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State of Minnesota

S.F. No. 785 -Restricted Video Games, Rental or Purchase Prohibition

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Date: March 7, 2005

Section 1, subdivision 1, defines "restricted video game" as a video game rated AO or M by the entertainment software rating board.

Subdivision 2 creates a petty misdemeanor penalty for persons under the age of 17 who knowingly rent or purchase a restricted video game.

Subdivision 3 requires retailers who sell or rent video games to post a sign that states the following: "It is against the law for a person under 17 to rent or purchase a video game rated AO or M. Violators may be subject to a $25 penalty."

CT:vs

Senators Pappas, Ortman, McGinn, Neuville and Wergin introduced--

S.F. No. 785: Referred to the Committee on Crime Prevention and Public Safety.

A bill for an act

relating to crime prevention; prohibiting children under the age of 17 from renting or purchasing certain video games; providing penalties; proposing coding for new law in Minnesota Statutes, chapter 609.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. [609.6855] [RESTRICTED VIDEO GAMES; PROHIBITIONS.]

Subdivision 1. [DEFINITION.] As used in this section, "restricted video game" means a video game rated AO or M by the Entertainment Software Rating Board.

Subd. 2. [PROHIBITED ACTS; PENALTY.] A person under the age of 17 who knowingly rents or purchases a restricted video game is guilty of a petty misdemeanor and is subject to a fine of not more than $25.

Subd. 3. [POSTED SIGN REQUIRED.] A person or entity engaged in the retail business of selling or renting video games from a location or structure with access to the public shall post a sign in a location that is clearly visible to consumers. The sign must display the following language: "It is against the law for a person under 17 to rent or purchase a video game rated AO or M. Violators may be subject to a $25 penalty."

Senator ..... moves to amend S.F. No. 785 as follows:

Page 1, after line 22, insert:

"**[EFFECTIVE DATE.]** This section is effective August 1, 2005, and applies to crimes committed on or after that date."

startribune.com

Last update: March 8, 2005 at 7:06 AM

Game retailers get bad ratings

Chris Serres
Star Tribune
Published March 8, 2005

For many children, buying an adult-rated video game can be as easy as getting candy.

In 35 "sting" operations at stores in seven states, about 50 percent of boys under the age of 17 were able to buy video and computer games rated "M" for Mature, according to a recently released report by the Minneapolis-based National Institute on Media and the Family.

Children as young as 7 bought video games that rewarded them for performing acts of brutality, including beating women, shooting cops and driving over pedestrians.

These findings renewed doubts about whether major retail chains are doing enough to keep violent and sexually explicit games out of the hands of children. Now concerned shareholders are attempting to wedge a foot in the boardroom door at Best Buy to call attention to the problem.

"We've got to call for fines, stricter rules, some sort of financial penalty," said Gary Brouse, program director at the Interfaith Center on Corporate Responsibility, a coalition of 275 churches and religious organizations that promote socially responsible investing. "Clearly, retailers are not doing a good enough job policing themselves."

But as the level of violence and sexual activity intensifies in many of these games, the public pressure to restrict access has grown.

Best Buy Co. Inc. is fighting a shareholder resolution advanced by Christian Brothers Investment Services of New York that would require the Richfield-based consumer electronics chain to disclose its policy for the sale of Mature-rated games to children and teens.

Best Buy has asked the Securities and Exchange Commission (SEC) to reject the proposal, arguing that it intrudes into the company's "ordinary business operations."

It's unclear whether the proposal will ever appear on Best Buy's proxy statement, which it plans to send to shareholders this spring before the annual meeting. Most shareholder proposals fail, and hundreds are struck down each year because the SEC deems them too intrusive.

It is clear, however, that Best Buy is a logical target for such activism, as the company sells some of the most violent games distributed in the United States, according to a "watch list" developed by the National Institute on Media and the Family. This includes Grand Theft Auto: San Andreas, in which players rack up points by gunning down police and committing carjackings; and Leisure Suit Larry: Magna Cum Laude, where players help a college nerd lose his virginity.

Julie Tanner, corporate advocacy director for Christian Brothers Investment Services, said the religious group was merely asking for more disclosure from Best Buy -- including an explanation of its policy of distributing M-games to minors -- and she was surprised the company chose to oppose the proposal.

"If I'm concerned that my kid is buying these video games, the company is doing a service by stating what its policy is," Tanner said. "We're just asking for more disclosure and transparency."

Last summer, Best Buy instituted a policy of requiring age identification for the purchase of M-rated video games. The company also began sending "mystery shoppers" to about 20 percent of its domestic stores each month to determine whether the policy is being implemented. And Best Buy installed a system in its cash registers that prompts cashiers to confirm the customer's age before selling an M-rated game.

The company says the program is working, though it declined to disclose the results of its spot tests done with mystery shoppers.

"If you go into most of our stores, they're following these procedures," said Brian Lucas, a spokesman in the entertainment, software and appliance group at Best Buy.

Others, however, say the retailer still has room for improvement. Last year, an investigation by the New York City Council found that minors who attempted to buy a Mature-rated video game at six large retail chains in New York, including Best Buy, were able to buy it 71 percent of the time, a percentage the city called "unacceptably high."

Simply asking for identification is not enough, Brouse argues. Retail chains should follow the lead of Target Corp. of Minneapolis, which keeps all of its Mature-rated video games in glass cases that can be opened only by store personnel.

"If the 'M-games' are mixed with the regular games, how can children distinguish between what games are appropriate?" Brouse asked. "Kids will tend to push the issue and find some sort of enjoyment breaking the rules."

For retailers, violent video games have become big business. Computer and video games generated $7 billion in sales in 2003. And while only 10 percent receive an "M" rating, they are disproportionately popular. M-rated games represented six of the top 20 bestselling video games in 2003, according to the New York City Council report.

There is growing consensus among psychologists and pediatricians that violent video games lead to aggressive and antisocial behavior. A 2004 study, published in the Journal of Adolescence, found that teenagers who have non-aggressive personalities but play a lot of video games are almost 10 times as likely to get into a physical fight than teens who don't play the games.

"It's only been within the past three years, under public pressure, that retailers have created policies" designed to restrict access to violent video games, said David Walsh, president of the National Institute on Media and Family. "But having the policy is one thing, making sure it's enforced is another."

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startribune.com

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Video games in the home

Published March 8, 2005

70%

of children live in a home with at least one video game player; 33 percent have one in their bedrooms.

$7 billion

were spent in the United States in 2003 on video and computer games.

69%

of children were able to buy Mature-rated games in retail stores.

Watch list

These bestselling games were singled out by the Interfaith Center on Corporate Responsibility for violent content:

- **Grand Theft Auto: San Andreas,** and all earlier versions of the game
- **Halo 2** and all earlier versions
- **Half-Life 2** and all earlier versions
- **Doom 3** and all earlier versions
- **Hitman 2** and earlier versions
- **100 Bullets**
- **Manhunt**
- **Mortal Kombat: Deception**
- **Shadow Heart**
- **Gunslinger Girls**
- **America's Army**

Source: Interfaith Center on Corporate Responsibility

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SF 785 - PAPPAS

Violent Video Games: Facts and Figures

"Children who enjoy [violent video] games can
lose the emotional cues that trigger empathy"
(Star Tribune, 5/5/99, A9, Funk)

Lt. Col David Grossman, a national expert on media violence indicates that:
"Violent video games are almost identical to stimulators used by the military and police to train offices to shoot on reflex."

- Like cigarette makers, some makers of restricted games are marketing them to children. There are character action figures in toy stores and rebellious and very colorful ads in video game magazines which are popular among young boys.
  (National Institute on Media and the Family)

- As little as 5 minutes of exposure to violent video games makes younger children more aggressive, according to studies from the late 1980's.
  (Youth and Society, 3/1/99, Funk et al.)

- In violent video games, players who use violent strategies are rewarded with victory. This provides a cycle of reinforcement that supports an increase in pro-violence attitudes.
  (Youth and Society, 3/1/99, Funk et al.)

- Surgeon General, found repeated exposure to violent entertainment causes more aggressive behavior.
  (Surgeon General, Los Angeles Times, 1/17/01)

Data from a June 23, 1999 Gallop Poll shows that:

- 73% of adults believe that the sales of violent video games to children under the age of 18 need to be restricted.

- 61% of Americans believe that violence in computer games is "Very Serious" or "Serious".

- 57% of those polled believe that government has a "major responsibility" for restricting access to the games.

All persons may freely speak, write and publish their sentiments on all subjects,
being responsible for the abuse of such right.
(Section 3, Article 1, Bill of Rights, Constitution of the State of Minnesota)

Psychological Studies – Violence in the Media:

- **Twenty percent of suburban high-schoolers endorse shooting someone "who has stolen something from you,"** (Toch and Silver, 1993)

- **49% of seventh- and eighth- graders studied prefer games involving human or fantasy violence.** (Funk, Journal of Clinical Pediatrics)

- **Media violence is most likely to affect the behavior of individuals who are already at-risk for violent behavior.** (Kandel-Englander, 1994)

- **The mechanism of impact may include learning and imitation, a triggering of preexisting tendencies, or desensitization to actual violence.** (Strasburger, 1995; Huesman and Miller, 1994)

- **In violent games, the winning strategies are violent actions.** (Provenzo, 1991)

- **Playing violent video games like Doom, Wolfenstein 3D or Mortal Kombat can increase a person's aggressive thoughts, feelings and behavior both in laboratory settings and in actual life, according to two studies appearing in the April issue of the American Psychological Association's (APA) *Journal of Personality and Social Psychology*. Furthermore, violent video games may be more harmful than violent television and movies because they are interactive, very engrossing and require the player to identify with the aggressor, say the researchers.** (APA Press, 2000)

- **All too many video games have themes that reward anti-social, violent behavior, usually by a lone, *Rambo*-type character against hundreds of nameless enemies. Few have educational themes or reward teamwork. Young children naturally mimic what they see and respond to both real and fictional violence.**

  So-called shooter games can develop hand-eye coordination beyond that of soldiers in the military. This is why the day trader in Atlanta - an adult - chose the *Goldeneye* video game to train for his shooting spree. We don't know the long-term effects of virtual carnage, but we know it can foster isolation, aggression towards women and desensitization to the pain of real life human beings. (Vote.com)

VIOLENT VIDEO GAME FAQ SHEET

Information taken from the National Institute on Media and the Family "Mediawise Video Game Report Card"

- **92%** of youngsters age 2 – 17 play video or computer games.
- The best selling games of the past year glorify and reward extreme violence, particularly toward women. While these games are rated M (Mature – Not Appropriate for Under 17), they are **extremely popular with pre-teen and teenage boys who report no trouble buying the games**.
    - An example of this violence is the year's best selling video game – **Grand Theft Auto: Vice City**. Every day millions of youth, mostly male, are entertaining themselves with a game that **denigrates women** and glamorizes violence against them.
    - Parents and other adults are almost totally unaware of the content of the game. In a survey of over 600 parents and teachers, less than 3% had any knowledge of the anti-female or excessively violent content of the game.
    - Studies of exposure to sexual violence suggest that watching even short amounts of sexual violence, such as the violence contained in Vice City, can desensitize viewers to it.

The Overall Rating given to the entire gaming field as it relates to child welfare issues by the National Institute on Media and the Family is an "F."

This grade reflects the dramatic increase in violent games, and in particular games rewarding violence against women. The grade also reflects the questionable ratings in the video game field, the growing problem of game addiction, and the continued ease with which children and youth purchase or rent adult games.

ESRB (Entertainment Software Rating Board) **Video Game Rating System**

EARLY CHILDHOOD (Ages 3 and Over)	Contains no violence. Child requires reading skills, fine motor skills and a high level of thinking skills.
KIDS TO ADULTS (Ages 6 and Over)	May contain scenes of mild animated violence or realistic violence, some comic mischief or some crude language.
TEENS (Ages 13 and Over)	Contains all of the above, plus more animated or realistic violence. May have strong language and/or suggestive themes.
MATURE (Ages 17 and Over)	May contain everything in the Teen category plus realistic blood and gore, obscene language, drug use and sexual innuendos.
ADULT ONLY	Could contain graphic sex and/or violence, in addition to everything in the Mature category.

Minnesota PTA

*every*child. *one* voice.®

Testimony of Minnesota PTA on SF 785, (video rentals) to the Senate Crime Committee- 3/08/05

My name is Peggy Smith. I represent Minnesota PTA and am the parent of a 12 year old middle school student. We are part of National PTA. With over 6 million members, National PTA is the oldest and largest volunteer child and youth advocacy organization in the country. For over 100 years National PTA has been dedicated to securing adequate laws for the protection of youth. One of our missions is "to support and speak on behalf of children and youth in the schools, in the community, and before governmental bodies… that make decisions affecting children."[1] We also work to help parents in developing parenting skills. We are a non-profit, non-partisan organization. Minnesota PTA has been advocating for children and youth for over 82 years.

For many years, National PTA has worked with government and business to develop policies and legislation that would help to improve media available to children. In fact, National PTA's involvement on this issue dates back to the early 1900s, when parents were concerned about their children's viewing of vaudeville shows. Still today, our members are concerned about "the impact of "television, video games, music and movie violence on the children of this nation".

- We currently have a National PTA position on media, adopted in 2003, which rolls together several older positions dealing with pornography and rating systems which encompasses recognition of the right of free speech of individuals to create and disseminate a product,
- Urges parent to be involved with and monitor television movie, interactive video games and concerts, etc.
- Urges rating systems for recorded music, movies, television and video games to alert parents to objectionable content
- And commits to increasing awareness of the impact of television, video games and other media on children
- And "supports efforts to encourage broadcasters of network and cable stations to refrain from showing adult films and programming during hours when children are at home…"
- One example of our efforts in this area is our 10 year media collaboration with Cable in the Classroom, the cable industry's foundation. Here's a parent guide to media which resulted form that collaboration.
- National PTA and Minnesota PTA believe that this is a shared responsibility with media industry, government parents.

According to testimony given before the U.S. Senate Governmental Affairs Committee regarding the development of a uniform rating system, for all forms of entertainment, "There is a clear causal connection between media violence and aggressive attitudes, values, and behavior, particularly among children"[2] There are over 1000 studies that "point overwhelmingly to a causal connection between media violence and aggressive attitudes, values and behavior." [3] "By age 18, the average young person will have viewed an estimated 200,000 acts of violence on television alone."[4]

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[1] National PTA resources 2004-2005, Leadership section, p.3
[2] Testimony of National PTA before U.S. Governmental Affairs Committee on July 25,2001
[3] National PTA Position Statement on "Children, Adolescents and the Media"
[4] National PTA Position Statement on "Children, Adolescents and the Media"

Minnesota PTA

*every*child. *one* voice.®

Minnesota PTA has a couple of positions which pertain to this bill. First, we have a specific position, adopted in 1991 on Video Rental Regulations, which reads as follows: The Minnesota PTA urges legislation requiring all establishments to require appropriate proof of age to be shown before X-rated or R-rated videos may be rented and written parental permission to rent PG-13 videos when not accompanied by an adult."[5] Minnesota PTA members feel it is a shared responsibility. We share the concerns for limiting access to developmentally inappropriate and objectionable movies expressed in SF 785. We are concerned however that there is no shared responsibility on the part of retailers to be a part of the solution. We do not feel it is appropriate to make students the only ones bearing responsibility here. From our position it is clear that we believe that an important part of the solution to limiting access of children to rental videos rated Mature is "to require all establishments renting videos to require appropriate proof of age.

Secondly, Minnesota PTA's position on television violence also supports our video rental position. Basically, we believe exposure to television programming that has graphic sex scenes. Obscene language, and violence is contrary to our children's best interest. We urge PTA members to educate parents to monitor television programming and "to support legislation requiring commercial broadcasters to air more appropriate programming for children during the main times that children watch TV."[6]

In sum, Minnesota PTA believes that limiting access to mature rated videos is important; but the remedy proposed in SF 785 to make it a petty misdemeanor for youth to rent videos is not a provision which we support. Thank you for the opportunity to testify on behalf of Minnesota PTA.

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[5] Minnesota PTA Handbook, p. 3-32
[6] Minnesota PTA Handbook, p. 3-32

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Memorandum in Opposition to Minnesota Senate Bill 785

The members of The Media Coalition believe that Senate Bill 785 likely violates the First Amendment rights of retailers and others. The members of The Media Coalition represent most of the publishers, booksellers, librarians, periodical distributors, recording, movie and video game manufacturers, and recording and video retailers in Minnesota and the rest of the United States.

S.B. 785 would bar any person under 17 years old from knowingly buying or renting a videogame rated "AO" or "M" by the Entertainment Software Ratings Board. Also, all retailers who sell or rent videogames would have to post a sign in a prominent location that says: "It is against the law for a person under 17 to rent or purchase a video game rated AO or M. Violators may be subject to a $25 fine."

The bar on the purchase or rental of videogames based on any rating system is very likely unconstitutional. While voluntary ratings exist to help parents determine what is appropriate for their children, government enforcement or adoption of an existing rating system is constitutionally impermissible. Courts in nine different states have ruled it unconstitutional either to enforce the Motion Picture Association of America's rating system or to financially punish a movie that carries specific rating designations. MPAA v. Specter, 315 F.Supp. 824 (E.D. Pa. 1970), enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or children viewing, as determined by CARA ratings. In Eastern Federal Corporation v. Wasson, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% on all admissions to view movies rated either "X" or unrated was an unconstitutional delegation of legislative power to a private trade association. See also, Swope v. Lubbers, 560 F.Supp.1328 (W.B. Mich, S.D. 1983) (use of M.P.A.A. ratings was improper as a criteria for determination of constitutional protection), Drive-In Theater v. Huskey, 435 F.Sd 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

Further, when these ratings are applied to speech with violent content the problem created by government enforcement of a ratings system is compounded. Speech is presumed to be protected by the First Amendment unless it falls into a few very narrow classes. As the Supreme Court said in Free Speech Coalition v. Ashcroft, "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children." 535 U.S.1382,

1389 (2002). None of the types of speech cited by the court includes speech with violent content alone. Violent content in otherwise constitutionally protected material is not a permissible subject of government regulation for adults or minors. Every court that has addressed this issue has held that speech with violent content, without exception, is constitutionally protected. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) enjoined enforcement of a county ordinance that barred the sale or rental to minors of video games with violent content. American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 462 (2001) enjoined enforcement of a city ordinance that limited minors' access to violent video games. Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 118 (W.D. Wash. 20004) barred enforcement of a state law that barred dissemination to minors of video games that included violence against "peace officers." Bookfriends v. Taft, 233 F.Supp.932 (S.D. Ohio, W. Div. 2002) deemed speech with violent content as fully protected by the First Amendment and enjoined enforcement of Ohio's "harmful to juveniles" law that would have criminalized dissemination to a minor of speech with violent content. Davis-Kidd Booksellers, Inc. v. McWherter, 886 S.W. 2d 705 (Tenn. 1993) struck down a restriction on the sale to minors of material containing "excess violence." Video Software Dealers Assn. v. Webster, 968 F.2d 684 (8th Cir. 1992) held that "unlike obscenity, violent expression is protected by the First Amendment." State v. Johnson, 343 So. 2d 705, 710 (La. 1977) declared that prohibiting the sale of violent materials to minors exceeded the limits placed on regulation of obscene materials by the U.S. Supreme Court. Sovereign News Co. v. Falke, 448 F. Supp. 306, 400 (N.D. Ohio 1977), while remanded on other grounds, overturned a statute defining as "harmful to minors" material describing or representing "extreme or bizarre violence."

While minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. Supreme Court has ruled that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." Erznoznick v. City of Jacksonville, 422 U.S. 212-13 (1975). In the case of Ginsberg v. New York, 390 U.S. 629 (1968), the U.S. Supreme Court established a three-part test for determining whether material is "harmful to minors" and may therefore be banned for sale to minors. The mere presence of an "adult" rating alerting parents that a video game might be inappropriate for minors is no basis for assuming that the material meets the Ginsberg test. In fact, it is likely that most rated material would not meet this legal threshold test for harmfulness. Therefore, a law barring the sale or rental of such material would inevitably prevent minors from getting works that they have a First Amendment right to possess.

Passage of this ordinance could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In several recent successful challenges to videogame legislation, the state agreed to pay to the plaintiffs more than $300,000 in attorneys' fees in each litigation.

Again, we ask you to please protect the First Amendment rights of all people of Minnesota and defeat this legislation.

March 7, 2005

POSITION STATEMENT ON MINNESOTA S.F. 785

The Video Software Dealers Association (VSDA) and the more than 200 video and video game retail establishments in the state of Minnesota it represents are opposed to Senate File 785. This bill would make it unlawful for anyone under age 17 to rent or purchase a video game rated "M" ("Mature") or "AO" ("Adults Only") by the Entertainment Software Rating Board (ESRB).

