸ For these reasons, states that pattern their statute after the *Miller* test may be setting themselves up for failure because invoking the *Miller* test gives a court an easy reason to strike the statute down.³⁹

After these arguments likely fail, the state's remaining option is to argue that although the speech is protected, the government can still regulate it.⁴⁰ There are two different types of regulations, content-neutral and content-based, and each applies a different standard in constitutionality determinations.⁴¹ Preventing the sale of violent video games to minors is clearly a content-based regulation subjecting it to strict scrutiny review.⁴² To meet the strict scrutiny standard, the state would need to show a compelling state interest and demonstrate that the regulation or statute was narrowly drawn to achieve that compelling state interest.⁴³

Here, the state interest is the protection of minors, so it is instructive to look at the seminal case regarding the treatment of minors under the First Amendment: *Ginsberg v. New York*.⁴⁴ There, the Court held that even though the regulated speech was "obscene" only to minors, the harm to minors constituted a compelling state interest.⁴⁵ The Court required only a rational relationship between the regulation and the objective of safeguarding minors.⁴⁶

Proponents of this type of legislation have tried to use *Ginsberg* to persuade courts to apply a lower standard of review.⁴⁷ The major flaw with this assertion is that violent video games are not "obscene."⁴⁸ Therefore, while *Ginsberg* applied a lower standard of review to

37. See *Miller*, 413 U.S. at 24.

38. *Id.*; see generally Pyle, *supra* note 2.

39. See Pyle, *supra* note 2, at 480.

40. See Phillips, *supra* note 2, at 1408.

41. See *id.* at 1407-08.

42. See *id.* at 1408.

43. See *id.*

44. 390 U.S. 629 (1968).

45. *Id.* at 643.

46. *Id.* at 639-43.

47. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001); *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 959-60 (8th Cir. 2003).

48. *Am. Amusement Mach. Ass'n*, 244 F.3d at 574; Hamilton, *supra* note 3, at 195.

situations involving minors, the Court did so in a setting involving unprotected speech.⁴⁹

Moreover, the Court in the case of *Erznoznik v. City of Jacksonville*, although upholding the decision in *Ginsberg*, found that a different regulation was not narrowly tailored enough to meet the strict scrutiny test.⁵⁰ The Court made it clear that states do not have free reign to regulate First Amendment speech merely because it involves minors.⁵¹

The standard that a court applies when reviewing a state regulation is critical because of the nature of the data currently available regarding violence in video games.⁵² No data has shown a causal relationship between violent video games and violent actions by minors.⁵³ Thus, SB 105 would fail the traditional strict scrutiny test and would be held unconstitutional.⁵⁴ However, if a court applies the rational relation test of *Ginsberg*, the state might prevail because some evidence shows that violent video games produce higher aggression in minors who play them (although opponents of regulations such as SB 105 would argue that the studies producing this evidence contain fatal flaws).⁵⁵

One of the more compelling arguments regarding the restriction of minors' access to violent video games is the idea that minors could become desensitized to violence.⁵⁶ The U.S. government began conducting studies during World War II to determine how it could train soldiers to overcome their instinct not to shoot another human

49. See *Ginsberg*, 390 U.S. at 635.

50. 422 U.S. 205 (1975). The Court stated that:

Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription.

Id. at 213-14.

51. *Id.*

52. See Clay Calvert, *Violence, Video Games, and A Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 18-20 (2002).

53. See *id.* at 19.

54. See *id.* at 20.

55. See Marjorie Heins, *Introduction to Brief Amici Curiae of Thirty-Three Media Scholars in St. Louis Video Games Case*, 31 HOFSTRA L. REV. 419, 419-20 (2002).

56. Phillips, *supra* note 2, at 1398-1402.

being.⁵⁷ This science, which became known as “killology” and remains in practice today, involved practices such as using human targets during shooting practice.⁵⁸ The same could apply to minors who play violent video games in which they are killing other humans.⁵⁹

Although a statute such as SB 105 faces significant constitutional hurdles, it appears that states will continue to push this issue until the Supreme Court ultimately settles it, evidenced by the fact that similar legislation is currently pending in other states including New York, Illinois, North Carolina, and Maryland.⁶⁰

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57. *See id.* at 1398.

58. *See id.* at 1398-1400.

59. *See id.* at 1399-1400.

60. *Id.*; *see also* Hiawatha Bray, *Politicians Renew Attack on Violent Video Games*, BOSTON GLOBE, July 4, 2005.