AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**American Amusement Machine Association v. Kendrick, 244 F.3d 572** (7th Cir. 2001)

*In 2000, the City of Indianapolis adopted an ordinance that prohibits the operator of five or more video-game machines in one place from allowing unaccompanied minors to use “an amusement machine that is harmful to minors” and requires that such machines be separated by a partition from other machines. Machines that harmful to minors were defined as those that predominantly appealed to a morbid interest in violence or a prurient interest in sex, was patently offensive to prevailing community standards, and lack serious artistic value.*

*A federal district judge determined that the video games were a protected form of speech but that the city had a reasonable basis for believing the ordinance would protect children from harm. On appeal, a panel of the Seventh Circuit reversed that ruling, holding that the plaintiffs were likely to win their case on the merits and were entitled to a preliminary injunction. When the U.S. Supreme Court declined to hear its appeal, Indianapolis abandoned the ordinance.*

JUDGE POSNER.

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The ordinance brackets violence with sex, and the 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, while the plaintiffs insist that since their games are not obscene in the conventional sense they must receive the full protection of the First Amendment. Neither position is compelling. Violence and obscenity are distinct categories of objectionable depiction, and so the fact that obscenity is excluded from the protection of the principle that government may not regulate the content of expressive activity (as distinct from the time, place, or manner of the activity) neither compels nor forecloses a like exclusion of violent imagery. . . .

. . . . The main worry about obscenity, the main reason for its proscription, is not that it is harmful, which is the worry behind the Indianapolis ordinance, but that it is offensive. A work is classified as obscene not upon proof that it is likely to affect anyone's conduct, but upon proof that it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity. . . . No proof that obscenity is harmful is required either to defend an obscenity statute against being invalidated on constitutional grounds or to uphold a prosecution for obscenity. Offensiveness is the offense.

One can imagine an ordinance directed at depictions of violence because they, too, were offensive. Maybe violent photographs of a person being drawn and quartered could be suppressed as disgusting, embarrassing, degrading, or disturbing without proof that they were likely to cause any of the viewers to commit a violent act. They might even be described as “obscene,” in the same way that photographs of people defecating might be, and in many obscenity statutes are, included within the legal category of the obscene, even if they have nothing to do with sex. In common speech, indeed, “obscene” is often just a synonym for repulsive, with no sexual overtones at all.

But offensiveness is not the basis on which Indianapolis seeks to regulate violent video games.   Nor could the ordinance be defended on that basis. The most violent game in the record, “The House of the Dead,” depicts zombies being killed flamboyantly, with much severing of limbs and effusion of blood; but so stylized and patently fictitious is the cartoon-like depiction that no one would suppose it “obscene” in the sense in which a photograph of a person being decapitated might be described as “obscene.” It will not turn anyone's stomach. The basis of the ordinance, rather, is a belief that violent video games cause temporal harm by engendering aggressive attitudes and behavior, which might lead to violence.

This is a different concern from that which animates the obscenity laws, though it does not follow from this that government is helpless to respond to the concern by regulating such games. Protecting people from violence is at least as hallowed a role for government as protecting people from graphic sexual imagery. . . . Such punishment is permissible “content based” regulation, and in effect Indianapolis is arguing that violent video games incite youthful players to breaches of the peace. But this is to use the word “incitement” metaphorically. As we'll see, no showing has been made that games of the sort found in the record of this case have such an effect. . . . Classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial. The notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity.

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If the community ceased to find obscenity offensive, yet sought to retain the prohibition of it on the ground that it incited its consumers to commit crimes or to engage in sexual discrimination, or that it interfered with the normal sexual development of its underage consumers, a state would have to present a compelling basis for believing that these were harms actually caused by obscenity and not pretexts for regulation on grounds not authorized by the First Amendment. The Court in *Ginsberg v. New York* (1968) was satisfied that New York had sufficient grounds for thinking that representations of nudity that would not constitute obscenity if the consumers were adults were harmful to children. We must consider whether the City of Indianapolis has equivalent grounds for thinking that violent video games cause harm either to the game players or (the point the City stresses) the public at large.

The grounds must be compelling and not merely plausible. Children have First Amendment rights. This is not merely a matter of pressing the First Amendment to a dryly logical extreme. The murderous fanaticism displayed by young German soldiers in World War II, alumni of the *Hitler-Jugend*, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. . . . People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

No doubt the City would concede this point if the question were whether to forbid children to read without the presence of an adult the *Odyssey*, with its graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake, killing the suitors, and hanging the treacherous maidservants;  or *The Divine Comedy* with its graphic descriptions of the tortures of the damned;  or *War and Peace* with its graphic descriptions of execution by firing squad, death in childbirth, and death from war wounds. Or if the question were whether to ban the stories of Edgar Allen Poe, or the famous horror movies made from the classic novels of Mary Wollstonecraft Shelley (*Frankenstein*) and Bram Stoker (*Dracula*). Violence has always been and remains a central interest of humankind and a recurrent, even obsessive 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. 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.

Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. . . .

The City rightly does not rest on “what everyone knows” about the harm inflicted by violent video games. 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. The City instead appeals to social science to establish that games such as “The House of the Dead” and “Ultimate Mortal Kombat 3,” games culturally isomorphic with (and often derivative from) movies aimed at the same under 18 crowd, are dangerous to public safety. . . . The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments. It is highly unlikely that they are more harmful, because “passive” entertainment aspires to be interactive too and often succeeds. When *Dirty Harry* or some other avenging hero kills off a string of villains, the audience is expected to identify with him, to revel in his success, to feel their own finger on the trigger. It is conceivable that pushing a button or manipulating a toggle stick engenders an even deeper surge of aggressive joy, but of that there is no evidence at all.

. . . . Common sense says that the City's claim of harm to its citizens from these games is implausible, at best wildly speculative. Common sense is sometimes another word for prejudice, and the common sense reaction to the Indianapolis ordinance could be overcome by social scientific evidence, but has not been. The ordinance curtails freedom of expression significantly and, on this record, without any offsetting justification, “compelling” or otherwise.

. . . . We have emphasized the “literary” character of the games in the record and the unrealistic appearance of their “graphic” violence. If the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be), a more narrowly drawn ordinance might survive a constitutional challenge.

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*Reversed*.