VSDA opposes S.F. 785 because it would usurp the rights of parents, is unnecessary, and would violate the First Amendment and the Constitution of the State of Minnesota. However, the home video industry believes we have a role to play in helping parents ensure that their children do not gain access to video games the parents deem inappropriate for them, and we actively assist parents in this regard.

S.F. 785 Would Usurp the Rights of Parents

S.F. 785 would restrict minors' access to certain video games even if their parents authorize them to have access. Thus, it would usurp the rights of parents to determine whether a particular video game is appropriate for their children and would prohibit access to material the state deems inappropriate, regardless of a parent's wishes.

In addressing the issues related to the content of entertainment, the state cannot infringe the rights of parents to raise their families as they see fit. Parents have a fundamental right to determine which games their children can or cannot play. The state may not make these decisions for parents.

Legal Restrictions Are Unnecessary

The best control of entertainment is parental control. There is no better place than in a home video store for parents to control the content of the video games and movies to which their children have access. Video retailers have already taken action to aid parents in making more-informed entertainment choices for their families. They do this through the "Pledge to Parents" program used by Movie Gallery and many other VSDA members and the similar, company-specific programs used by VSDA members Blockbuster, Hollywood Video, and others.

The centerpiece of Pledge to Parents, established by VSDA in 1991, is a commitment by participating retailers:

1. Not to rent or sell videos or video games designated as "restricted" to persons under 17 without parental consent, including all movies rated "R" by the Motion Picture Association of America (MPAA) and all video games rated "Mature" by the ESRB.
2. Not to rent or sell videos rated "NC-17" by the MPAA or video games rated "Adults Only" by the ESRB to persons age 17 or under.

In addition, as part of the Pledge to Parents program, many retailers solicit from customers written instructions regarding what types of video games and movies can be rented or purchased by family members. Thus, the voluntary systems of video stores allow parents, if they so choose, to be even more restrictive than any government-enforced system would be.

Major mass merchant retailers that sell video games have also implemented policies to prohibit the sale of "Mature"-rated video games to minors. (We are unaware of any major retailer that sells video games rated "Adults Only".)

S.F. 785 Would Violate the First Amendment

S.F. 785 would violate the First Amendment of the U.S. Constitution by placing legal restrictions on the purchase or rental by minors of certain video games based on the ratings of the games.

We must note that a rating of "Mature" or "Adults Only" is not a legal determination that the video or computer games should be restricted to adults, but rather is a voluntary advisory provided by the video game industry to parents. An ESRB rating of "Mature" is a voluntary advisory that means the video or computer game has been determined to contain content that may be suitable for persons age 17 or older. An "Adults Only" rating means the ESRB believes the "[c]ontent [is] suitable only for adults." The government cannot constitutionally restrict the sale or rental of the games–even by minors–based on these voluntary industry ratings.

Video games, like other forms of entertainment, are covered by the First Amendment. *See American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001); *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). Minors have significant First Amendment rights, and "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975); *see also Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511-14 (1969); *Rabeck v. New York*, 391 U.S. 462 (1968).

Given U.S. Supreme Court decisions on entertainment products, it is clear that, in order for government restrictions on video or computer games to be permissible, either: the material must be legally "obscene" or "obscene for minors"; or the restriction must be based on a compelling state interest and be narrowly tailored to alleviate the asserted problem. The restrictions on video games proposed by S.F. 785 meet neither of these criteria. *See American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (obscenity law does not cover non-sexual depictions of violence, and it is "unlikely" that there could be a compelling state interest that could justify a restriction on minors' access to depictions of violence); *Interactive Digital Software Association*

v. St. Louis County, 329 F.3d 954 (finding no evidence of a compelling government interest that could justify the county's restrictions on violent video games); *Video Software Dealers Association v. Maleng*, 325 F. Supp. 2d 1180 (obscenity law does not cover non-sexual depictions of violence, and there is no compelling state interest that could justify a law barring dissemination to minors of video games that depict violence against law enforcement officers because there is no evidence that such depictions lead to real-world violence against law enforcement).

S.F. 785 Would Impermissibly Delegate Legislative Power

S.F. 785 may violate Article III, Section 1 of the Minnesota Constitution by delegating to a private association (the ESRB) unfettered legislative authority to determine which video games may legally be available for rental or sale to minors. *See Lee v. Delmont,* 228 Minn. 101, 112, 36 N.W.2d 530, 538 (Minn. 1949)(delegation of fact-finding function to an administrative agency must be accompanied by clear policies and standards); *House of Seagram, Inc. v. Assam Drug Co.*, 85 S.D. 27, 33, 176 N.W.2d 491, 495 (S.D. 1970)(delegation by the South Dakota legislature of its discretionary power to private persons "creates a new and private government and violates an essential concept of our democratic society and is constitutionally invalid").

Video Software Dealers Association

Established in 1981, the Video Software Dealers Association (VSDA) is the not-for-profit international trade association for the $24 billion home entertainment industry. VSDA represents more than 1,000 companies throughout the United States, Canada, and other nations. Its members operate more than 12,500 retail outlets in the U.S. that sell and/or rent DVDs, VHS cassettes, and console video games. Membership comprises the full spectrum of video retailers (from single-store operators to large chains), video distributors, the home video divisions of major and independent motion picture studios, and other related businesses that constitute and support the home video entertainment industry.

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ESSENTIAL FACTS

ABOUT GAMES AND YOUTH VIOLENCE

entertainment software association

"Consensus is lacking on whether video games with viol content fuel aggressive behavior in children and adolescent

-from the *Journal of the American Medical Association*, Brian Vastag, 2004

Average game player age:
30

Average game buyer age:
36

Percentage of time parents are involved in purchase or rental of games:
83%

Percentage of games purchased by adults:
90%

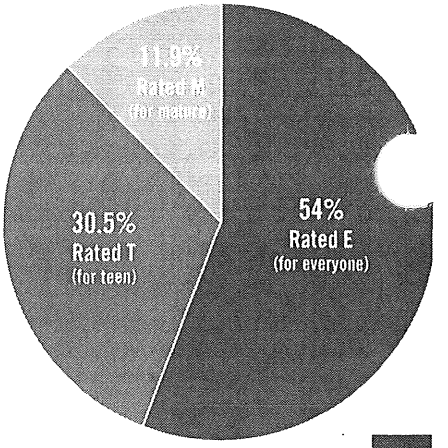
Percentage of parents who monitor the content of the games their children play:
92%

To fully understand the debate about violence in games and place it in some rational context, it is important to first understand basic facts about the industry.

FACTS ABOUT GAME CONTENT AND CONSUMERS

- The average American video game *player* is 30 years old. The average game *buyer* is 36 years old.
- Parents are involved in the purchase or rental of games 83 percent of the time, according to a September 2000 Federal Trade Commission report, and industry research in the United States shows that 90 percent of games are actually purchased by adults. In other words, in an overwhelming majority of instances, parents are ultimately making the decisions about what games their kids acquire.
- Ninety-two percent of parents report that they monitor the content of the games their children are playing.
- Game players under the age of 18 report that they get their parent's permission 83 percent of the time before purchasing a computer or video game.
- Computer and video games are rated by the Entertainment Software Rating Board (ESRB) whose system includes age recommendations and content descriptors. Even entertainment industry watchdogs such as Senator Joseph Lieberman (D-CT) and the National Institute on Media and the Family, call the ESRB the best media rating system in existence. In short, if people object to games that contain violence, the information is available so they can avoid buying them for themselves and their families.
- Just as there is a wide spectrum of movies, music and books available to consumers, the video game industry provides a variety of entertainment choices for people of all ages. In 2003, 54 percent of games sold were rated "E" (for "Everyone"), 30.5 percent were rated "T" (for "Teen"), and 11.9 percent were rated "M" (for "Mature").

VIDEO GAME SALES, 2003



Source: The NPD Group / NPD Funworld®
TRSTS® and NPDTechworld℠ / The ESA

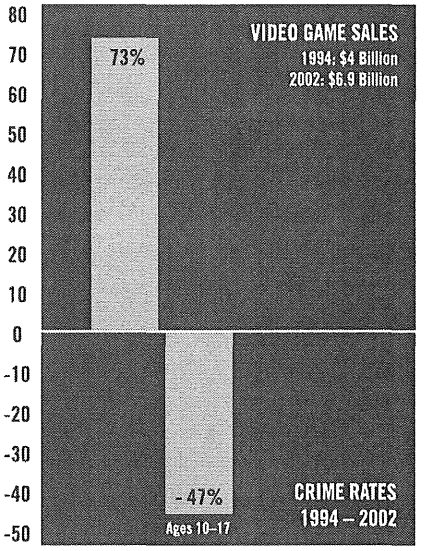
WHAT ABOUT YOUTH VIOLENCE? LOOKING AT THE STATISTICS

- Many of the games which include violent content and are sold in the United States — and some with far more violence — are also sold in foreign markets. But the incidence of violent crime in these non-U.S. markets is considerably lower than in the United States. This suggests that the cause of violent crime lies elsewhere.
- Violent crime, particularly among the young, has decreased dramatically during since the early 1990s while video games have increased steadily in popularity and use.

From Gerard Jones' book *Killing Monsters* (2002):

Certainly video games haven't had any significant impact on real-world crime. "The research on video games and crime is compelling to read," said Helen Smith, forensic psychologist, youth violence specialist, and author of *The Scarred Heart.* "But it just doesn't hold up. Kids have been getting less violent since those games came out. That includes gun violence and every other sort of violence that might be inspired by a video game." (p.167)

JUVENILE VIOLENT CRIME DECREASED DRAMATICALLY FROM 1994 TO 2002 WHILE AT THE SAME TIME COMPUTER AND VIDEO GAME SALES SOARED



Sources: IDC/Link and NPD Group for Sales Data; U.S. Dept. of Justice Office of Juvenile Justice and Delinquency Program for crime rates.

WHAT DOES THE SCIENCE SAY? INDEPENDENT RESEARCH FINDINGS

Bensley, L. & Van Eeenwyk, J. (2000). "Video Games and Real-Life Aggression: Review of the Literature." Olympia, WA: Washington State Department of Health.

This review was based on available objective research and was conducted by the State of Washington at the request of the state legislature. These researchers reviewed every major study purporting to show that violent video games lead to aggressive behavior, only finding that:

> "In conclusion, current research evidence is not supportive of a major public concern that violent video games lead to real-life violence." (p.256)

Vastag, B. (2004). "Does Video Game Violence Sow Aggression?" *Journal of the American Medical Association.*

In a summary of research, researcher, Brian Vastag, details the results of major studies and their findings. His conclusion is that:

> Consensus is lacking on whether video games with violent content fuel behavior in children and adolescents... If video games do increase violent tendencies outside the laboratory, the explosion of gaming over the past decade — from $3.2 billion in sales in 1995 to $7 billion in 2003, according to industry figures — would suggest a parallel trend in youth violence. Instead, youth violence has been decreasing.

Durkin, K. (1999). "Computer Games and Australians Today." Australian Government Office of Film and Literature Classification.

In a review of the main developments in research into game play and its effects on children, Durkin finds:

> Despite several attempts to find effects of aggressive content in either experimental studies or field studies, at best only weak and ambiguous evidence has emerged.... ...the accumulating evidence — provided largely by researchers keen to demonstrate

the games' undesirable effects — does indicate that it is very hard to find such effects and that they are unlikely to be substantial. (p.36)

Office of the Surgeon General (2001). "Youth Violence: A Report of the Surgeon General." U.S. Department of Health and Human Services.

After examining the science on violence in video games, the Surgeon General concluded:

> The overall effect size for both randomized and correlational studies was small for physical aggression and moderate for aggressive thinking... The impact of video games on violent behavior remains to be determined. (p.92)

Tremblay, R. (2004). "Physical Aggression During Early Childhood: Trajectories and Predictors." *Pediatrics.*

Dr. Richard Tremblay, professor of Pediatrics, Psychiatry and Psychology, Canada Research Chair in Child Development, and Director of the Centre of Excellence for Early Childhood Development and widely considered one of the world's leaders in aggression studies, has determined that:

> Most children have initiated the use of physical aggression during infancy, and most will learn to use alternatives in the following years before they enter primary school. Humans seem to learn to regulate the use of physical aggression during the preschool years. Those who do not appear to be at highest risk of serious violent behavior during adolescence and adulthood. Results from the present study indicate that children at highest risk of not learning to regulate physical aggression in early childhood have mothers with a history of antisocial behavior during their school years, mothers who start childbearing early and who smoke during pregnancy; parents who have low income, and have serious problems living together.

Sternheimer, K. (2003). "It's Not the Media: The Truth About Pop Culture's Influence on Children."

In her book, Dr. Sternheimer researches why the media is a constant target of attack and focal point of blame for society's ills. She looks deeper into our societal dilemmas to see what other common factors could be affecting children.

> Blaming media for changes in childhood and social problems has shifted our public conversation away from addressing the real problems that impact children's lives. The most pressing crisis facing American children is not media culture but poverty (p. 4) ....We want research to support our fear so badly that even a minor study filled with flaws will be published and circulated throughout the news media (p. 112)....Violent video games are a lot like dreams where we work out our fears or anxieties without actually ever engaging in them (p.114).

Dr. Sternheimer also critiques an article, "Video Games and Aggressive Thoughts, Feelings and Behavior in Laboratory and Life," written in 2000 by Dr. Craig Anderson and Dr. Karen Dill.

> ...upon close inspection [of the article], the studies the article based its conclusions on are riddled with both conceptual and methodological problems. Based on their research we cannot conclude that "playing violent video games can contribute to aggressive and violent behavior in real life," as *Time* reported in 2000 (p. 119).
>
> The authors admit in their report that "the existence of a violent video game effect cannot be unequivocally established" from their research. Nonetheless, this study was widely reported on in the news media as proof that "even small doses of violent video games are harmful to children," even though children were not the subjects of the study (p. 120).

Cumberbatch, G. (2001). "Video Violence: Villain or Victim?" *Video Standards Council*, U.K.

In a broad critique of media violence research in an effort to determine harmful effects, Dr. Guy Cumberbatch determined:

> The real puzzle is that anyone looking at the research evidence in this field could draw any conclusions about the pattern let alone argue with such confidence and even passion that it demonstrates the harm of violence on television, in film and in video games. While tests of statistical significance are a vital tool of the social sciences, they seem to have been more often used in this field as instruments of torture on the data until it confesses something which could justify a publication in a scientific journal. If one conclusion is possible, it is that the jury is not still out. It's never been in. Media violence has been subjected to lynch mob mentality with almost any evidence used to prove guilt.

Essential Facts About Games and Court Rulings

Virtual Worlds and Judicial Realities

There have been many efforts on the part of state and local legislative bodies to regulate access to games. However, courts have ruled that computer and video games are protected speech, and efforts by these legislative bodies to ban or limit access to or the sale of games they find objectionable will inevitably run afoul of the First Amendment of the United States Constitution.

To provide a clear and easy to understand summary of various courts rulings, the Entertainment Software Association (ESA) is providing this document with key parts of the judicial rulings highlighted. For the complete text of a ruling, please contact our Public Relations Manager, Dan Hewitt at dhewitt@theESA.com.

United States Court of Appeals for the Seventh Circuit
American Amusement Machine Association, et al. v. Kendrick, et al.
244 F.3d 572
Decided: March 2001

Writing in a unanimous decision of a three judge panel, the Honorable Richard A. Posner, of the Seventh Circuit reaffirmed that children have First Amendment rights. He further wrote;

"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. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own. Protests from readers caused Dickens to revise Great Expectations to give it a happy ending, and tourists visit sites in Dublin and its environs in which the fictitious events of Ulysses are imagined to have occurred. The cult of Sherlock Holmes is well known."

In reference to scientific studies, such as research by Craig Anderson, et al., provided to the Court arguing that interactive games cause violent behavior:

"There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the interactive character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. 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."

United States Court of Appeals for the Eighth Circuit
IDSA v. St. Louis County
329 F.3d 954, 957
Decided: June 2003

In another unanimous decision of a three judge panel, the Honorable Morris S. Arnold, of the Eight Circuit Court of Appeals, found that First Amendment protects a wide array of content, including video games. He wrote:

"If the first amendment is versatile enough to 'shield [the] painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,' ... we see no reason why the pictures, graphic design, concept art, sounds, music, stories and narrative present in video games are not entitled to similar protection."

"We do not mean to denigrate the government's role in supporting parents, or the right of parents to control their children's exposure to graphically violent materials. We merely hold that the government cannot silence protected speech by wrapping itself in the cloak of parental authority... To accept the County's broadly-drawn interest as a compelling one would be to invite legislatures to undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority."

Regarding the concern the games are harmful to minors because of their content, the Court found the county's evidence, once again, studies by Craig Anderson, et al., to be unpersuasive:

"The...conclusion that there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health is simply unsupported in the record...[T]his vague generality falls far short of a showing that video games are psychologically deleterious. The County's remaining evidence included the conclusory comments of county council members; a small number of ambiguous, inconclusive, or irrelevant (conducted on adults, not minors) studies; and the testimony of a high school principal who admittedly had no information regarding any link between violent video games and psychological harm...Where first amendment rights are at stake, 'the Government must present more than anecdote and supposition.'"

Western District United States District Court
Video Software Dealers Association, et al., v. Maleng, et al.
325 F. Supp.2d 1180
Decided: July 2004

From The Honorable Robert Lasnik, District Court Judge:

In his ruling, Judge Lasnik rejected the state's argument that video games should be regulated under obscenity law, and declined the state's invitation to expand the narrowly defined obscenity exception to include portrayals of violence.

"[S]uch depictions [of violence] have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation," wrote Judge Lasnik.

Dismissing the claims of the state's expert witnesses and the studies presented, Judge Lasnik determined:

"...the Court finds that the current state of research cannot support the legislative determinations that underlie the Act because there has been no showing that exposure to video games that 'trivialize violence against law enforcement officers' is likely to lead to actual violence against such officers. Most of the studies on which defendants rely have nothing to do with video games, and none of them is designed to test the effects of such games on the player's attitudes or behavior toward law enforcement officers. Where the studies do involve exposure to violent video games, the subjects are often asked to play games selected by the researcher and are then evaluated for behaviors that serve as proxies for actual aggression. Assuming, for the sake of argument, that the frustrations inherent in learning a new game or console system are not responsible for any measurable increase in hostility, neither causation nor an increase in real-life aggression is proven by these studies."

Reinforcing that games are protected by the First Amendment, Judge Lasnik wrote:

"The games at issue...[have] story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experiences. All of the games provided to the Court for review are expressive and qualify as speech for purposes of the First Amendment. In fact, it is the nature and effect of the message being communicated by those video games which prompted the state to act in this sphere."

Additionally, Judge Lasnik found that the state's attempt to ban the sale of games depicting violence against law enforcement officers was impossibly vague and, "failed to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." He wrote:

"Would a game built around The Simpsons or Looney Tunes characters be 'realistic' enough to trigger the Act? Is the level of conflict represented in spoofs like the Dukes of Hazzard sufficiently 'aggressive?' Do the Roman centurions of Age of Empires, the enemy officers depicted in Splinter Cell, or the conquering forces of Freedom Fighters qualify as 'public law enforcement officers'?"

Cases on Regulation of Violent Materials

Winters v. New York, 333 U.S. 507 (1948). The United States Supreme Court held as impermissibly vague a New York statute defining obscenity as material principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of blood shed, lust or crime. The Court further stated that, "[t]hough we can see nothing of any possible value to society in these magazines, they are entitled to the same protection of free speech as the best of literature." Winters, 333 U.S. at 510.

Interstate Circuit, Inc v. City of Dallas, 366 F.2d 590 (5th Cir. 1966), remanded 391 U.S. 53, 88 S.Ct. 1649, 20 L.Ed.2d 415 (1968). The Fifth Circuit struck down as overbroad and unconstitutional a Dallas city ordinance that classified as "not suitable for young persons" any film which described or portrayed excessive brutality or criminal violence, holding that "the standard for classification must be restricted to the control of obscenity." The court asserted that narrowly tailored statutes aimed at protecting children from material obscene to children can pass constitutional muster, provided that the statute's effect would not reduce material available to adults only to that which would also be suitable for children.

Allied Artists Pictures Corp. v. Alford, 410 F. Supp. 1348 (W.D. Tenn. 1976). The court held as unconstitutionally vague an ordinance prohibiting dissemination to juveniles of materials with "excess violence," defined as "the depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for violence's sake." The court noted that a system where films are classified as either suitable or unsuitable for children, and when unsuitable, only exhibited with a special license and posting of the film's classification, is an improper exercise of prior restraint. The court concluded that the statute is overbroad, because its definition of what may be obscene to minors includes material non-sexual in nature, citing Cohen v. California, 403 U.S. 15, which held that to be obscene, the material in question must be, in some significant way, erotic.

Sovereign News Co. v. Falke, 448 F. Supp. 306(N.D. Ohio 1977). The court held an Ohio statute that defined as "harmful to minors" material describing or representing "extreme or bizarre violence" to be an unconstitutional restraint on free expression and overbroad. (Remanded on other grounds, 610 F. 2d 428 (6th Cir. 1979)). Applying Miller, the court noted that only material sexual in nature may be construed as obscene and held that violent material not containing depictions or descriptions of sexual conduct will always be afforded the highest degree of protection.

State v. Johnson, 343 So. 2d 705 (La. Sup. Ct. 1977). The court held a Louisiana statute prohibiting the "advertisement, exhibition or display of violent material, defined as any tangible work or thing which the trier of facts determines depicts actual or simulated patently offensive acts of violence, including but not limited to, acts depicting sadistic conduct, whippings, beatings, torture and mutilation of the human body" as invalid for exceeding the "limits placed upon the regulation of obscene materials." Following Miller, the court found that if material is to be designated as obscene, it must be sexual in nature.

American Booksellers Ass'n v. Hudnut, 771 F. 2d 323 (7th Cir. 1985), aff'd 475 U.S. 1001 (1986). The Seventh Circuit found an Indianapolis ordinance restricting speech-based content, subjugating women through sex and/or violence, to be unconstitutionally over broad, noting that content-based restrictions imposing a particular normative set of values is thought control, the effect of which would be to ban speech not conforming to the political objectives of the ordinance. The court stated that: "racial bigotry, anti-Semitism, violence on television, reporters' biases – these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet, all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." At 330.

Video Software Dealers Ass'n v. Webster, 968 F. 2d 684 (8th Cir. 1992). The Eighth Circuit found that a Missouri Statute restricting the rental or sale to minors of video cassettes depicting violence did not fall within the legal definition of obscenity for either minors or adults and violated the First Amendment, because it was not narrowly tailored to promote a compelling state interest, it was unconstitutionally

vague, and it unconstitutionally imposed strict liability. The court noted that where legislation may imperil a fundamental right (in this case violent speech), a narrowly tailored law is a necessity. The court concluded that the statute is an attempt to exercise a content-based speech restriction, which is impermissible. The lack of definitions for such key words as "morbid" and "violence", the court observes, limits the ability of lay people to be put on notice of what is and is not permissible speech. Finally, the court concludes that the imposition of strict liability would have the effect of limiting total speech available, since distributors of speech (here, video cassette sellers) would sell only the material that they had personally inspected. "When First Amendment freedoms are at stake, the Supreme Court has 'repeatedly emphasized that precision of drafting and clarity of purpose are essential.'" At 691.

Davis Kidd Booksellers v. McWherter, Tenn. Chancery Court #90- 1893- III(I), Feb. 14, 1992; on appeal to Tenn. Sup. Ct., #01s01-9208-CH-00090, (argued Feb. 1993). The court held as unconstitutionally vague a Tennessee statute prohibiting the display or sale of any material harmful to minors, including material that contains "excess violence," because it required a subjective judgment on the part of law enforcement as to the material in question.

Eclipse Enterprises, Inc v. Gulotta, 134 F 3d 63 (2d Cir 1997). The Second Circuit overturned a Nassau county ordinance banning the sale of trading cards with pictures and descriptions of heinous crimes or criminals, finding that the restriction violated the free speech clause of the First Amendment, because the law was neither necessary nor narrowly drawn to protect the county's compelling interest in protecting psychological well-being of minors and combating juvenile crime. The court noted that the county was unable to present evidence demonstrating a link between youth violence and exposure to violent material, which doomed the county's compelling state interest argument, because the county must show that the speech leads to real harms. See Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622.

AAMA v. Kendrick, 244 F.3d 572 (7th Cir.), cert. denied, 534 U.S. 994 (2001). The Seventh Circuit affirmed that video games are a form of expression, which are protected by the First Amendment and that restrictions on a minor's access to video games that depict violence are unconstitutional. Judge Posner rejected the concept of shielding children from violence and stated, "To shield children 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." Significantly, the court rejected Indianpolis' reliance on the psychological studies authored by professors Anderson and Dill stating that, "those studies do not support the ordinance."

IDSA v. St Louis County, 329 F.3d 954 (8th Cir. 2003). The Eighth Circuit Court of Appeals unanimously ruled that a St. Louis County law seeking to ban the sale or rental of video and arcade games to minors that depict violence is unconstitutional. In its ruling, the Eighth Circuit made three important findings. First, the Court concluded that video games, regardless of content are constitutionally protected speech. Second, the Court found that the county had utterly failed to establish that there is a compelling state interest in regulating the sale of games to minors on behalf of parents, or the right of parents to control their children's exposure to graphically violent materials. Third, the Court was dismissive of the county's claim that violent video games need to be regulated because they have been proven to be harmful to minors The Court found that the county's evidence which it called, "...a small number of ambiguous, inconclusive or irrelevant (conducted on adults not minors studies....was unpersuasive."

VSDA v. Maleng, 325 F. Supp 2d 1180 (W.D. Wash. July 15, 2004). Federal District Court Judge Lasnik granted the video game industry's motion for summary judgment, permanently enjoining the enforcement of the Washington State law that would prohibit the sale of certain computer and video games based on depictions of violence against law enforcement personnel. In the opinion, Judge Lasnik acknowledged that video games are expressive and qualify as speech for the purposes of the First Amendment. He rejected the State's argument that "obscenity" includes violence, and he concluded that current research does not prove a causal link between violent video games and violent behavior. Finally, he opined that the law was too broad to give a person of ordinary intelligence a reasonable opportunity to know what was prohibited.

Bookfriends v. Taft, 233 F.Supp. 932 (S.D. Ohio 2002). The district court in Ohio enjoined the enforcement of a statute that prohibited the dissemination of materials to juveniles which come within the statute's definition of "harmful to juveniles". The court held that the statute's definition of "harmful to juveniles", which was defined as including material that contains depictions or descriptions of violence, cruelty, foul words and glorification of crime, was unconstitutionally overbroad. The case was appealed to the Sixth Circuit, but subsequently, the Ohio legislature amended the statute to eliminate most of the overbreadth problem. The Sixth Circuit remanded to address the applicability of the statute to the internet.

February 2005

Cases on Ratings

Drive In Theatres v. Huskey, 305 F. Supp. 1232 (W.D. N.C. 1969), aff'd 435 F.2d 228 (4th Cir 1970).

The court held that a sheriff's ban on films rated "R" and "X" by the MPAA unconstitutionally incorporated a private organization's ratings and was an invalid prior restraint lacking procedural safeguards, such as an expedited, prior adversary hearing on the possible obscenity of the particular material, with the burden of proof resting on the state to show that the material is obscene. "Probable cause for violation of obscenity statutes is a judicial determination which cannot be delegated to the motion picture distributors association nor to the film producers nor to studio officials. It is an individual determination which has to be made *film by film* on a local level *after* an adversary hearing, if convictions are to flow therefrom."

Hooksett Drive-In v. Hooksett, 110 N.H. 287 (1970).

The court held that a fee to regulate cannot be a fee to prohibit in disguise. The town of Hooksett sought to impose a licensing fee of $500 per exhibition of an "X" rated film at an open-air drive-in, which the court found exercised a police power with respect to the theatres, and that license and permit fees must be limited to covering the regulatory expenses of the town.

Engdahl v. Kenosha, 317 F. Supp. 1133 (E.D. Wisc. 1970).

The court held a Kenosha city obscenity law unconstitutional for using the MPAA guidelines in lieu of independent legislative standards and placing the burden of challenging the ratings on the citizenry. The ordinance prohibited minors from seeing adult films, defined as those rated by the MPAA in a category recommending that "minors, unaccompanied by a parent or guardian, be denied admission." Because the standards only came into play when a citizen took the step of appealing a rating, the burden improperly rested on the appealing party, instead of on the censor. Freedman v. Maryland, 380 U.S. 51 (1965). Additionally, the court ruled that prior restraint can only be tolerated where it "operates under judicial superintendence and assures an almost immediate judicial determination of the validity of the restraint." Bantam Books v. Sullivan, 372 U.S. 58 (1963).

MPAA v. Specter, 315 F. Supp. 824 (E.D. Pa. 1970).

The court ruled that a PA statute, imposing criminal liability on exhibitors warranting that a film is suitable for minors, and then in the course of displaying that film, display before, during, or after, another film or preview that is unsuitable for minors, is unconstitutional and void for vagueness, because it employs the MPAA rating system, which uses no legislative standard. The court also held that the statute subjects only a portion of exhibitors to criminal liability, since it applied only to films rated by the MPAA.

State v. Watkins, 259 S.Car. 185 (1972); vacated and remanded, sub. nom. Watkins v. South Carolina, 413 U.S. 905 (1973); aff'd and remanded, 203 S.E. 2d 429 (1973).

The court held that the power to legislate may not be delegated to another part of the government, to a private individual, corporation, or organization. Therefore, a statute

exempting MPAA rated films from the obscenity law was held unconstitutional, because the law exempted all MPAA approved films from state obscenity laws.

Eastern Federal Corporation v. Wasson, 316 S.E. 2d 373 (S.C. 1984).

The Supreme Court of South Carolina held a statute placing a 20% tax on all "X" rated and un-rated films was unconstitutional, because the ratings contemplated were at the sole discretion of an independent organization (the MPAA), and a tax based on a rating would be an impermissible delegation of legislative power.

Swope v. Lubbers, 560 F. Supp 1328 (W.D. Mich, S.D. 1983).

The court held that movie ratings have no bearing on the movie's constitutional status, and that a content-based prior restraint is unconstitutional, since it would put an institution in the position of a censor. "First Amendment rights, however, have long been regarded as among the most precious. As one court stated, 'It needs no citation to suggest that first amendment liberties have been considered among the most important guaranteed to citizens in the Bill of Rights.'" At 11.

Potter v. State, 509 P.2d 933 (Okl. Crim. App. 1973).

The court ruled that incorporating the MPAA ratings into the standard of criminal liability is an unconstitutional delegation of legislative power, because it violates due process, without rules, guidelines, or safeguards; and that statutes attempting to censor and require the prior restraint of speech must be "narrowly drawn, reasonable, and with definite standards." At 935. In support, the court quoted Justice Frankfurter: "legislation must not be so vague, that language so loose, as to leave to those who have to apply it too wide a discretion." At 936.

Weis v. Chatham County, Superior Ct., Chatham County, GA., Feb. 17, 1970.

The court ruled that an ordinance imposing different tax rates on theatres based on the ratings of the films shown and requiring a special license for the display of "R" and "X" rated films, abridges free speech "in that it stifles the dissemination of ideas via the medium of film protected under the First Amendment." (Court Order, 4). The court further ruled that the ordinance was unconstitutional on due process and equal protection grounds, stating that the tax was a confiscatory measure designed to coerce theater owners, and that the ordinance improperly differentiated between theaters.

Daniels Cablevision v. US, 835 F.Supp. 1 (D. D.C. 1993)

The District Court of DC ruled that legislation requiring cable operators to notify subscribers of MPAA movie ratings constituted an unconstitutional content-based "indecency" restriction. The court opined that Congress had simply incorporated the MPAA's rating system as the measure of indecency. Its failure to define indecency for itself, abdicating that responsibility to a trade association, was sufficient to invalidate the legislation. The DC Circuit Court in Time Warner Entertainment v. FCC, 93 F.3d 957 (DC Cir. 1996), reversed this finding, holding that the legislation was merely a disclosure statute and did not create a direct restriction on speech. However, the Circuit Court explicitly noted that the MPAA's rating system does not measure which movies are constitutionally protected and which are not.

Media Violence Research and Youth Violence Data: Why Do They Conflict?

Cheryl K. Olson, M.P.H., S.D.

Objective: *Contrary to media headlines and public perceptions, there is little evidence of a substantial link between exposure to violent interactive games and serious real-life violence or crime.* **Conclusion:** *Further research is needed on whether violent games may affect less dramatic but real concerns such as bullying, fighting, or attitudes and beliefs that support aggression, as well as how effects may vary by child characteristics and types of games. There is also a need for research on the potential benefits of violent games for some children and adults. (Academic Psychiatry 2004; 28:144–150)*

It's almost an American tradition to blame the corruption of youth on violent mass media, from the lurid "half-dime" novels of the 19th century to 1930s gangster films and 1950s horror/crime comics (1). In 1972, a report to the U.S. Surgeon General addressed then-growing concerns about violent television. Its authors pondered how television content and programming practices could be changed to reduce the risk of increasing aggression without causing other social harms. They concluded: "The state of present knowledge does not permit an agreed answer" (2).

Violent video games are the most recent medium to be decried by researchers, politicians, and the popular press as contributing to society's ills. In particular, they were implicated in a series of notorious shootings:

> Although it is impossible to know exactly what caused these teens to attack their own classmates and teachers . . . one possible contributing factor is violent video games. Harris and Klebold enjoyed playing the bloody, shoot-'em-up video game *Doom*, a game licensed by the U.S. Army to train soldiers to effectively kill (3)

(Anderson and Dill did not cite a source for the use of *Doom* by the military. However, according to the web site of the U.S. Army Corps of Engineers Topographic Engineering Center, *Doom II* was indeed licensed in 1996 and transformed into *Marine Doom*, which "teaches concepts such as mutual fire team support, protection of the automatic rifleman, proper sequencing of an attack, ammunition discipline and succession of command" [see www.tec.army.mil/TD/tvd/survey/Marine_Doom.html]).

> "We've been seeing a whole rash of shootings throughout this country and in Europe that relate back to kids who obsessively play violent video games. The kids involved as shooters in Columbine were obsessively playing violent video games. We know after the Beltway sniper incident where the 17-year-old was a fairly good shot, but Mr. Muhammad, the police tell us, got him to practice on an ultra-violent video game in sniper mode to break down his hesitancy to kill."

—Washington State Rep. Mary Lou Dickerson, on *The NewsHour with Jim Lehrer*, July 7, 2003. (She co-sponsored legislation to ban the sale or rental of games that portray violence against police to children under 17.)

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The series of random shootings by Lee Malvo and John Muhammad created panic in the Washington, DC area. News headlines repeated claims by Malvo's defense team that the youth had been brainwashed and trained to kill while playing video games with sniper shooting modes such as *Halo*, *Tom Clancy's Ghost Recon*, and *Tom Clancy's Rainbow Six: Covert Ops*. The jury was shown clips of these games and of the film *The Matrix*. A psychologist testified that exposure to this kind of entertainment makes violence seem more acceptable and promotes violent thoughts and actions. In response, the prosecutor simply asked, "What about the millions and millions of young American males who play video games and don't go out and kill random people on the street?" (4)

Certainly, the stealing, beating, strangling, and hacking depicted in games such as *Grand Theft Auto III*, *Manhunt*, and *Mortal Kombat: Deadly Alliance* are shocking to many adults. It seems reasonable to assume that wielding virtual guns and chainsaws must be bad for our children. However, the potential of gangster movies to trigger violence or teach criminal methods to the young seemed just as real to previous generations. Local censorship boards in New York and Chicago edited out hundreds of scenes that "glorified gangsters or outlaws" or "showed disrespect for law enforcement" (1).

In that place and time, it's possible that cinema criminals such as James Cagney and Edward G. Robinson were bad influences on some young people. This can't be proved or disproved. Today, however, most of us view these films as quaint entertainment classics. Before we make sweeping assumptions about the effects of media content, we must examine the data.

School Shootings and Video Games

In response to the outcry that followed deadly shootings in Colorado, Oregon, Kentucky, and Arkansas, the U.S. Secret Service and the U.S. Department of Education began a study called the Safe School Initiative (5). This involved an intensive review of the 37 incidents of "targeted" school violence, aimed at a specific person, group, type (such as "jocks" or "geeks"), or at an entire school, that took place between 1974 and 2000. The goal was to look for commonalities and create a profile of potential attackers in order to prevent future tragedies.

The conclusion: There was no useful profile. Along with male gender, the most common shared trait was a history of suicide attempts or suicidal thoughts, often with a documented history of extreme depressed feelings. If all schools instituted programs to identify and refer depressed and suicidal youth, more would receive treatment and promising futures could be saved (6). But using those methods to detect potential killers would result in overwhelming numbers of false positives and the stigmatization of thousands.

Moreover, there is no evidence that targeted violence has increased in America's schools. While such attacks have occurred in the past, they were and are extremely rare events. The odds that a child will die in school through murder or suicide are less than one in one million (7). What *has* dramatically increased is our exposure to local and national news about the "recent trend" in school shootings (8). Research has shown that crime-saturated local and national television news reports increase viewers' perception of both personal and societal risk, regardless of actual danger (9, 10).

Constant news coverage leaves the impression that youthful crime is increasing. Some have referred to a "wave of violence gripping America's youth," fueled by exposure to violent media (11). Using data supplied to the FBI by local law enforcement agencies, the U.S. Office of Juvenile Justice and Delinquency Prevention reported (12) that the rate of juvenile arrests increased in the late 1980s, peaking in 1994. At the time, this seemed to be a worrisome trend, but it proved to be an anomaly. Juvenile arrests declined in each of the next 7 years. **Between 1994 and 2001, arrests for murder, forcible rape, robbery, and aggravated assaults fell 44%, resulting in the lowest juvenile arrest rate for violent crimes since 1983.** Murder arrests, which reached a high of 3,800 in 1993, fell to 1,400 in 2001 (12).

Interestingly, the sharp temporary rise in juvenile murders from 1983 to 1993 has been attributed to a rapid rise in gun use, concentrated among black male adolescents (13, 14). We have no evidence that black male adolescents' use of violent media differed significantly from that of other young people, though there is ample evidence that as a group, they have greater exposure to other risk factors for violence (15). And what of juvenile arrests for property crimes? In 2001, these achieved their lowest level in over 30

years (12). In other words, there's no indication that violence rose in lockstep with the spread of violent games. Of course, this is not proof of lack of harm.

Could violent media have played some role in the rare but horrifying mass murders in our schools? This can't be ruled out, but evidence is scant. According to the Secret Service review, one in eight perpetrators showed some interest in violent video games, one-fourth in violent movies, and one-fourth in violent books, but there was no obvious pattern. Instead of interactive games, their interactive medium of choice was pen and paper. Thirty seven percent expressed violent thoughts and imagery through poems, essays, and journal entries (5).

Trends in Violent Game Use

The rapid spread of video games among the young, including violent games, has surprised and unnerved many parents. Games with violent content and "Mature" ratings are available for computers, all three major game consoles (PlayStation 2, Xbox, and GameCube), and portable handhelds such as Game Boy.

According to a 1999 survey by the Kaiser Family Foundation (16), 83% of children ages 8 to 18 reported having at least one video game console in their home, and 45% had one in their bedroom. In addition, 74% have at least one computer at home. Fifty-five percent of boys and 23% of girls said they played video games on a typical day, with nearly 20%, primarily boys, playing an "action or combat [game], (i.e., *Duke Nukem, Doom*)."

These figures have probably increased since that time. According to the Entertainment Software Association (formerly called the Interactive Digital Software Association), sales of video and computer games in the United States have grown steadily, from $3.2 billion in 1995 to $7 billion in 2003. The industry group is coy about how many children are actually playing, stating only that among the "most frequent" computer and video game players, 30% and 38%, respectively, are under age 18. Citing market research data from 2000, an IDSA report (17) states that 61% of game users are 18 or older (suggesting that 39% are *under* 18).

Violent games are also widely sold. It is possible to find even gore-laden games such as *BloodRayne* (named for its bustier-clad vampire spy heroine and described on the maker's web site as "an intense third-person action/horror experience") at child-friendly outlets such as Toys R Us. Similar to R-rated movie restrictions, retailers are supposed to prevent sales of M-rated games to youth under age 17. However, "mystery shopper" studies by the U.S. Federal Trade Commission (18) found that young teens ages 13 to 16 were able to purchase M-rated games 85% of the time. This number declined to 69% in a follow-up survey released in October 2003. In sum, playing video and computer games—including games with violent content—is now a routine activity for American youth, particularly boys.

Video Game Research and Public Policy

How has this spurt in electronic game play affected our youth? Along with the Washington, D.C. snipers and school shooters, several academic studies (primarily experiments) have received broad coverage in the popular media and are cited by the press and some advocacy groups as evidence that video games create dangerous, aggressive thoughts, feelings, and behaviors. Local, state, and federal legislation, including criminal penalties for selling or renting certain games to minors, have been introduced based on these studies (19, 20), as have private lawsuits (21).

Many of these studies provide useful insights into the potential for harm (and sometimes benefit) from violent interactive games. But problems arise when the customary discussion of limitations falls by the wayside. Ideas are taken out of context and repeated in the media echo chamber, creating a false sense of certainty. Here are some of the limitations of current studies as a basis for policy making, with illustrative examples.

Vague Definitions of Aggression

Some researchers use "aggression" and "violence" almost interchangeably, implying that one inevitably leads to the other (22). Aggressive play that follows exposure to games or cartoons containing violence (23, 24) is not distinguished from aggressive behavior intended to harm. Aggressive thoughts, feelings, and behaviors may be presented as equivalent in importance and treated as valid surrogates for real-life violence, with the assumption that reducing these factors will reduce harm (25). The muddled

terminology and unspoken assumptions can undermine the credibility of studies. After all, most parents of whining toddlers have occasional aggressive thoughts and feelings, but that's a far cry from actual child abuse.

Use of Violent Media Is Not Put Into Context With Other Known Contributors to Aggression or Violence

Lee Malvo, for example, had a history of antisocial and criminal behavior. He reportedly hunted and killed perhaps 20 cats with a slingshot and marbles (4). Compared to playing violent video games, animal torture is both more unusual and directly related to harming humans. According to public health and juvenile justice research, the strongest childhood predictors of youth violence are involvement in crime (not necessarily violent crime), male gender, illegal substance use, physical aggressiveness, family poverty, and antisocial parents. As children grow older, peer relationships become important predictors: associating with antisocial or delinquent peers, gang membership, and lack of ties with prosocial peers and groups (26).

A final problem with using aggression as a surrogate for violence is that most children who are aggressive or engage in antisocial behavior do not grow up to be violent adolescents or adults, and most violent adolescents were not notably aggressive as children (26).

Test Conditions That Are Difficult to Generalize to the Real World

Experimental settings are not only artificial, but turn game play into game "work." Subjects may have only 10 minutes to learn and play a game before results are measured and cannot choose when to start or stop playing (27). Most experiments involve a single game exposure, which cannot reasonably represent the effects of playing an array of games in real life (28). Additionally, young people commonly play games with others. In the Kaiser Family Foundation survey, virtually all children played their video games with friends, siblings, or other relatives. (By contrast, the majority of computer games were played alone, although some children played with a friend in the room or with someone over the Internet.) Effects of the social context of games, be they positive or negative, have received little attention to date (29).

Small, Nonrandom, or Nonrepresentative Samples

This is another barrier to broad generalization of research results. While it is not uncommon to recruit college undergraduates in psychology courses for experimental studies, those students differ in numerous ways from the typical young American teen—the population of greatest interest to most researchers and policy makers (3). Other studies use samples that are very narrow in age or geography (e.g., 10- and 11-year-old Flemish children) (30).

A Blinkered View of Causality

Some (but not all) experimental studies have found that aggressive thoughts or behavior increase after playing a particular video game (25, 29). It has been postulated that experimental studies prove causality by ruling out other plausible explanations (25). In the real world, however, this could be a very complex relationship. That is, aggressive children may seek out violent games, and violent games may reinforce aggressive behavior. This may be a two-way relationship or the result of other factors such as lack of parental supervision or connection. Additionally, effects of moderating variables, such as the nature and context of violence in a given game, or subject age or developmental stage are often not considered (29).

Study Findings Are Combined in Ways Not Appropriate for Policy Use

"Meta-analysis" and related techniques, for example, may be used to merge study findings for a more robust result. A 2004 meta-analysis of the effects of playing violent video games (25) combined studies with subjects of varying age and gender who were exposed to different types and amounts of game violence in a variety of environments (experiments and correlational studies), with varying outcomes—a range of behavioral, cognitive, affective, and arousal measures. Results were represented only in terms of average effect size. Given the different study types, exposures, populations, and outcome measures, this

goes well beyond the prohibition against "comparing apples and oranges" in meta-analyses (31, 32).

Again, however, the primary problem is the way these findings are interpreted. The size and representativeness of study samples were not considered in assessing study quality, and the outcome of concern—real-world violence or related harm—was never directly studied. Despite this, the results were viewed as important evidence that violent game exposure leads to major societal harm.

Current Thinking on Game Violence Effects

The research community is sharply divided on whether violent games are harmful, and if so, for whom and to what degree. Several well-regarded reviews have concluded that the current body of research is unable to support the argument that the fantasy violence of games leads to real-life violence—although this could change as evidence accumulates (33) or games become more realistic (34).

In an appendix to its chapter on risk factors, the Surgeon General's 2001 report on youth violence reviewed effects of exposure to violent media. The report noted that there is evidence for a small to moderate short-term increase in physically and verbally aggressive behavior. However, the sum of findings from cross-sectional, experimental, and longitudinal studies "suggest that media violence has a relatively small impact on violence" and that "the impact of video games on violent behavior remains to be determined" (26).

Potential Effects of Games on "Below the Radar" Violence

This does not mean that we should put research on media violence on the back burner. Instead, we need to put it in context. First, many known risk factors for violence aren't amenable to change, while exposure to media (content and dose) is potentially alterable. Second, while they may not play a starring role in headline-grabbing crimes, video games and other violent media could have less visible but significant harmful effects on children's lives. For example, it's feasible that certain types or amounts of video game play could affect emotions, cognitions, perceptions, and behaviors in ways that promote bullying and victimization.

In recent years, we have become increasingly aware of bullying as a threat to healthy development and well being. A large United States survey of children in grades 6 through 10 found that nearly 30% reported occasional or frequent (at least once a week) involvement as a bully, victim, or both (35). The most recent government report on school crime and safety (36) found that the percentage of children ages 12 to 18 who reported being bullied increased from 1999 (5%) to 2001 (8%). According to the latest National Youth Risk Behavior Survey (37), the percentage of high school students who felt too unsafe to go to school at least once in the previous 30 days increased significantly from 1997 to 2001 (from 4% to 6.6%). In 2001, fewer adolescents reported carrying weapons on school property (which could reflect aggressive intent or a fear-based need for self-protection), but the risk of being threatened or injured with a gun, club, or knife on school property has not decreased, as 8.9% of students reported this had happened to them at least once in the previous 12 months.

Suggestions for Future Research

In summary, it's very difficult to document whether and how violent video and computer games contribute to serious violence such as criminal assault or murder. (Practically speaking, this would require a massive and expensive study because game playing is common, and murder is rare.) It is feasible, however, to study how violent games may contribute to some types of everyday violence and aggression and to the beliefs, attitudes, and interpretations of behavior that support them. For example, are heavy players of violent games more likely to view aggression as a first-choice solution to problems instead of a last resort (e.g., instead of talking or seeking mediation first), to see violence as easily justified, to feel less empathy for others, or to interpret ambiguous behavior (e.g., a bump in the school hallway) as deliberately hostile, threatening, or disrespectful (34, 38)? Another issue is whether and how the effects of video game violence might be compounded by exposure to violence in other media. Cautious interpretation is necessary, since there is always the risk of confusing cause and effect or correlation with causation.

To make intervention efforts more effective and cost-efficient, it's important to focus on which children are at risk. Risk factors for violence tend to occur

in clusters. Violent game play may disproportionately affect children who lack protective factors such as a nurturing relationship with at least one adult and connection to and relative success in school (39). A child's stage of emotional or cognitive development may also be important.

The amount of time spent playing games is also worthy of study. Given the ubiquity of violent game play among boys, we might see a J-shaped curve, similar to common findings in research on adult alcohol use: a little is healthy, but a lot becomes a health risk (40). In other words, a moderate amount of interactive game play may be associated with a healthier social life, while increasing amounts of play (or solitary play) may correlate with poor adjustment or emotional difficulties.

Few researchers have asked children *why* they play games and what meaning games have for them (29). While most probably play for fun or sociability, some children seem to use games to vent anger or distract themselves from problems. This could be functional or unhealthy, depending on the child's mental health and the amount and type of game play. We know almost nothing about the differential effects of games on depressed or anxious children or those with attention deficit-hyperactivity disorder.

There is also a need for research on the effects of different types of games, going beyond the gore level. Does violence that serves a worthy end (e.g., a SWAT team rescuing hostages) or violence that is ultimately punished (e.g., a criminal protagonist ends up dead or in jail) have different effects than violence that is rewarded, even if the games are equally bloody? Do children who enjoy violent games with story lines differ from those who prefer bouts of fighting? Do violent games that make use of irony and sarcasm, such as *Grand Theft Auto: Vice City*, have differential effects on children who are not cognitively able to detect that irony and sarcasm?

We need to learn more about what activities are displaced by game play. A teenager who spends hours playing games over the Internet might miss key opportunities to build social skills with real people or lose opportunities for healthy physical activity.

Finally, researchers must acknowledge that electronic games are a moving target. The technology is constantly advancing. Studies conducted 5 or even 2 years ago may have limited relevance given improvements in graphics, the rise of Internet gaming (41), the introduction of games controlled by voice or body movements (42), and the potential for increased tactile feedback via "haptics" technology to create the sense of immersion in a virtual world (43).

We might take a lesson from America's history of media hysteria. It's time to move beyond blanket condemnations and frightening anecdotes and focus on developing targeted educational and policy interventions based on solid data. As with the entertainment media of earlier generations, we may look back on some of today's games with nostalgia, and our grandchildren may wonder what the fuss was about.

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CHECK THE RATINGS ON EVERY VIDEO & COMPUTER GAME BOX

Rating symbols on the front:

Titles rated **EC (Early Childhood)** have content that may be suitable for persons ages 3 and older. Titles in this category contain no material that parents would find inappropriate.

Titles rated **E (Everyone)** have content that may be suitable for persons ages 6 and older. Titles in this category may contain minimal violence, comic mischief and/or mild language.

Titles rated **T (Teen)** have content that may be suitable for persons ages 13 and older. Titles in this category may contain violent content, mild or strong language, and/or suggestive themes.

Titles rated **M (Mature)** have content that may be suitable for persons ages 17 and older. Titles in this category may contain mature sexual themes, more intense violence and/or strong language.

Titles rated **AO (Adult Only)** have content suitable only for adults. Titles in this category may include graphic depictions of sex and/or violence. Adults Only products are not intended for persons under the age of 18.

Product has been submitted to the ESRB and is awaiting final rating.

Content descriptors on the back:

See back for more details on content descriptors.

ESRB
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ESRB
CONTENT DESCRIPTORS

ESRB Content Descriptors and Definitions:

• **Alcohol Reference**	Reference to and/or images of alcoholic beverages
• **Animated Blood**	Cartoon or pixilated depictions of blood
• **Blood**	Depictions of blood
• **Blood and Gore**	Depictions of blood or the mutilation of body parts
• **Cartoon Violence**	Violent actions involving cartoon-like characters. May include violence where a character is unharmed after the action has been inflicted
• **Comic Mischief**	Scenes depicting slapstick or gross vulgar humor
• **Crude Humor**	Moderately vulgar antics, including bathroom humor
• **Drug Reference**	Reference to and/or images of illegal drugs
• **Edutainment**	Content of product provides user with specific skills development or reinforcement learning within an entertainment setting. Skill development is an integral part of product
• **Fantasy Violence**	Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life
• **Informational**	Overall content of product contains data, facts, resource information, reference materials or instructional text
• **Intense Violence**	Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death
• **Language**	Mild to moderate use of profanity
• **Lyrics**	Mild references to profanity, sexuality, violence, alcohol, or drug use in music
• **Mature Humor**	Vulgar and/or crude jokes and antics including "bathroom" humor
• **Mild Violence**	Mild scenes depicting characters in unsafe and/or violent situations
• **Nudity**	Graphic or prolonged depictions of nudity
• **Partial Nudity**	Brief and mild depictions of nudity
• **Real Gambling**	Player can gamble, including betting or wagering real cash or currency
• **Sexual Themes**	Mild to moderate sexual references and/or depictions. May include partial nudity
• **Sexual Violence**	Depictions of rape or other violent sexual acts
• **Simulated Gambling**	Player can gamble without betting or wagering real cash or currency
• **Some Adult Assistance May Be Needed**	Early Childhood descriptor only
• **Strong Language**	Profanity and explicit references to sexuality, violence, alcohol, or drug use
• **Strong Lyrics**	Profanity and explicit references to sex, violence, alcohol, or drug use in music
• **Strong Sexual Content**	Graphic depiction of sexual behavior, possibly including nudity
• **Suggestive Themes**	Mild provocative references or materials
• **Tobacco Reference**	Reference to and/or images of tobacco products
• **Use of Alcohol**	The consumption of alcoholic beverages
• **Use of Drugs**	The consumption or use of illegal drugs
• **Use of Tobacco**	The consumption of tobacco products
• **Violence**	Scenes involving aggressive conflict

Additionally, online games that include user-generated content (e.g. chat, maps, skins) carry the notice "Game Experience May Change During Online Play."

For the most up-to-date list of content descriptors and definitions, go to http://www.esrb.org/

entertainment
software
association

MEMORANDUM IN OPPOSITION TO MINNESOTA SENATE BILL 785

The Entertainment Software Association (ESA) is the trade association representing publishers of computer and video games for consoles, personal computers, and the Internet. Our members publish over 90% of the $7 billion entertainment software sold in the United States.[1]

The ESA respectfully submits this memorandum in opposition to SB 785 before the Minnesota Legislature that prohibits the sale or rental of a restricted video game, defined as a video game rated "M" or "AO" by the Entertainment Software Association (ESRB), to a minor. The bill requires retailers to post a warning sign and impose a fine on a minor who knowingly rents or purchases a restricted video game.

The ESA opposes the legislation for three reasons. First, the proposal is unnecessary because the entertainment software industry has created a successful self-regulatory program to rate its products through the ESRB, and to provide rating information. Second, the proposed legislation is unconstitutional because it restricts a minor's access to video games that are neither obscene nor harmful under Minnesota law or the First Amendment. Third, the proposed restrictions also have been found to violate Due Process, because they unlawfully delegate legislative power to a private trade association.

THE ESRB RATING SYSTEM

The ESRB is a voluntary rating system that has provided consumers with information about the age appropriateness and content of entertainment software. The ESRB issues five age-based rating categories that are supplemented with short phrases, called descriptors that highlight the content of the entertainment software. The rating categories are: Early Childhood (EC - Ages 3 and older), Everyone (E - Ages 6 and older), Teen (T - Ages 13 and older), Mature (M - Ages 17 and older), and Adults Only (AO - Limited to those 18 and older). There are over 30 descriptors such as animated blood, suggestive themes, fantasy violence, intense violence, cartoon violence and strong or mild language. Together the rating and descriptors provide consumers with the advance information they need to make informed purchase and rental decisions for their families.

In 2001, the FTC praised the ESRB as "the most comprehensive of the three [entertainment] industry systems" and for helping parents make informed choices about the games their children play. In September 2004, the Kaiser Family Foundation released a national survey of parents that found the ESRB ratings system to be the most useful of all the [entertainment] ratings systems. Ninety-one percent of parents surveyed said the video game ratings system is somewhat to very useful. In fact, ESA has been in the forefront of entertainment industry

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[1] **ESA's Members: Activision, Inc.; Atari; Buena Vista Games; Capcom USA, Inc.; Crave Entertainment; Eidos Interactive; Electronic Arts; Her Interactive; id software; Konami Digital Entertainment America; LucasArts; Microsoft Corporation; Midway Games, Inc.; Namco Hometek, Inc.; Nintendo of America, Inc.; NovaLogic, Inc.; SEGA of America, Inc.; Sony Computer Entertainment America; Square Enix USA, Inc.; Take-Two Interactive Software, Inc.; THQ, Inc.; Ubi Soft, Inc.; Vivendi Universal Games; Warner Bros. Interactive Entertainment, Inc; and Wild Tangent.**

efforts that prohibit target marketing to children; encourage rating compliance at retail; and educate parents and consumers about the ESRB ratings system.

SB 785 IS UNNECESSARY

This legislation is unnecessary because the industry recognizes the importance of retailer rating enforcement and is voluntarily working to achieve that goal. To that end, the ESA is working with the Video Software Dealers Association (VSDA), the Interactive Entertainment Merchants Association (IEMA), and individual retailers across the country to ensure that retailers have information about the ESRB, to make ESRB rating information available to the public and to enforce ESRB ratings. The National Institute on Media and the Family (NIMF) recently found in its annual secret shopper survey that sales of M-rated games to minors were prevented 66% of the time. This is an improvement from 45% last year.

In December 2003, the IEMA, which represents the nation's leading computer and video game retailers, announced a new initiative designed to prevent the sale of "M" rated games to children under 17 years old. All IEMA members, who are responsible for 85% of all video and computer games sold in the United States, pledged to implement by Holiday Season 2004 a national carding program at the point of sale for games rated "M" by the ESRB. Moreover, the VSDA is a strong supporter of the ESRB and utilizes a "Pledge to Parents" program to promote voluntary enforcement of the ESRB's rating system guidelines.

The newly formed Coalition of Entertainment Retail Trade Associations (CERTA) representing more than 2,000 retailers who operate more than 40,000 video and video game stores, theatres, music stores, online music sites, and other retailers offering entertainment products declared June 2004 "Ratings Awareness Month". The focus of this national annual campaign is to encourage retailers to review their ratings education and voluntary ratings enforcement policies, reemphasize those policies to their employees, and educate their customers about the movie, music and video game ratings systems and store policies.

The ESRB also has an integrated multimedia consumer education campaign that includes TV, print and online advertising, as well as a retail partnership program. The goal is to provide parents and consumers with information about the content of computer and video games, so they can make informed purchase decisions. The campaign, featuring the slogan "OK to Play?-Check the Ratings," urges parents to use both components of the rating system including rating symbols that suggest age appropriateness and content descriptors indicating elements in a game that may have triggered a particular rating. In addition, the ESRB retail partnership program includes materials that encourage and support enforcement of store policies not to sell "M" rated games to customers under 17.

INDUSTRY DEMOGRAPHICS AND SALES STATISTICS

The vast majority of video games do not contain violence. Of the almost 10,000 titles rated by the ESRB, 67% have been rated "E" as appropriate for all ages, 23% have been rated "T" as appropriate for those 13 and older and only 7% are rated "M" as suitable for those over 17. And a look at sales figures for 2004 shows that titles suitable for a broad audience dominate the best seller charts. In 2004, 13 out of the top 20 best selling video and PC games received an "Everyone" rating, 2 were rated "Teen" and 5 were rated "Mature."

It is also worth observing that the typical video game costs between $30-$60. Adults constitute 64% of video game players, with the average age being 29 years old according to PricewaterhouseCooper. In 2003, 94% of computer game buyers and 84% of console game players were over the age of 18. Thus, parents or adults, not children, make most purchases.

In fact, according to the Federal Trade Commission (FTC), parents are involved in the purchase of games more than 80% of the time. In the vast majority of cases, adults bring games into the home.

SB 785 VIOLATES THE FIRST AMENDMENT TO THE U.S. CONSTITUTION

Video games are fully protected speech, receiving the same First Amendment protection as books, movies, and television programs. IDSA v. St. Louis County, 329 F.3d 954, 957 (8th Cir. 2003) (holding video games as protected as the best of literature); AAMA v. Kendrick, 244 F.3d 572, 577-78 (7th Cir.) (describing in detail video games expressive qualities, including their ability to convey age-old themes of literature, messages, and ideologies, just as books and movies do); VSDA v. Maleng, 325 F.Supp.2d 1180 (W.D. Wa. 2004) (finding video games to be expressive speech entitled to full First Amendment protection). In so holding, these courts have enjoined laws that attempted to regulate minors' access to violent video games and affirmed that there is no First Amendment exception for violent content in video games.

It also is important to note that the ESRB's "M" and "AO" ratings are strictly advisory and not a legal determination that particular video games are obscene or harmful to minors. A video game may be given an "M" or "AO" rating as a result of language and/or violence that is neither obscene nor harmful to minors based on U.S. Supreme Court decisions. While the Supreme Court stated in Miller that obscenity was not protected by the First Amendment and could be regulated by the states, it has repeatedly held that virtually all other portrayals of behavior are protected by the First Amendment.

Access to a video game by an adult may be proscribed only if the video game is obscene, which requires a finding that such games "if taken as whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value..." Miller v. California, 413 U.S. 15, 21 (1973). Regulations limiting a minor's access to a video game face similar constitutional scrutiny: access may be prohibited only if the video game is "harmful to minors," which requires a finding that it depicts nudity, sexual contact, sexual excitement, or sadomasochistic abuse which "predominantly appeals to the prurient, morbid, or shameful interests of minors, which is patently offensive to prevailing standards in the adult community concerning what is suitable for minors and which is utterly without redeeming social importance for minors." Ginsberg v. New York, 390 U.S. 629 (1968). The prohibition against the sale or rental of video games rated "M" or "AO" by the ESRB goes well beyond obscenity guidelines established by U.S. Supreme Court decisions. The proposal is unconstitutional because it makes it a crime to sell or rent to a minor any video game in contravention of its rating. The bill would deny minors access to material that is neither obscene under the Supreme Court in Miller, nor harmful to minors under the standards established by the Supreme Court in Ginsberg, and is thus protected speech.

SB 785 VIOLATES DUE PROCESS

The legislation relies upon the ESRB rating system by prohibiting a minor's access to "M" and "AO" rated games. The incorporation of the ESRB rating system into law is a violation of Due Process. Due Process is violated when a statute delegates the regulation for the operation of a statute to a private association that is not subject to narrowly and reasonably drawn definitive standards. Rosen v. Budco, Inc., et al., 10 Phila. at 112; Motion Picture Association v. Specter, 315 F.Supp. 824 (E.D. Pa 1970) (statute that penalized exhibitors who showed films and previews that were "not suitable" for children as determined by MPAA ratings found unconstitutional for vagueness). The Tennessee Attorney General's Office determined that similar legislation constituted an unauthorized delegation of legislative authority, and was thus unconstitutional, Opinion No. 00-068. The delegation to a private association or rating body,

whether it is the film industry's rating system or the video game industry's ESRB, of local legislative authority is a violation of the Due Process clause.

Courts throughout the country have invalidated the incorporation of MPAA ratings in a variety of statutory contexts. We believe that the legislation's incorporation of the ESRB rating system into law would meet the same fate. See State v. Watkins, 191 S.E. 2d 135 (1972) vacated and remanded on other grounds, Watkins v. South Carolina, 413 U.S. 905 (1973) (exemption from state obscenity statute for films with the "MPAA code seal of Approval" violates Due Process); Potter v. State, 509 P.2d 933 (1973) (obscenity statute that exempted films approved by the MPAA was improper delegation of legislative authority); Drive-In Theater v. Huskey, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating); Daniels Cablevision v. US, 835 F.Supp. 1 (D. D.C. 1993) and in Time Warner Entertainment v. FCC, 93 F.3d 957 (DC Cir. 1996), (the MPAA's rating system cannot be used to measure which movies are indecent and constitutionally protected and which are not).

RESTRICTIONS ON VIOLENT CONTENT ARE UNCONSITITUTIONAL

The prohibition against the sale or rental of video games that depict violence goes well beyond obscenity guidelines established by the U.S. Supreme Court. While the Court stated in Miller that obscenity was not protected by the First Amendment, it has repeatedly held that virtually all other portrayals of behavior, such as violence, are protected by the First Amendment. In Winters v. New York, 333 U.S. 507 (1948), the Court had before it magazines that were "nothing but stories and pictures of bloodshed and lust." 333 U.S. at 512. The Court found that while the magazines had no serious literary or other value they were nevertheless fully protected by the First Amendment. Id. At 510.

In Interstate Circuit, Inc. v. City of Dallas, 391 U.S. 53, 88 S.Ct. 1649 (1968), the Fifth Circuit struck down as overbroad an ordinance which classified as "not suitable for young persons" any film which described or portrayed excessive brutality or criminal violence. The Court found that the restriction on brutality or violence was invalid and held that "the standard for classification must be restricted to the control of obscenity." The Supreme Court in Sovereign News Co. v. Falke, 448 F. Supp. 306 (U.S.DC Ohio 977), cert. denied, 447 U.S. 923 (1980), confirmed that material containing non-obscene violence, brutality, or cruelty could not be banned. Further, the Supreme Court declared an Indianapolis ordinance unconstitutional because it prohibited non-obscene sexual violence. ABA v. William Hudnut, 106 S.Ct. 1172 (1986). The Court reasoned that the First Amendment preserves the right of every speaker in this nation to advocate even unpopular views. Thus, restrictions placed upon the depiction of distasteful, upsetting or socially unacceptable behavior restrain free expression and are unconstitutionally overbroad. The Eighth Circuit Court of Appeals invalidated a statute that prohibited the sale or rental of "violent" videocassettes to minors. VSDA v. Webster, 968 F.2d 684 (1992). A Nassau county ordinance barring the sale of trading cards to minors that depict heinous crimes in Nassau County was declared unconstitutional, Eclipse Enterprise, Inc. v. Gulotta, 134 F.3d 63 (2d Cir. 1997). Bookfriends v. Taft, 233 F.Supp.932 (S.D. Ohio, W. Div. 2002). The Court deemed speech with violent content as fully protected by the First Amendment and enjoined enforcement of Ohio's "harmful to juveniles" law that would have criminalized dissemination to a minor of speech with violent content. The Seventh and Eighth Circuits have held it unconstitutional to limit minors' access to violent video games. AAMA v. Kendrick, (7th Cir. 2001), cert. den.; IDSA v. St. Louis County. Most recently in VSDA v. Maleng, the District Court declared unconstitutional a statute that prohibited the sale or rental of violent video games to minors and rejected the argument obscenity should be expanded to include graphic portrayals of violence.

NO EVIDENCE OF A CAUSAL LINK BETWEEN VIOLENT VIDEO GAMES AND CRIMINAL ACTS

In May 2000, the Washington State Department of Health conducted an extensive study, researching whether a link exists between violent video games and real life violence. After reviewing three databases, identifying 25 reports and looking at three different age groups, the Department of Health concluded that "the research evidence is not supportive of a major public concern that violent video games levels to real life violence." The Department reaffirmed this conclusion in 2002. The National Association of Attorneys General (NAAG) released a report in April 2000, studying the causes of youth violence. The report found that home life and harassment by peers were the number 1 and 2 causes of youth violence in the country.

On January 17, 2001, Surgeon General David Satcher released a comprehensive report, Youth Violence: A Report of the Surgeon General which examined all studies on youth violence, to establish the scope of youth violence in the United States. The report found that youth violence is caused by numerous factors and targets lifestyle decisions, such as drugs, guns and gangs, as the main culprits causing violence in young people. Surgeon General Satcher said, "The report found...that it was extremely difficult to distinguish between the relatively small long-term effects of exposure to media violence and those of other influences."

A report prepared by the FBI, Lessons Learned: A FBI Perspective School Violence Seminar includes a cumulative offender profile of school shooters and listed thirty factors, such as low self-esteem, fascination with firearms and a lack of family support that may be indicators of violent acts. The report did not list playing video games as a factor. In fact, many of the shooters share the factors cited by the FBI including a fascination with guns, dysfunctional family, isolation from peers, emotional problems, prior threats to commit acts of violence, and acts of cruelty to animals. Recently, in VSDA v. Maleng, the Court reviewed the current social science on the effects of video game play and concluded that the research does not show that exposure to violent content produces sudden, actual violent behavior.

MINNESOTA TAXPAYERS WOULD BE LIABLE

Since a statute that singles out constitutionally protected speech is a violation of rights (particularly when based on the content of the speech), prevailing plaintiffs who invalidate the law are entitled to an award of court costs and attorneys' fees. Thus, Minnesota taxpayers would not only bear the cost of defending an invalid law, but also the cost of a successful challenge. In a challenge to a Missouri statute that regulated access to violent video cassettes, the Eighth Circuit required Missouri to pay the plaintiffs nearly $200,000 in court costs and attorneys' fees in VSDA v. Webster. In 2002, Indianapolis paid the arcade industry $318,000 stemming from their successful challenge of a violent arcade game statute in addition to about $400,000 spent in their defense of the ordinance, resulting in criticism from constituents for enacting a law without carefully scrutinizing constitutional issues. St. Louis County paid the IDSA $180,000 for court costs and attorney fees stemming from their challenge of an ordinance prohibiting the sale or rental of violent video games to minors, IDSA v. St Louis County. Most recently, the State of Washington paid almost $350,000 in attorney fees to the ESA, in VSDA v. Maleng, after the U.S. District Court struck down the state's statute prohibiting the sale or rental of violent video games to minors.

SB 785 INTERFERES WITH PARENTAL AUTHORITY

The bill would interfere with the right of parents to make their own decisions regarding which entertainment software products their child should use. The ESA does not believe that it is appropriate to expand the role of government to make personal choices for parents; nor do we believe that parents would support such government intrusion in their lives. We submit that

parents must decide what games, books, and movies their children should see, not the government.

CONCLUSION

As stated, with the ESA working with computer and video game retailers to encourage use of the ESRB rating system and display of the ESRB rating information signage, retailers throughout the State of Minnesota voluntarily enforce the rules of the ESRB rating system. Further, unless a video game meets the narrow definition of obscenity for adults set forth by the Supreme Court in Miller, or is "harmful to minors" in Ginsberg, it may not be prohibited. The legislation requires the enforcement of the ESRB rating system without any legal determination of whether the game is obscene or harmful to minors. Such restrictions are constitutionally invalid and adverse to the public interest in fostering and protecting free speech. Finally, the incorporation in the legislation of the ESRB rating system as a standard to prohibit access to minors to video games unlawfully delegates legislative authority to a private association in violation of the Due Process clause of the U.S. Constitution.

Therefore, for practical reasons as well as for constitutional infirmities, the ESA respectfully urges the Minnesota Legislature to defeat Senate Bill 785.

In the
United States Court of Appeals
For the Seventh Circuit

No. 00-3643

American Amusement Machine Association, et al.,

Plaintiffs-Appellants,

v.

Teri Kendrick, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP00-1321-C H/G--David F. Hamilton, Judge.

Argued December 1, 2000--Decided March 23, 2001

Before Posner, Diane P. Wood, and Williams, Circuit Judges.

Posner, Circuit Judge. The manufacturers of video games and their trade association seek to enjoin, as a violation of freedom of expression, the enforcement of an Indianapolis ordinance that seeks to limit the access of minors to video games that depict violence. Denial of a preliminary injunction has precipitated this appeal.

The ordinance defines the term "harmful to minors" to mean "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" that age, and contains either "graphic violence" or "strong sexual content." "Graphic violence," which is all that is involved in this case (so far as appears, the plaintiffs do not manufacture, at least for exhibition in game arcades and other public places, video games that have "strong sexual content"), is defined to mean "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 [disfigurement]."

The ordinance forbids any operator of five or more video-game machines in one place to allow a minor unaccompanied by a parent, guardian, or other custodian to use "an amusement machine that is harmful to minors," requires appropriate warning signs, and requires that such machines be separated by a partition from the other machines in the location and that their viewing areas be concealed from persons who are on the other side of the partition. Operators of fewer than five games in one location are subject to all but the partitioning restriction. Monetary penalties, as well as suspension and revocation of the right to operate the machines, are specified as remedies for violations of the ordinance.

The ordinance was enacted in 2000, but has not yet gone into effect, in part because we stayed it pending the decision of the appeal. The legislative history indicates that the City believes that participation in violent video games engenders violence on the part of the players, at least when they are minors. The City placed in evidence videotapes of several of the games that it believes violate the ordinance.

Although the district judge agreed with the plaintiffs that video games, possibly including some that would violate the ordinance, are

"speech" within the meaning of the First Amendment and that children have rights under the free-speech clause, he held that the ordinance would violate the amendment only if the City lacked "a reasonable basis for believing the Ordinance would protect children from harm." He found a reasonable basis in a pair of empirical studies by psychologists which found that playing a violent video game tends to make young persons more aggressive in their attitudes and behavior, and also in a larger literature finding that violence in the media engenders aggressive feelings. The judge also ruled that the ordinance's tracking of the conventional standard for obscenity eliminated any concern that the ordinance might be excessively vague.

Having decided that the ordinance did not violate the plaintiffs' constitutional rights, the district judge did not consider the other criteria that might bear on the decision to grant or deny a preliminary injunction. In this appeal too, the parties argue only over whether the ordinance is legal, tempting us to treat this as if it were an appeal from a final judgment in favor of the defendants. We shall consider at the end of the opinion whether there is any occasion for further proceedings in the district court.

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, Winters v. New York, 333 U.S. 507, 518-20 (1948); United States v. Thoma, 726 F.2d 1191, 1200 (7th Cir. 1984) ("depictions of torture and deformation are not inherently sexual and, absent some expert guidance as to how such violence appeals to the prurient interest of a deviant group, there is no basis upon which a

trier of fact could deem such material obscene"); State v. Johnson, 343 So. 2d 705, 709-10 (La. 1977), 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. This would be obvious if a pornographer were to argue that because violence is "like" obscenity yet has not yet been placed on the list of expressive forms that can be regulated on the basis of their content, see, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382-84 (1992); DiMa Corp. v. Town of Hallie, 185 F.3d 823, 827 (7th Cir. 1999), obscenity should be struck from the list.

We shall discover some possible intersections between the concerns that animate obscenity laws and the concerns that animate the Indianapolis ordinance as we proceed, but in general the concerns are different. 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. Miller v. California, 413 U.S. 15, 24 (1973); United States v. Moore, 215 F.3d 681, 686 (7th Cir. 2000); United States v. Langford, 688 F.2d 1088, 1091 (7th Cir. 1982); United States v. Loy, 237 F.3d 251, 262 (3d Cir. 2001). Obscenity is to many people disgusting, embarrassing, degrading, disturbing, outrageous, and insulting, but it generally is not believed to inflict temporal (as distinct from spiritual) harm; or at least the evidence that it does is not generally considered as persuasive as the evidence that other speech that can be regulated on the basis of its content, such as threats of physical harm, conspiratorial communications, incitements, frauds, and libels and slanders, inflicts such

harm. There are people who believe that some forms of graphically sexual expression, not necessarily obscene in the conventional legal sense, may incite men to commit rape, or to disvalue women in the workplace or elsewhere, see, e.g., Catharine A. MacKinnon, Only Words (1993); but that is not the basis on which obscenity has traditionally been punished. 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 are 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, Miller v. California, supra, 413 U.S. at 25; Pope v. Illinois, 481 U.S. 497, 501 n. 4 (1987); United States v. Langford, supra, 688 F.2d at 1091 n. 3, 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. Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942), permits punishment of "fighting words," that is, words likely to cause a breach of the peace--violence. See also R.A.V. v. City of St. Paul, supra, 505 U.S. at 386, 391-92. 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. Nor can such a showing be dispensed with on the ground that preventing violence is as canonical a role of government as shielding people from graphic sexual imagery. The issue in this case is not violence as such, or directly; it is violent images; and here the symmetry with obscenity breaks down. 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.

There is a hint, though, that the City is also concerned with the welfare of the game-playing children themselves, and not just the welfare of their potential victims. This concern is implicit in the City's citation of Ginsberg v. New York, 390 U.S. 629, 639-43 (1968), which holds that potential harm to children's ethical and psychological development is a permissible ground

for trying to shield them from forms of sexual expression that fall short of obscenity. See also FCC v. Pacifica Foundation, 438 U.S. 726, 749-50 (1978). Ginsberg upheld a statute that forbade any representation of nudity that "(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." 390 U.S. at 633. In the present setting, concern with the welfare of the child might take two forms. One is a concern with the potential psychological harm to children of being exposed to violent images, and would be unrelated to the broader societal concern with violence that was the primary motivation for the ordinance. Another, subtler concern would be with the consequences for the child incited or predisposed to commit violent acts by exposure to violent images. In Hoctor v. U.S. Dept. of Agriculture, 82 F.3d 165, 168 (7th Cir. 1996), we noted that the Animal Welfare Act requires secure containment of dangerous animals in part because if they escape and injure a human being they are likely to be killed. A child who is caught and punished for committing a violent act suffers, much as his victim does--indeed, one purpose of punishment is to inflict on the criminal suffering commensurate with that of his victims, either to deter him or others from committing such crimes or (in retributive theory) because it is considered just that he should suffer as his victims do. Obscenity statutes, too, might be thought concerned not just with offensiveness, or with third-party effects (the thrust of the Indianapolis pornography ordinance, a precursor of the present ordinance, invalidated in American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd without opinion, 475 U.S. 1001 (1986)), but also with the potential harm to the consumer of obscenity, especially a child who might be disturbed by graphic sexual images or suffer psychological harm--and thus Ginsberg. See also Osborne v. Ohio, 495 U.S.103,

111 (1990).

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 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. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-14 (1975); Tinker v. Des Moines Independent School District, 393 U.S. 503, 511-14 (1969). 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. And since an eighteen-year-old's right to vote is a right personal to him rather than a right to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. 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 are 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. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own. Protests from readers caused Dickens to revise Great Expectations to give it a happy ending, and tourists visit sites in Dublin

and its environs in which the fictitious events of Ulysses are imagined to have occurred. The cult of Sherlock Holmes is well known.

Most of the video games in the record of this case, games that the City believes violate its ordinances, are stories. Take once again "The House of the Dead." The player is armed with a gun--most fortunately, because he is being assailed by a seemingly unending succession of hideous axe-wielding zombies, the living dead conjured back to life by voodoo. The zombies have already knocked down and wounded several people, who are pleading pitiably for help; and one of the player's duties is to protect those unfortunates from renewed assaults by the zombies. His main task, however, is self-defense. Zombies are supernatural beings, therefore difficult to kill. Repeated shots are necessary to stop them as they rush headlong toward the player. He must not only be alert to the appearance of zombies from any quarter; he must be assiduous about reloading his gun periodically, lest he be overwhelmed by the rush of the zombies when his gun is empty.

Self-defense, protection of others, dread of the "undead," fighting against overwhelming odds--these are all age-old themes of literature, and ones particularly appealing to the young. "The House of the Dead" is not distinguished literature. Neither, perhaps, is "The Night of the Living Dead," George A. Romero's famous zombie movie that was doubtless the inspiration for "The House of the Dead." Some games, such as "Dungeons and Dragons," have achieved cult status; although it seems unlikely, some of these games, perhaps including some that are as violent as those in the record, will become cultural icons. We are in the world of kids' popular culture. But it is not lightly to be suppressed.

Although violent video games appeal primarily to boys, the record contains, surprisingly, a feminist violent video game, "Ultimate Mortal Kombat 3." A man and a woman are dressed in

vaguely medieval costumes, and wield huge swords. The woman is very tall, very fierce, and wields her sword effortlessly. The man and the woman duel, and the man is killed. Another man appears--he is killed too. The woman wins all the duels. She is as strong as the men, she is more skillful, more determined, and she does not flinch at the sight of blood. Of course, her success depends on the player's skill, and the fact that the player, whether male or female, has chosen to be the female fighter. (The player chooses which fighter to be.) But the game is feminist in depicting a woman as fully capable of holding her own in violent combat with heavily armed men. It thus has a message, even an "ideology," just as books and movies do.

We are not persuaded by the City's argument that whatever contribution to the marketplace of ideas and expression the games in the record may have the potential to make is secured by the right of the parent (or guardian, or custodian--and does that include a babysitter?) to permit his or her child or ward to play these games. The right is to a considerable extent illusory. The parent is not permitted to give blanket consent, but must accompany the child to the game room. Many parents are too busy to accompany their child to a game room; most teenagers would be deterred from playing these games if they had to be accompanied by mom; even parents who think violent video games harmful or even edifying (some parents want their kids to develop a shooter's reflexes) may rather prevent their children from playing these games than incur the time and other costs of accompanying the children to the game room; and conditioning a minor's First Amendment rights on parental consent of this nature is a curtailment of those rights.

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 social science evidence on which the City relies consists primarily of the pair of psychological studies that we mentioned earlier, which are reported in Craig A. Anderson & Karen E. Dill, "Personality Processes and Individual Differences--Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life," 78 J. Personality & Soc. Psych. 772 (2000). Those studies do not support the ordinance. There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the interactive character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. 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.

We can imagine the City's arguing that it would like to ban violent movies too, but that either this is infeasible or the City has to start somewhere and should not be discouraged from experimenting. Experimentation should indeed not be discouraged. But the City makes neither argument. Its only expressed concern is with video games, in fact only video games in game arcades, movie-theater lobbies, and hotel game rooms. It doesn't even argue that the addition of violent video games to violent movies and television in the cultural menu of Indianapolis youth significantly increases whatever dangers media depictions of violence pose to healthy character formation or peaceable, law-abiding behavior. Violent video games played in public places are a tiny fraction of the media violence to which modern American children are exposed. Tiny--and judging from the record of this case not very violent compared to what is available to children on television and in movie theaters today. The characters in the video games in the record are cartoon characters, that is, animated drawings. No one would mistake them for photographs of real people--another difference between this case and Ginsberg. The idea that a child's interest in such fantasy mayhem is "morbid"--that any kid who enjoys playing "The House of the Dead" or "Ultimate Mortal Kombat 3" should be dragged off to a psychiatrist--gains no support from anything that has been cited to us in defense of the ordinance.

Ginsberg did not insist on social scientific evidence that quasi-obscene images are harmful to children. The Court, as we have noted, thought this a matter of common sense. It was in 1968; it may not be today; but that is not our case. We are not concerned with the part of the Indianapolis ordinance that concerns sexually graphic expression. The video games at issue in this case do not involve sex, but instead a children's world of violent adventures. 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.

It is conceivable though unlikely that in a plenary trial the City can establish the legality of the ordinance. We need not speculate on what evidence might be offered, or, if none is offered (in which event a permanent injunction should promptly be entered), what amendments might bring the ordinance into conformity with First Amendment principles. 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.

That we need not decide today. The plaintiffs are entitled to a preliminary injunction. Not only have they shown a strong likelihood of ultimate victory should the City persist with the case; they will suffer irreparable harm if the ordinance is permitted to go into effect, because compliance with it will impose costs on them of altering their facilities and will also cause them to lose revenue. And given the entirely conjectural nature of the benefits of the ordinance to the people of Indianapolis, the harm of a preliminary injunction to the City must be reckoned slight, and outweighed by the harm that denying the injunction would impose on the plaintiffs. The judgment is therefore reversed, and the case remanded with instructions to enter a preliminary injunction.

Reversed and Remanded, with Instructions.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-3010

Interactive Digital Software Association; Missouri Retailers Association; Video Software Dealers Association; American Amusement Machine Association; Amusement & Music Operators Association; Interactive Entertainment Merchants Association; BFC Enterprises, Inc.; J.S. Morris and Sons Novelty Company; Vending Enterprises, doing business as Midwest Enterprises, Inc.; Wonder Novelty Co.,	*	
Appellants,	*	
v.	*	Appeal from the United States District Court for the Eastern District of Missouri.
St. Louis County, Missouri; George R. Westfall, in his official capacity as County Executive of St. Louis County, Missouri; Ronald A. Battelle, in his official capacity as Chief of Police of St. Louis County, Missouri,	*	
Appellees.	*	
Thirty-Three Media Scholars; International Game Developers Association; ID Software, Incorporated; American Booksellers Foundation for	*	

Free Expression; Association of American Publishers, Incorporation; Freedom to Read Foundation; International Periodical Distributors Association; Motion Picture Association of America, Incorporated; Publishers Marketing; Recording Industry Association of America; The Thomas Jefferson Center for the Protection of Free Expression; American Civil Liberties Union,

Amici on Behalf of Appellant.

The Lion & Lamb Project; City of Indianapolis,

Amici on Behalf of Appellee.

Submitted: March 12, 2003

Filed: June 3, 2003

Before BOWMAN, MORRIS SHEPPARD ARNOLD, and RILEY, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This is a suit to enjoin the enforcement of St. Louis County Ordinance No. 20,193 (Oct. 26, 2000), which amends Chapter 602 of the St. Louis County Revised Ordinances by adding new sections 602.425 through 602.460. The ordinance, in relevant part, makes it unlawful for any person knowingly to sell, rent, or make available graphically violent video games to minors, or to "permit the free play of"

graphically violent video games by minors, without a parent or guardian's consent.[1] The plaintiffs (companies or associations of companies that create, publish, distribute, sell, rent, and make available to the public video games and related software) assert that the ordinance violates the right of free speech guaranteed by the first amendment.

The plaintiffs moved for summary judgment, seeking to have the ordinance declared unconstitutional; the district court denied that motion. *Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002). Because the district court had considered and upheld the constitutionality of the ordinance in the course of ruling on the plaintiffs' motion for summary judgment, the district court *sua sponte* dismissed the case. This appeal ensued. We reverse and remand with directions to the district court to enter an injunction that is not inconsistent with this opinion.

I.

In rejecting the plaintiffs' constitutional challenge to the ordinance, the district court first concluded that video games were not a protected form of speech under the first amendment. *Id.* at 1135. The district court believed that, because video games are a new medium, they must "be designed to express or inform, and there has to be a likelihood that others will understand that there has been some type of expression" before they are entitled to constitutional protection. *Id.* at 1132-33, 1134. But the Supreme Court has long emphasized that the first amendment protects "[e]ntertainment, as well as political and ideological speech," *see Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981), and that a "particularized message" is not required for speech to be constitutionally protected, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995) (internal quotation omitted). *See also Winters v. New York*, 333 U.S. 507, 510 (1948).

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[1]The ordinance also restricts minors' access to video games with strong sexual content, but plaintiffs do not challenge those provisions of the ordinance.

The record in this case includes scripts and story boards showing the storyline, character development, and dialogue of representative video games, as well as excerpts from four video games submitted by the County. If the first amendment is versatile enough to "shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll," *Hurley*, 515 U.S. at 569, we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to a similar protection. The mere fact that they appear in a novel medium is of no legal consequence. Our review of the record convinces us that these "violent" video games contain stories, imagery, "age-old themes of literature," and messages, "even an 'ideology,' just as books and movies do." *See American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001). Indeed, we find it telling that the County seeks to restrict access to these video games precisely because their content purportedly affects the thought or behavior of those who play them. *See* Preamble to St. Louis County Ordinance No. 20,193 (Oct. 26, 2000).

We recognize that while children have in the past experienced age-old elemental violent themes by reading a fairy tale or an epic poem, or attending a Saturday matinee, the interactive play of a video game might present different difficulties. *See American Amusement*, 244 F.3d at 577-78. The County suggests in fact that with video games, the story lines are incidental and players may skip the expressive parts of the game and proceed straight to the player-controlled action. But the same could be said of action-packed movies like "The Matrix" or "Charlie's Angels"; any viewer with a videocassette or DVD player could simply skip to and isolate the action sequences. The fact that modern technology has increased viewer control does not render movies unprotected by the first amendment, and equivalent player control likewise should not automatically disqualify modern video games that are "analytically indistinguishable from ... protected media such as motion pictures." *See Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002).

We note, moreover, that there is no justification for disqualifying video games as speech simply because they are constructed to be interactive; indeed, literature is most successful when it "draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own," *American Amusement*, 244 F.3d at 577. In fact, some books, such as the pre-teen oriented "Choose Your Own Nightmare" series (in which the reader makes choices that determine the plot of the story, and which lead the reader to one of several endings, by following the instructions at the bottom of the page) can be every bit as interactive as video games.

Whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the first amendment, we are obliged to recognize that "they are as much entitled to the protection of free speech as the best of literature." *See Winters*, 333 U.S. at 510. We must therefore determine whether the County has advanced a constitutional justification for the ordinance's restrictions on speech.

II.

Because the ordinance regulates video games based on their content (the ordinance applies only to "graphically violent" video games), we review it according to a strict scrutiny standard. *See United States v. Dinwiddie*, 76 F.3d 913, 921 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992). We reject the County's suggestion that we should find that the "graphically violent" video games in this case are obscene as to minors and therefore entitled to less protection. It is true that obscenity is one of the few categories of speech historically unprotected by the first amendment. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992). But we have previously observed that "[m]aterial that contains violence but not depictions or descriptions of sexual conduct cannot be

obscene." *Video Software*, 968 F.2d at 688. Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults. *See id.*

A content-based restriction on speech is presumptively invalid, and the County therefore bears the burden of demonstrating that the ordinance is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end. *See R.A.V.*, 505 U.S. at 382, 395. The County first suggests that the ordinance forwards the compelling state interest of protecting the "psychological well-being of minors" by reducing the harm suffered by children who play violent video games. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). We do not question that the County's interest in safeguarding the psychological well-being of minors is compelling in the abstract. *See id.*; *see also New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Video Software*, 968 F.2d at 689. Yet when the government defends restrictions on speech "it must do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion) (internal citation and quotation omitted). We believe that the County "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*

The County's conclusion that there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health is simply unsupported in the record. It is true that a psychologist appearing on behalf of the County stated that a recent study that he conducted indicates that playing violent video games "does in fact lead to aggressive behavior in the immediate situation ... that more aggressive thoughts are reported and there is frequently more aggressive behavior." But this vague generality falls far short of a showing that video games are psychologically deleterious. The County's remaining evidence included the conclusory comments of county council members; a small number of ambiguous, inconclusive, or irrelevant (conducted on adults, not minors) studies; and the

testimony of a high school principal who admittedly had no information regarding any link between violent video games and psychological harm.

Before the County may constitutionally restrict the speech at issue here, the County must come forward with empirical support for its belief that "violent" video games cause psychological harm to minors. In this case, as we have already explained, the County has failed to present the "substantial supporting evidence" of harm that is required before an ordinance that threatens protected speech can be upheld. *See Eclipse Enters. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997); *see Turner*, 512 U.S. at 666; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000). We note, moreover, contrary to the district court's suggestion, that the County may not simply surmise that it is serving a compelling state interest because "[s]ociety in general believes that continued exposure to violence can be harmful to children," *Interactive Digital*, 200 F. Supp.2d at 1137. *See American Amusement*, 244 F.3d at 578. Where first amendment rights are at stake, "the Government must present more than anecdote and supposition." *Playboy Entm't*, 529 U.S. at 822.

The County next asserts that it has a compelling interest in "assisting parents to be the guardians of their children's well-being." Indeed, the ordinance states that "parents and guardians should have the power to control the types of games their children play and to control their exposure to violent and sexual materials." Preamble to St. Louis County Ordinance No. 20,193. While it is beyond doubt that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), the question here is whether the County constitutionally may limit first amendment rights as a means of aiding parental authority. We hold that, under the circumstances presented in this case, it cannot.

We believe that *Ginsberg*, the primary case cited by the County in support of its position, is inapposite because it invokes the much less exacting "rational basis"

standard of review. *See Ginsberg*, 390 U.S. at 639, 641. In *Ginsberg*, the Supreme Court recognized that the government could legitimately regulate sexually explicit material that is obscene as to minors but not obscene as to adults. *See Ginsberg*, 390 U.S. at 636-640. But *Ginsberg* did not involve protected speech (like the speech at issue in this case), and thus the Supreme Court merely needed to determine whether "it was *rational* for the legislature to find that the minors' exposure to [sex] material might be harmful. ... *The legislature could properly conclude* that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* at 639 (emphasis added). Nowhere in *Ginsberg* (or any other case that we can find, for that matter) does the Supreme Court suggest that the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to governments to regulate what minors read and view.

We do not mean to denigrate the government's role in supporting parents, or the right of parents to control their children's exposure to graphically violent materials. We merely hold that the government cannot silence protected speech by wrapping itself in the cloak of parental authority. To that end, we are guided by the Supreme Court's recognition that "[s]peech 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 the government seeks to control the flow of information to minors." *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975). To accept the County's broadly-drawn interest as a compelling one would be to invite legislatures to undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority.

III.

Because we have already determined that the ordinance cannot survive strict constitutional scrutiny, we do not reach the issue of whether the ordinance is unconstitutionally vague. We also need not consider whether the district court erred in dismissing the case *sua sponte*.

We therefore reverse the judgment of the district court and remand the case for entry of an injunction that is not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

03-CV-01245-BR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIDEO SOFTWARE DEALERS ASSOCIATION, *et al.*,

Plaintiffs,

v.

NORM MALENG, *et al.*,

Defendants.

No. C03-1245L

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART DEFENDANTS' CROSS-MOTION

This matter comes before the Court on "Plaintiffs' Motion for Summary Judgment" and defendants' "Cross Motion for Summary Judgment." Plaintiffs are companies and associations of persons that create, publish, distribute, sell, rent, and/or make available to the public computer and video games. Plaintiffs brought this action seeking to enjoin enforcement of RCW 9.91.180 (previously identified as Washington House Bill No. 1009, 58th Leg., Reg. Sess. (2003) and hereinafter identified as "the Act") on the ground that the Act violates the First Amendment by creating penalties for the distribution of computer and video games to minors based solely on their content and viewpoint. Similar disputes have erupted across the country as state and local governments have attempted to regulate the dissemination of violent video games to children. As of this date, no such regulation has passed constitutional muster. See Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); American Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001); Video Software Dealers Ass'n v.

Webster, 968 F.2d 684 (8th Cir. 1992). See also James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002) (private party's attempt to impose tort liability based on the dissemination of video games fails in light of countervailing First Amendment interests); Wilson v. Midway Games, Inc., 198 F. Supp.2d 167 (D. Conn. 2002) (same); Sanders v. Acclaim Entm't, Inc., 188 F. Supp.2d 1264 (D. Colo. 2002) (same). Having reviewed the memoranda, declarations, and exhibits submitted by the parties, having considered the arguments of counsel, and having reviewed the record as a whole,[1] the Court finds as follows:

I. STANDING

As an initial matter, defendants argue that plaintiffs do not have standing to challenge the Act on any ground other than overbreadth because plaintiffs have not alleged that their First Amendment rights would be violated if the Act were enforced. If plaintiffs were not asserting personal injuries, they might bear the heavy burden of proving that there is no limiting construction that could be placed on the Act to avoid the alleged constitutional infirmity. See Broadrick v. Oklahoma, 413 U.S. 601, 610-13 (1973). Defendants' underlying assertion is incorrect, however: plaintiffs have asserted their own First Amendment rights (Complaint at ¶ 20) and, in the context of the preliminary injunction motion, identified various injuries that they as game creators, distributors, and retailers would suffer if the Act became effective. Those potential injuries have not changed and plaintiffs have standing to challenge the constitutionality of the Act insofar as it directly affects the content and distribution of their speech. In addition, plaintiffs have standing to assert the First Amendment rights of their consumers, the minors who would be deprived of access under the Act. See Broadrick, 413 U.S. at 612 (in the First Amendment area, the Supreme Court has "altered its traditional rules of standing to permit . . . 'attacks on overly broad statutes with no requirement that the person making the attack

[1] Defendants' motion to strike the statement of Dr. Goldstein and plaintiffs' motion for a continuance under Rule 56(f) are DENIED.

demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Dombrowski v. Pfister, 380 U.S. [479, 486 (1965)]."); American Amusement Mach. Ass'n, 244 F.3d at 576-77 (allowing video game manufacturers to champion the First Amendment rights of children).

Defendants also suggest that this Court should refrain from ruling on the constitutionality of the Act until the courts of the State of Washington have had an opportunity to construe it. In the circumstances of this case (where enforcement of the Act has been enjoined), the only way the state courts would have an opportunity to interpret the Act is through the certification process. Defendants have not, however, asked the Court to certify questions to the state Supreme Court or identified issues of state law the resolution of which would overcome the First Amendment issues discussed below. To the extent defendants are arguing that the Court should abstain from deciding the constitutional issues under Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941), the significant risks of irreparable injury to plaintiffs' First Amendment rights while the parties wait for cases to wend their way through the state court system make abstention inappropriate. See Porter v. Jones, 319 F.3d 483, 486-87 (9th Cir. 2003) ("It is rarely appropriate for a federal court to abstain under Pullman in a First Amendment case, because there is a risk in First Amendment cases that the delay that results from abstention will itself chill the exercise of the rights that the plaintiff seek to protect by suit.").

II. PROTECTED SPEECH

The party claiming the protections of the First Amendment has the burden of showing that the conduct at issue expresses some idea or thought. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984). Communications designed to entertain the listener, rather than to impart information or debate public affairs, are eligible for constitutional protections. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). In evaluating a person's claim that conduct is expressive, the Court considers "whether an intent to convey a

particularized message is present, and whether the likelihood is great that the message would be understood by those who viewed it." Nordyke v. King, 319 F.3d 1185, 1189 (9th Cir. 2003) (citation and internal quotation marks omitted), reh'g en banc denied, 364 F.3d 1025 (9th Cir. 2004).

The early generations of video games may have lacked the requisite expressive element, being little more than electronic board games or computerized races. The games at issue in this litigation, however, frequently involve intricate, if obnoxious, story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experience. All of the games provided to the Court for review are expressive and qualify as speech for purposes of the First Amendment. In fact, it is the nature and effect of the message being communicated by these video games which prompted the state to act in this sphere. As noted by the Eighth Circuit: "Whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the [F]irst [A]mendment, we are obliged to recognize that 'they are as much entitled to the protection of free speech as the best of literature.'" Interactive Digital Software Ass'n, 329 F.3d at 958 (citing Winters v. New York, 333 U.S. 507, 510 (1948)). The Court finds that the games at issue are expressive and qualify for the protections of the First Amendment.

Defendants argue that, even if the video games regulated under the Act are expressive, they fall into one of the few categories of speech that have been historically unprotected, in this case, obscenity. Defendants correctly point out that the phrase "obscene material" is not inherently limited to sexually-explicit materials. The Latin root "obscaenus" literally means "of filth" and has been defined to include that which is "disgusting to the senses" and "grossly repugnant to the generally accepted notions of what is appropriate." See Miller v. California, 413 U.S. 15, 18 n.2 (1973). Graphic depictions of depraved acts of violence, such as the murder, decapitation, and robbery of women in Grand Theft Auto: Vice City, fall well within the more general definition of obscenity. Nevertheless, the Supreme Court has found that, when

used in the context of the First Amendment, the word "obscenity" means material that deals with sex. Id. Only "works which depict or describe sexual conduct" are considered obscene and therefore unprotected. State statutes designed to regulate obscene material must be drafted narrowly to cover only "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller, 413 U.S. at 24.

Defendants acknowledge that the Act does not regulate works that depict sexual conduct. Undaunted by the clear pronouncements of the Supreme Court regarding the limited scope of materials that are subject to regulation as obscene, defendants argue that the Court should expand the definition of obscenity to include graphic portrayals of violence. No court has accepted such an argument, probably because existing case law does not support it. In addition to the fact that the Supreme Court has expressly limited "obscenity" to include only sexually-explicit materials, the historical justifications for the obscenity exception simply do not apply to depictions of violence. Sexually-explicit materials were originally excluded from the protections of the First Amendment because the prevention and punishment of lewd speech has very little, if any, impact on the free expression of ideas and government regulation of the sexually obscene has never been thought to raise constitutional problems. Roth v. United States, 354 U.S. 476, 484-85 (1957). The same cannot be said for depictions of violence: such depictions have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation. The Court declines defendants' invitation to expand the narrowly-defined obscenity exception to include graphic depictions of violence.

Finally, defendants argue that the state should be permitted to determine what speech or ideas are wholesome enough to disseminate to minors, even if the speech is protected under the First Amendment and does not satisfy the imminent lawlessness analysis of

Brandenburg v. Ohio, 395 U.S. 444 (1969). Defendants rely heavily on Ginsberg v. New York, 390 U.S. 629 (1968), to support their theory that the state can regulate any speech that is "harmful to minors." Although the Supreme Court has used a "harmful to minors" analysis to broaden the definition of obscene material, the decision in Ginsberg is based on the fact that sexually-explicit material is not entitled to the protections of the First Amendment. The statute at issue in Ginsberg did not create an entirely new category of unprotected speech: rather, it adjusted the Roth definition of obscene material to capture that which is of sexual interest to minors.

Defendants have not identified, and the Court has not found, any case in which a category of otherwise protected expression is kept from children because it might do them harm. Defendants' cannot prohibit the dissemination of otherwise protected speech simply because the audience consists of minors. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideals 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 the government seeks to control the flow of information to minors." Erznoznik v. Jacksonville, 422 U.S. 205, 213-14 (1975).

III. Strict Scrutiny

Because the video and computer games at issue in this litigation are expressive speech that is entitled to the full protections of the First Amendment, strict scrutiny applies. It is undisputed that the Act seeks to regulate plaintiffs' speech based on its content (as opposed to the time, manner, and place in which it is published).[2] Content-based regulations are

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[2] In a footnote, defendants acknowledge that the Act is a content-based restriction, but argue that the restrictions are viewpoint neutral. It is not clear what relevance this distinction has in this case. In order to justify restrictions on speech in a limited public forum, the state must show that it has not discriminated on the basis of viewpoint. See Good News Club v. Milford Central Sch., 533 U.S. 98, 106-07 (2001). The forum at issue does not fall within that category, however, and the fact that the

presumptively invalid (R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)) and are rarely permitted (United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 818 (2000)). Under this analysis, the Act will be upheld only if defendants can show that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that interest. Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002).

A. Compelling State Interest

In enacting House Bill 1009, the Legislature noted two compelling interests: (1) "to curb hostile and antisocial behavior in Washington's youth" and (2) "to foster respect for public law enforcement officers." Apparently recognizing the constitutional problems associated with attempting to regulate speech because it is anti-government, defendants have merged these two purposes, arguing that "[t]he Legislature was motivated to curb hostile and antisocial behavior of youths, including violence and aggression toward law enforcement officers." Response at 21.

Federal courts have repeatedly recognized that the state has a legitimate and compelling interest in safeguarding both the physical and psychological well-being of minors. See Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989); Interactive Digital, 329 F.3d at 958. One could argue that the Act is intended to protect youth from psychological desensitization and the development of aggressive feelings/behaviors. Simply identifying a compelling state interest is not enough, however:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434, 1455 (D.C. Cir. 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these

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restriction is content-based is sufficient to give rise to strict scrutiny. In addition, the fact that the Act regulates only speech that is anti-law enforcement (*i.e.*, depicting violence against law enforcement officers is prohibited but the portrayal of the same acts against children is not) makes the claim of viewpoint neutrality doubtful.

> harms in a direct and material way. See Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); Los Angeles v. Preferred Communications, Inc., 476 U.S. [488, 496 (1986)] ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity") (internal quotation marks omitted) . . . .

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 667, 664-65 (1994). See also Playboy, 529 U.S. at 816-17. If the state is able to show that the psychological well-being of Washington's youth is in genuine jeopardy, it has the additional burden of showing that the regulation is narrowly tailored to address that problem "without unnecessarily interfering with First Amendment freedoms." Sable Communications, 492 U.S. at 126.

The disease the Legislature apparently seeks to cure is the game-related increase in hostile and antisocial behavior in minors, particularly toward law enforcement officers. Defendants rely heavily on the Legislature's finding that "there has been an increase in studies showing a correlation between exposure to violent video and computer games and various forms of hostile and antisocial behavior."[3] In general, courts must "accord substantial deference to the predictive judgments" of the legislature. Turner Broad. Sys., 512 U.S. at 665 (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973)). Where the challenged legislation restricts or limits freedom of speech, however, the courts must ensure that the

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[3] To the extent the Act is designed to prevent future, rather than immediate, acts of violence, the Supreme Court and the Ninth Circuit have expressly rejected the idea that the possibility of future harm can justify the regulation of speech. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002) ("The prospect of crime, however, by itself does not justify laws suppressing protected speech."); Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 689 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech.") (internal quotation marks and citation omitted); Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1199-1200 (9th Cir. 1989) ("Numerous cases establish that speech may not be suppressed simply because it is offensive. . . . Instead, a large body of case law sharply limits the reach of these categories by requiring that the speech be directed toward and likely to incite imminent unlawful action.") (internal citations omitted). Defendants have expressly disavowed any attempt to satisfy the Brandenburg analysis and cannot justify the Act by asserting the possibility of future harm.

legislature's judgments are based on reasonable inferences drawn from substantial evidence. Turner Broad. Sys., 512 U.S. at 666; Century Communications Corp. v. F.C.C., 835 F.2d 292, 304 (D.C. Cir. 1987) ("when trenching on [F]irst [A]mendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures").

Defendants have produced expert reports and a number of studies which find a correlation between a minor's exposure to depictions of violence and the development of aggressive tendencies and anti-social behaviors. Plaintiffs have produced their own expert report, a like number of studies, and a presentation by the State's Department of Health which conclude that no causal connection between playing violent video games and real-life violence has been established. As discussed above, this Court must ensure that the predictive judgments that prompted the legislature to act are based on reasonable inferences drawn from substantial evidence. Having reviewed all of the evidence provided by the parties in the light most favorable to defendants, the Court finds that defendants have presented research and expert *opinions from which one could reasonably infer that* the depictions of violence with which we are constantly bombarded in movies, television, computer games, interactive videos games, *etc.*, have some immediate and measurable effect on the level of aggression experienced by some viewers and that the unique characteristics of video games, such as their interactive qualities, the first-person identification aspect, and the repetitive nature of the action, makes video games potentially more harmful to the psychological well-being of minors than other forms of media. In addition, virtually all of the experts agree that prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or anti-social behavior (other factors include family problems, problems with peers at school and in the neighborhood, biological factors, *etc.*).

Nevertheless, the Court finds that the current state of the research cannot support the legislative determinations that underlie the Act because there has been no showing that

exposure to video games that "trivialize violence against law enforcement officers" is likely to lead to actual violence against such officers. Most of the studies on which defendants rely have nothing to do with video games, and none of them is designed to test the effects of such games on the player's attitudes or behavior toward law enforcement officers. Where the studies do involve exposure to video games, the subjects are often asked to play games selected by the researcher and are then evaluated for behaviors that serve as proxies for actual aggression. Assuming, for sake of argument, that the frustrations inherent in learning a new game or console system are not responsible for any measurable increase in hostility, neither causation nor an increase in real-life aggression is proven by these studies.[4] That is not to say that the video games presented to the Court are unobjectionable. To the contrary, many of them promote hateful stereotypes and portray levels of violence and degradation that are repulsive. The Court, along with virtually every entity that has considered this issue, hopes that more research is done to determine the long-term effects of playing violent video games on children and adolescents. Although "[w]e do not demand of legislatures scientifically certain criteria of legislation" (Ginsberg, 390 U.S. at 642 (internal quotation marks omitted)), given the state of the existing research in this area, the Court finds that the Legislature's belief that video games cause violence, particularly violence against law enforcement officers, is not based on reasonable inferences drawn from substantial evidence.

In the absence of substantial evidence supporting the Legislature's prediction that the regulation of violent video games will curb hostile and anti-social behavior in youths, particularly toward law enforcement officers, it is virtually impossible to conclude that "the

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[4] Even if one accepts the basic premise that interactive games involving repetitive actions "teach" the player certain skills, the evidence as it currently exists suggests only that players are taught improved reaction time, eye/hand coordination, and how to score points in the game. Dr. Provenzo's concern that a person playing Grand Theft Auto: Vice City will learn how to shoot a police officer is little more than conjecture: a proven ability to manipulate a controller and push buttons will not teach a person to load, aim, or fire a gun.

regulation will in fact alleviate [the identified] harms in a direct and material way." Turner Broad. Sys, 512 U.S. at 664-65. Defendants argue that the Act is just the first step toward stamping out all game-related aggression and that they should not be faulted for focusing their first regulatory efforts on just one type of violence. The problem with this approach is that the Act is both over-inclusive and under-inclusive. If the Legislature hopes to prevent game-inspired hostility toward law enforcement officers, the Act sweeps too broadly in that it would restrict access to games that reflect heroic struggles against corrupt regimes, involve accidental injuries to officers, and/or contain disincentives for violence against law enforcement officers. At the same time, the Act is too narrow in that it will have no effect on the many other channels through which violent representations are presented to children. As a step toward reducing game-related aggression as a whole, the Act would be particularly ineffective because it would not keep minors from playing some of the most offensive and violent video games. Only those games involving law enforcement officers would be off-limits, leaving vile portrayals of mutilation and murder of other persons (often women and minorities) unregulated and widely available to minors. Even if defendants were able to show a causal connection between violent video games and real-life aggression in minors, the record does not support a finding that the Act is likely to curb such aggression in a direct and material way

B. Narrowly Tailored to Further Compelling State Interest

Where strict scrutiny applies, courts strike down speech restrictions "[i]f a less restrictive alternative would serve the Government's interest." Playboy, 529 U.S. at 813. Even the less exacting test applied to content-neutral regulations requires that the state show "that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" Turner Broad. Sys., 512 U.S. at 665 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). The Court finds that, even if the state's interest in preventing video game-related violence toward law enforcement officers were compelling, the limitations imposed by the Act impact more constitutionally protected speech than is necessary

to achieve the identified ends and are not the least restrictive alternative available.

As this litigation has progressed, defendants and their experts have asserted that "ultra-violent" video games cause aggression and must be regulated in order to further the state's compelling interests. The Act, however, does not simply regulate games "in which a high level of realistic violence is sustained" throughout play (Opposition at 2) and is not limited to the most vile portrayals of violence. Rather, the Act regulates all "video or computer game[s] that contain[] realistic or photographic-like depictions of aggressive conflict in which the player kills, *injures, or otherwise causes physical harm to a human form in the game who is* depicted, by dress or other recognizable symbols, as a public law enforcement officer." This definition is expansive and does not attempt to regulate the dissemination of video games on the basis of the extremity of the violence portrayed -- even the most loathsome acts are not covered as long as the victim is anyone other than a "public law enforcement officer." Where the victim is identified as a law enforcement officer, however, the distribution of games that contain even relatively common forms of violence, reflect laudable struggles against evil authority figures, depict unintentional harm, or have very limited violent content, is restricted. In short, the regulation of speech at issue here is not limited to the ultra-violent or the patently offensive and is far broader than what would be necessary to keep filth like Grand Theft Auto III and Postal II out of the hands of children.

For all of the foregoing reasons, the Act "does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression." Erznoznik, 422 U.S. at 217. Given the nationwide, on-going dispute in this area, it is reasonable to ask whether a state may ever impose a ban on the dissemination of video games to children under 18. The answer is "probably yes" if the games contain sexually explicit images (see Ginsberg, 390 U.S. at 634-38; American Amusement Mach., 244 F.3d at 574-76, 579), and "maybe" if the games contain violent images, such as torture or bondage, that appeal to the

prurient interest of minors (see Miller, 413 U.S. at 24). State attempts to regulate ultra-violent video games that have no sexual component have failed for a number of reasons, including those set forth above. While the Court cannot give advisory opinions on cases or controversies not before it, future attempts to regulate video games on the basis of their content will be analyzed under a framework such as the Court has undertaken here. Key considerations will be:

-- does the regulation cover only the type of depraved or extreme acts of violence that violate community norms and prompted the legislature to act?

-- does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint or status? and

-- do the social scientific studies support the legislative findings at issue?

IV. VAGUENESS

Legislative enactments must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Defendants steadfastly refuse to identify the range of video games the state seeks to regulate under the Act, leaving many unanswered questions for the Court, retailers, and authors to ponder. The language of the statute itself is broad and covers all "video or computer game[s] that contain[] realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer." Would a game built around The Simpsons or the Looney Tunes characters be "realistic" enough to trigger the Act? Is the level of conflict represented in spoofs like the Dukes of Hazard sufficiently "aggressive?" Do the Roman centurions of Age of Empires, the enemy officers depicted in Splinter Cell, or the conquering forces of Freedom Fighters qualify as "public law enforcement officers?" When pressed at oral argument, defense counsel was unable to determine whether firefighters were "public law enforcement officers," suggesting that such

issues should be determined by the state courts. As noted above, however, there is a substantial risk that plaintiffs' exercise of their First Amendment rights would be chilled while each issue of interpretation is presented to the state courts, thereby depriving plaintiffs of the very rights they seek to protect in this suit.

The problem is not, as defendants suggest, that a retail clerk might be unaware of the contents of a particular game: such a situation may give rise to a defense to an action brought under the Act but it is not a vagueness issue. The real problem is that the clerk might know everything there is to know about the game and yet not be able to determine whether it can legally be sold to a minor. The effects of such vagueness are particularly troublesome where First Amendment rights are implicated. Not only is a conscientious retail clerk (and her employer) likely to withhold from minors all games that could possibly fall within the broad scope of the Act, but authors and game designers will likely "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked." Grayned, 408 U.S. at 109 (internal quotation marks omitted). Given the fact that rights of free expression are at stake, the Court finds that the Act is unconstitutionally vague.

V. PRIOR RESTRAINT

Defendants' request for dismissal of plaintiffs' claim that the Act constitutes a prior restraint on speech is unopposed. Count III of plaintiffs' complaint is therefore, dismissed.

VI. EQUAL PROTECTION

Defendants' request for dismissal of plaintiffs' claim that the Act violates their right to equal protection under the law is unopposed. Count IV of plaintiffs' complaint is therefore, dismissed.

For all of the foregoing reasons, defendants and their officers, employees, and

representatives are permanently enjoined from enforcing RCW 9.91.180. Counts III and IV of plaintiffs' complaint are hereby DISMISSED. The Clerk of Court is directed to enter judgment in the above-captioned matter in favor of plaintiffs and against defendants.

DATED this 15th day of July, 2004.

Robert S. Lasnik
United States District Judge

Senate Counsel, Research, and Fiscal Analysis

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S.F. No. 1036 -CrimNet Policy Group Membership Changes

Author: Senator Julianne Ortman

Prepared by: Chris Turner, Senate Research (651/296-4350) CT

Date: March 7, 2005

The bill modifies the membership of the Criminal and Juvenile Justice Information Policy Group (otherwise know as the CrimNet Policy Group), by removing the Commissioner of Finance, lowering from four to three the number of judges appointed by the Chief Justice of the Supreme Court, and adding three members to be appointed by the Governor. The three governor-appointees must be employees or elected officials of local governmental units, and may be appointed only after consultation with the following groups:

Minnesota Sheriffs Association;
Minnesota Chiefs of Police Association;
Minnesota County Attorneys Association;
League of Minnesota Cities;
Minnesota Association of Counties;
Metropolitan Inter-County Association; and
Minnesota Association of Community Corrections Act Counties.

The bill is effective July 1, 2005.

CT:vs

Senators Ortman, McGinn and Neuville introduced--

S.F. No. 1036: Referred to the Committee on Crime Prevention and Public Safety.

A bill for an act

relating to public safety; reforming the CriMNet policy group; amending Minnesota Statutes 2004, section 299C.65, subdivision 1.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2004, section 299C.65, subdivision 1, is amended to read:

Subdivision 1. [MEMBERSHIP, DUTIES.] (a) The Criminal and Juvenile Justice Information Policy Group consists of the commissioner of corrections, the commissioner of public safety, the commissioner of administration, ~~the commissioner of finance, and four~~ three members of the judicial branch appointed by the chief justice of the Supreme Court, and three members appointed by the governor. The members appointed by the governor must be employees or elected officials of local governmental units and selected only after consultation with the Minnesota Sheriffs Association, the Minnesota Chiefs of Police Association, the Minnesota County Attorneys Association, the League of Minnesota Cities, the Minnesota Association of Counties, the Metropolitan Inter-County Association, and the Minnesota Association of Community Corrections Act Counties. The policy group may appoint additional, nonvoting members as necessary from time to time.

(b) The commissioner of public safety is designated as the chair of the policy group. The commissioner and the policy

group have overall responsibility for the successful completion of statewide criminal justice information system integration (CriMNet). The policy group may hire a program manager to manage the CriMNet projects and to be responsible for the day-to-day operations of CriMNet. The policy group must ensure that generally accepted project management techniques are utilized for each CriMNet project, including:

(1) clear sponsorship;

(2) scope management;

(3) project planning, control, and execution;

(4) continuous risk assessment and mitigation;

(5) cost management;

(6) quality management reviews;

(7) communications management; and

(8) proven methodology.

(c) Products and services for CriMNet project management, system design, implementation, and application hosting must be acquired using an appropriate procurement process, which includes:

(1) a determination of required products and services;

(2) a request for proposal development and identification of potential sources;

(3) competitive bid solicitation, evaluation, and selection; and

(4) contract administration and close-out.

(d) The policy group shall study and make recommendations to the governor, the Supreme Court, and the legislature on:

(1) a framework for integrated criminal justice information systems, including the development and maintenance of a community data model for state, county, and local criminal justice information;

(2) the responsibilities of each entity within the criminal and juvenile justice systems concerning the collection, maintenance, dissemination, and sharing of criminal justice information with one another;

(3) actions necessary to ensure that information maintained

in the criminal justice information systems is accurate and up-to-date;

(4) the development of an information system containing criminal justice information on gross misdemeanor-level and felony-level juvenile offenders that is part of the integrated criminal justice information system framework;

(5) the development of an information system containing criminal justice information on misdemeanor arrests, prosecutions, and convictions that is part of the integrated criminal justice information system framework;

(6) comprehensive training programs and requirements for all individuals in criminal justice agencies to ensure the quality and accuracy of information in those systems;

(7) continuing education requirements for individuals in criminal justice agencies who are responsible for the collection, maintenance, dissemination, and sharing of criminal justice data;

(8) a periodic audit process to ensure the quality and accuracy of information contained in the criminal justice information systems;

(9) the equipment, training, and funding needs of the state and local agencies that participate in the criminal justice information systems;

(10) the impact of integrated criminal justice information systems on individual privacy rights;

(11) the impact of proposed legislation on the criminal justice system, including any fiscal impact, need for training, changes in information systems, and changes in processes;

(12) the collection of data on race and ethnicity in criminal justice information systems;

(13) the development of a tracking system for domestic abuse orders for protection;

(14) processes for expungement, correction of inaccurate records, destruction of records, and other matters relating to the privacy interests of individuals; and

(15) the development of a database for extended

jurisdiction juvenile records and whether the records should be public or private and how long they should be retained.

[EFFECTIVE DATE.] This section is effective July 1, 2005.

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MICA Supports Local Representation on CriMNet Policy Group

Metropolitan Inter-County Association (MICA) is supporting the SF1036/HF908 introduced by Senator Julianne Ortman and Rep. Rob Eastlund that would modify the CriMNet Policy Group to allow for representation of local units of government. Presently CriMNet is governed by a policy group made up of four judicial appointees and four state commissioners (Public Safety, Corrections, Administration and Finance). The bill would add three representatives from local units of government appointed by the Governor after consultation with the leading organizations of local units of government and local law enforcement. The bill would reduce judicial representation to three and remove the Commissioner of Finance, who has expressed the opinion that she should be removed.

This legislation is based on the recommendation of the **Office of Legislative Auditor** submitted to the Legislature April of 2004.

The Auditor's report in relevant sections states:

• **Expanding the Policy Group to include local representatives would provide a perspective that is currently absent and would better reflect the collaborative nature of CriMNet.**

The Policy Group chose not to make such a recommendation in its proposals for the 2004 legislative session, but this remains a high profile issue for cities and counties. Those opposed to changing the Policy Group's composition said that they understood the philosophical importance of having local representation on the Policy Group, but were uncomfortable with the logistics of choosing who that might be. They also said that the majority of the Task Force is comprised of local representatives, and as restructured, the Task Force has a great deal of influence on CriMNet strategy and operations. Those in favor of local participation on the Policy Group argue that (1) cooperation from local jurisdictions is vital to CriMNet's success; (2) local criminal justice professionals have a unique, front-line perspective that should be reflected in CriMNet's strategic direction; and (3) a voting seat on the Policy Group is more influential than an advisory role on the Task Force. ***We find the rationale for adding local representation to be more compelling.*** Pp.76-77

RECOMMENDATIONS

To better ensure that the perspectives of local jurisdictions are considered in setting CriMNet policy, the Legislature should amend the law to add local representatives to the Policy Group... Pp.85

OLA CriMNet

February 2005 Update to the 2004 Evaluation Report

Problems OLA Identified

- **Substandard Program Management.** The CriMNet Office should coordinate, manage, and oversee the CriMNet program. But, the office failed to define CriMNet's objectives and scope; assess local jurisdictions' capacities to integrate their systems; and implement standard mechanisms for monitoring, tracking, and communicating about CriMNet.
- **Insufficient Staffing and Expertise.** Chronic understaffing and resulting gaps in expertise at the CriMNet Office contributed to management problems and delays.
- **Ineffective Governance.** CriMNet's governing "Policy Group" of eight judicial and executive branch leaders failed to ensure sufficient strategic direction and accountability.
- **Project Delays.** Individual CriMNet projects, including a central integration system, generally took longer and cost more than expected. Unresolved data classification issues, contracting deficiencies, security concerns, and unclear system requirements were underlying factors.

Changes Implemented

- **CriMNet's Purpose and Direction More Clearly Defined.** For the first time, in June 2004, CriMNet issued a "scope statement" that defined CriMNet Office responsibilities and specific projects needed to support integration of criminal justice information.
- **Program Management Strengthened.** To improve management and oversight at all levels, CriMNet implemented needed program management practices, including program and project-specific financial tracking, status reporting, and risk management procedures.
- **Staff Expertise Acquired.** To support all aspects of its work, the CriMNet Office developed a staffing plan and had filled 20 of 26 positions by early 2005.
- **Key Projects Underway.** CriMNet regained momentum and began essential projects to (1) define user requirements, (2) develop integration standards, (3) assess local criminal justice agencies' ability to share data, and (4) positively identify offenders and link their criminal records. Local government data sharing projects also made progress.

Issues Requiring Additional Legislative Attention

- **Data Practices Act Revisions.** CriMNet submitted proposals in 2004 to modify state data practice laws to address issues associated with sharing criminal justice information, but the related bills did not pass. The Legislature should act on similar 2005 bills.
- **Policy Group Accountability.** The Legislature should ensure that the Policy Group is adequately monitoring CriMNet project costs, milestones, and outcomes. In addition, because local criminal justice agencies are important users and providers of criminal justice data, the Legislature should add local representation to the CriMNet Policy Group.

CriMNet is available at http://www.auditor.leg.state.mn.us.
For more information, contact Deborah Junod at 651-296-1232 or deborah.junod@state.mn.us.

Summary

CriMNet has improved statewide access to criminal justice information, but management problems have impeded its progress.

CriMNet is a Minnesota program to integrate criminal justice information kept in separate systems and jurisdictions. CriMNet is being implemented incrementally through projects managed by state and local agencies. The Policy Group, with representatives from the courts and several state agencies, governs CriMNet. The CriMNet Office in the Department of Public Safety manages day-to-day program activities.

Major Findings:

- Since 1996, nearly $180 million in state and federal funds have been allocated for criminal justice information system improvements in Minnesota. Of that amount, about $55 million is the CriMNet program budget for fiscal years 2002-05 (pp. 21-24).
- CriMNet has improved access to criminal justice data, but work remains, such as integrating local jurisdictions' prosecution and law enforcement investigative data and linking offender records into accurate criminal histories (pp. 25-39).
- Most of the CriMNet projects we reviewed delivered the desired results, though most took longer and cost more than expected. Progress on some projects has slowed because of questions regarding data classification and security and because some system requirements have not been resolved (pp. 41-57).
- CriMNet's central infrastructure—called the "Integration Backbone"—will serve as the conduit among criminal justice systems and is scheduled to be operational in late 2004. This critical project has experienced significant planning and management problems and will not deliver some desired results without more work (pp. 46-51).
- The CriMNet Office and the Policy Group have not always functioned effectively, resulting in personnel problems, unclear priorities, slow progress setting integration standards, and conflicts among stakeholders. Inadequate staffing and lack of defined program scope are contributing factors (pp. 62-70).
- CriMNet leaders made a mid-course correction in early 2003 and, though progress has been slow, past problems are being addressed. Understaffing of the CriMNet Office remains a critical problem (pp. 70-81).

Key Recommendations:

- The Legislature should amend state law to resolve criminal justice data classification issues, modify the CriMNet governance structure, and require more detailed information from CriMNet to support spending plans (pp. 83-85).
- The Department of Public Safety should provide day-to-day support and direction for the CriMNet Office and expedite hiring CriMNet Office staff (pp. 82, 85).
- The Policy Group should ensure that it (1) receives from the CriMNet Office and other agencies the information it needs to assess, prioritize, and facilitate statewide integration efforts and (2) uses this information to make timely decisions (pp. 82-83).

Report Summary

Some important criminal justice data are not yet a part of CriMNet.

In Minnesota, criminal justice information is created and maintained on separate systems by courts, executive agencies, and local jurisdictions. CriMNet is a multi-jurisdictional program to integrate these systems, allowing law enforcement officers, judges, public defenders, and other criminal justice professionals to share certain data on offenders' criminal histories and their status in the justice system. Integrating this information has been an incremental process that started with planning in the early 1990s. In 2001, the Legislature adopted the CriMNet plan for integrating criminal justice information and started making significant investments in new and improved information systems. These and future integration efforts are referred to as "CriMNet."

CriMNet is not itself a database, but projects that help criminal justice personnel share data. One project is to build a connecting infrastructure, called the "Integration Backbone." Other projects aim to establish common work practices for recording and reporting criminal justice events or to improve agencies' criminal justice information systems.

The Policy Group, comprised of four judicial and four executive branch leaders, governs CriMNet. The CriMNet Office manages day-to-day program activities, and a task force of state, local, and other representatives advises the Policy Group. The Policy Group and CriMNet Office are responsible for setting CriMNet's strategic direction, determining priorities, making budget recommendations, and completing support work, such as setting security standards and maintaining data-sharing models. State and local agencies lead specific integration projects.

State and federal funding for CriMNet has typically been provided through appropriations and grants designated as being for "criminal justice information system improvements." For fiscal years 1996-2005, this category of state and federal funding in Minnesota totaled about $180 million. Of that amount, about $55 million is the CriMNet program budget for fiscal years 2002-05.

We evaluated the status of information integration to date; the extent to which state agency integration projects have met time, cost, and result expectations; and how well the CriMNet program overall has been managed.

Minnesota Has Made Significant Progress, But Criminal Justice Information Integration Is Not Yet Seamless

The state has made significant progress improving criminal justice technology and integrating key system components. For example, the Department of Corrections has successfully integrated probation and detention data that had previously been held in separate county and jail systems, and the courts are implementing a new statewide court information system. Other completed projects have made less visible, but necessary, system improvements to facilitate data sharing. For example, the Bureau of Criminal Apprehension upgraded the criminal justice network that many jurisdictions use to transmit data. Other accomplishments include statewide access to electronic fingerprint equipment and statewide databases for predatory offender data and arrest photos.

But some important criminal justice data have not yet been integrated. Public defense, prosecution, and local law enforcement, for example, do not have statewide information systems, although certain data are available statewide through an intermediary (e.g., law enforcement agencies submit some data to the Bureau of Criminal Apprehension). Absent additional statewide systems, fuller integration

To make CriMNet more effective, more work needs to be done to build accurate, statewide criminal histories.

of these data will depend on local jurisdictions' abilities to link their information systems with the state. At this time, the state does not know how great an investment is needed to integrate more local jurisdictions.

More work also needs to be done to positively identify offenders and link statewide criminal records by fingerprints rather than by less reliable methods. The core technology, electronic fingerprinting, is in place and another project to address problems linking fingerprints to arrest records is underway.

Most CriMNet Projects Have Achieved Desired Results, But With More Time and Expense Than Anticipated

Improvements in access to criminal justice information resulted from a series of individual projects at the departments of Public Safety and Corrections, the state courts, and local agencies. While these projects generally achieved desired results, they typically took longer and cost more than anticipated. Although not affecting each project to the same degree, factors influencing costs and timelines included: (1) lack of clear expectations and precise contract language for project deliverables; (2) insufficient state staffing or expertise; (3) challenges coordinating tasks among agencies; (4) inability to resolve work practice and legal issues prior to proceeding with technical development; and (5) changes to project design or scope.

A Central Integration System Should Be Fully Available Statewide in Late 2004, But Without Some Expected Functions

CriMNet's Integration Backbone—a critical CriMNet component—is the technical infrastructure that will connect disparate information systems. The state contracted with a vendor in 2002 to design and build the Backbone, but the project has not proceeded according to the time, cost, and scope parameters of the original vendor proposal and contract. The project is challenging, and some uncertainty in setting performance targets is understandable. But, some of this project's problems could have been avoided with better planning and management by the state.

Initial plans grossly underestimated the time it would take to achieve project goals. Other factors contributed to overruns, including (1) insufficient planning of the system's technical requirements, (2) questionable state decisions regarding vendor work products and priorities, and (3) too few state staff. The state renegotiated contract terms in mid-2003, and in our view, these changes should produce a better value for the state. The state expects to fully deploy the Integration Backbone in late 2004 with a search function linked to five statewide systems. Other planned functions have been delayed until staff are available to complete necessary supporting work.

Early Failure to Follow Best Practices Contributed to CriMNet Office Management Problems

The Legislature created the CriMNet Office in 2001 to coordinate, manage, and oversee the CriMNet program. However, in the office's early years, CriMNet Office managers and the Policy Group failed to make crucial planning decisions, such as defining CriMNet's objectives and scope, or to implement standard mechanisms for monitoring, tracking, and communicating about CriMNet's status. These weaknesses made it more difficult to manage the program on a day-to-day basis and to identify and resolve problems. This resulted in unfinished tasks (such as setting technical standards), incomplete information regarding CriMNet's cost and progress, and conflicts among stakeholders.

A variety of factors contributed to program management shortcomings. The CriMNet Office lacked sufficient staffing levels and expertise. In addition, previous CriMNet Office managers did not pay sufficient attention to the full range of their program responsibilities, such as setting technical standards and long-term planning. Finally, the Policy Group was not able to make timely decisions regarding critical program issues, such as data practices, or provide sufficient day-to-day supervision of CriMNet Office operations.

CriMNet policymakers need to set priorities and complete several key projects.

Recent Corrective Actions Demonstrate Commitment to Strengthening Program Management

Over the past year, the Policy Group and CriMNet Office managers have acted to improve program management. As a result, CriMNet, in general, has become more clearly focused and stakeholder collaboration is improving.

Changes include appointing a new executive director, plans to restructure and enlarge the CriMNet Office, using the state's project management standards to guide CriMNet Office operations, and adopting a strategic plan. In addition, the Policy Group made several governance changes, including assigning more responsibility to the advisory task force and embedding the CriMNet Office more fully within the Department of Public Safety's management structure.

CriMNet Staffing, Governance, and Other Issues Still Need Attention

Despite recent corrective actions, progress is still slower than is needed, in large part because insufficient staffing remains a critical problem. As of January 2004, the CriMNet Office had hired staff for only a few of 26 planned positions. These staff are needed to complete important activities, such as assessing user needs, defining technical and work process requirements, assessing local jurisdictions' capacities to integrate, and resolving data practice issues. Other matters needing attention include resolving how integration costs will be shared by federal, state, and local entities and implementing a communication strategy. We recommend several actions to improve CriMNet Office operations and to strengthen oversight and accountability.

Some stakeholders have suggested that the Legislature add one or more local jurisdiction representatives to the Policy Group. They argue that (1) cooperation from local jurisdictions is vital as integration progresses from the state to the local level, and (2) the front-line perspective should be reflected in CriMNet's strategic direction. But, other stakeholders argue that local jurisdictions are already represented through the Policy Group's advisory task force and as nonvoting members of the Policy Group. We find the arguments in favor of adding local representatives to the Policy Group to be more compelling, and we recommend that the Legislature modify the law accordingly.

Much of CriMNet's recent efforts have focused on completing state and local projects already underway and, at the CriMNet Office, rectifying management shortfalls. Now CriMNet needs to set priorities and initiate projects that address remaining gaps. The Legislature should look to the Policy Group for a plan that clearly identifies the next steps, as well as when and how CriMNet will resolve concerns with system security, local jurisdictions' needs, and compliance with state data practice laws.

Supporting work needs to be completed before CriMNet policymakers can set a longer-term integration agenda.

As yet, CriMNet officials have not defined longer-term integration priorities. To better position itself to do so, the CriMNet Office needs to complete a number of important prerequisite activities, such as assessing user needs, assessing local jurisdictions' capacities to integrate, and resolving data practice issues. As discussed above, it is imperative that the CriMNet Office get needed staff resources on board to direct these efforts, which will, by necessity, continue to involve extensive collaboration with staff in state and local agencies.

Governance Changes

The Policy Group, Task Force, and CriMNet Office made several changes in CriMNet governance to improve collaboration, more clearly define a CriMNet Office chain of accountability, and facilitate timely decisionmaking. Changes in 2003 included assigning more responsibility to the Task Force and embedding the CriMNet Office more fully within the Department of Public Safety management structure. At this point:

- **Governance changes initiated in mid-2003 make sense, but it is too early to assess their impact on accountability and decisionmaking.**

The Policy Group's advisory task force has been given greater responsibility for CriMNet projects.

In June 2003, the Policy Group approved a revamped charter for the Criminal and Juvenile Justice Task Force. The new charter modified the Task Force's roles and responsibilities to more closely align with those of a traditional technology project steering committee and to have its members, via subcommittees (called delivery teams), investigate specific problems and develop recommendations. For example, a Task Force subcommittee investigated data practice issues and, in December 2003, recommended to the Policy Group a list of legislative proposals. The Policy Group members we interviewed commented on the added value of this Task Force work, citing the strength of the background work that they do and the importance of obtaining input from the diverse perspectives presented by Task Force members. Using the Task Force in this way, rather than as simply a discussion forum, better reflects the collaborative nature of CriMNet and brings needed resources to the program.

Transition to the Task Force's new role has not been without bumps. According to some stakeholders, group members are at times struggling to shift their perspectives from advocacy for their respective jurisdictions to a more collaborative, problem-solving role. Several of the stakeholders we interviewed commented that trust is an issue in this transition. They added that trust among stakeholders at all levels eroded during 2002, and that melding the CriMNet Office, Task Force, and Policy Group into a unified force will take time.

As we said earlier, the CriMNet Office has always been an organizational unit within the Department of Public Safety, but through 2002, it operated largely outside of the department's day-to-day management structure. In 2003, the Commissioner of Public Safety changed that relationship and made the CriMNet Office an organizational unit within the Bureau of Criminal Apprehension, with the CriMNet Executive Director reporting to the bureau's superintendent. At its December 2003 meeting, the Policy Group tacitly supported this arrangement, although members raised several questions regarding the line between day-to-day supervision of CriMNet Office operations and the Policy Group's statutory

authority. The Policy Group clearly has authority in setting the strategic direction of CriMNet Office work by, for example, approving the strategic plan. It also has broad oversight authority over CriMNet and the responsibility to ensure that expected outcomes are met. But, by more clearly placing the CriMNet Office within the Department of Public Safety, the department will have more control over day-to-day decisionmaking.[7]

Not all stakeholders agree with the decision to give the Department of Public Safety greater authority over the CriMNet Office.

Not all stakeholders are comfortable with this arrangement. Some are concerned that Public Safety's influence on the CriMNet program will be too great, undermining the collaborative nature of CriMNet at a time when improving collaborative relationships is paramount. In contrast, others suggest that CriMNet be integrated fully into the Department of Public Safety, with the Policy Group functioning as an advisory body to the Commissioner of Public Safety and with no direct authority over the CriMNet Office. Based on our work, we have concluded that:

- **Keeping the CriMNet Office under the Policy Group's strategic direction serves important policy goals, but the office also needs direct day-to-day support and direction from the Department of Public Safety.**

We agree that CriMNet's governance structure and operations should reflect CriMNet's multi-jurisdictional nature, so we see the merits of the Legislature's governance design and the importance of the Policy Group. But, Policy Group oversight of CriMNet Office operations has its limits, as demonstrated in the performance problems experienced through 2002. Given the complexity of the CriMNet Office's mission and the level of effort needed to bring CriMNet program management practices up to par, we think it is important to have the CriMNet Office embedded in a clear, day-to-day accountability structure, which the Policy Group simply cannot provide. The Bureau of Criminal Apprehension, given its existing responsibility for the state's criminal justice data network, is a logical choice. Where strategic direction ends and day-to-day supervision begins is, of course, a gray area. Minimizing conflicting direction to the CriMNet Office will require close communication among the Executive Director, the Commissioner of Public Safety, and the Policy Group.

Another governance issue raised in 2003 is whether the Policy Group should include one or more local government representatives as voting members. Some criminal justice functions, such as prosecution, also are not represented. In our view:

- **Expanding the Policy Group to include local representatives would provide a perspective that is currently absent and would better reflect the collaborative nature of CriMNet.**

7 In December 2003, the Policy Group voted to recommend to the Legislature that the law be changed to state specifically that the CriMNet program manager serves at the pleasure of the Policy Group. According to Policy Group members, the recommended statutory language regarding the relationship between the CriMNet Office and the Policy Group simply states more clearly a relationship already established in the law—that the CriMNet Office was created to implement the work of the Policy Group. Since the Policy Group has always selected the CriMNet program manager, we do not take a position on this issue.

Local jurisdictions should have a place on the Policy Group.

The Policy Group chose not make such a recommendation in its proposals for the 2004 legislative session, but this remains a high profile issue for cities and counties.[8] Those opposed to changing the Policy Group's composition said that they understood the philosophical importance of having local representation on the Policy Group, but were uncomfortable with the logistics of choosing who that might be. They also said that the majority of the Task Force is comprised of local representatives, and as restructured, the Task Force has a great deal of influence on CriMNet strategy and operations. Those in favor of local participation on the Policy Group argue that (1) cooperation from local jurisdictions is vital to CriMNet's success; (2) local criminal justice professionals have a unique, front-line perspective that should be reflected in CriMNet's strategic direction; and (3) a voting seat on the Policy Group is more influential than an advisory role on the Task Force. We find the rationale for adding local representation to be more compelling.

Program Controls

CriMNet has made progress in implementing standard program control procedures, as summarized in Table 4.5. To date, efforts that are farthest along include formal program status reporting and strengthening program review and decisionmaking by the Task Force and Policy Group. Other controls are in various stages of design. Overall, we found that:

- **CriMNet officials have designed structured processes to help manage and oversee CriMNet operations, but it is important to shift from *planning* these controls to actively *using* them to manage CriMNet work.**

Status Reporting

The new CriMNet Office team took immediate steps in mid-2003 to improve program status reporting. At first, these reports were filled with lists of program management and Integration Backbone project tasks that had gone undone in previous years. Later reports focused on the status of efforts to complete this make-up work. Improvements in status reporting worked in tandem with the substantive work being done by the Task Force to better focus Policy Group meetings and to improve the quantity and quality of information available about CriMNet's status. Still, work remains in this area. As of December 2003, neither the Task Force nor Policy Group had consistently reviewed program status during their respective meetings. Instead, both groups' meetings focused on other issues, such as legislative proposals for data practices and other statutory changes. While these are, without a doubt, important issues, it is imperative from a program

8 The Task Force twice put forward recommended statutory language that would add Task Force leaders to the Policy Group—once recommending that the Task Force chair and two vice-chairs be added and the second time recommending only the Task Force chair. In discussing the merits of the recommendation, a key sticking point for Policy Group members was that the Task Force chair might not necessarily be a local employee because the Task Force includes members from, for example, the state and private sector. At the December 2003 Policy Group meeting, the Commissioner of Public Safety suggested that the proposal be modified such that the Task Force chair would appoint to the Policy Group a Task Force member who was also a local jurisdiction employee. The Task Force Chair did not support this suggestion, and the motion failed.

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S.F. No. 778 -DWI Provisions (SCS0778A-1 Delete-Everything Amendment)

Author: Senator Leo T. Foley

Prepared by: Chris Turner, Senate Research (651/296-4350) CT

Date: March 8, 2005

Section 1 authorizes the Bureau of Criminal Apprehension (BCA), or a laboratory authorized by the BCA, to certify lab test results directly to the Commissioner of the Department of Public Safety (DPS). Under current law, the BCA returns the results to the arresting officer, who then must forward them to the DPS for entry on the violator's driving record, triggering the driver's license revocation by the state. This change is intended to speed the license revocation action, while minimizing recording mistakes and lost reports.

Section 2 provides that a petition for judicial review of a license plate impoundment order must include proof of service on DPS, and must include the name of the driver and the law enforcement agency that issued the order. Strikes current language regarding the scope of judicial reviews.

Section 3 clarifies that both of two conditions (not either of the two) must be met before a plate impoundment order is rescinded and the violator's plates are returned:

- the license revocation has been rescinded; and
- the criminal charge for the violation underlying the impoundment order has been dismissed with prejudice, or the violator has been acquitted of the charge.

Section 4 requires a petitioner challenging a vehicle forfeiture provide proof of the service of the complaint on the law enforcement agency that initiated the forfeiture when requesting a judicial hearing. Current law only requires proof of service of the complaint to the prosecuting authority.

Sections 5 and 6 require that chemical dependency assessments include:

- diagnosis of the nature of the offender's chemical and alcohol involvement;
- consideration of the person's alcohol concentration at the time of arrest;
- checks with the person's collateral contacts, including the person's relevant family members, employers, educational institutions, criminal justice agencies, and probation officer, if any; and
- a review of relevant records and reports, including police and arrest reports, driving records, and chemical testing and test refusal records.

Section 7 prohibits the court and DPS from using chemical dependency assessments that do not meet the requirements specified in sections 5 and 6.

CT:vs

Senators Foley, Skoglund and Chaudhary introduced--

S.F. No. 778: Referred to the Committee on Crime Prevention and Public Safety.

A bill for an act

relating to crimes; exempting law enforcement agency that forfeits a vehicle involved in impaired driving offense from requirement to obtain vehicle title in its name before transferring vehicle; permitting Bureau of Criminal Apprehension to certify chemical test results directly to commissioner of public safety for driver's license action; further limiting scope of judicial review of license plate impoundment order; expanding proof of service requirement for petitioner appealing license plate impoundment or vehicle forfeiture order; clarifying conditions under which new license plates may be issued following plate impoundment; amending Minnesota Statutes 2004, sections 168A.12, by adding a subdivision; 169A.52, subdivision 4; 169A.60, subdivisions 10, 11; 169A.63, subdivision 8.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2004, section 168A.12, is amended by adding a subdivision to read:

Subd. 2a. [OWNER'S INTEREST TERMINATED OR VEHICLE SOLD PURSUANT TO FORFEITURE.] If the interest of the owner is terminated pursuant to section 169A.63, the appropriate agency as defined in section 169A.63, subdivision 1, shall promptly mail or deliver to the Department of Public Safety the last certificate of title, if available, an application for a new certificate in the format the department prescribes, and an affidavit made by or on behalf of the appropriate agency that the interest of the owner was lawfully terminated. However, if the appropriate agency holds the vehicle for resale, it need not secure a new certificate of title if:

(1) the appropriate agency mails or delivers to the department notice that it is holding the vehicle for resale;

(2) the notice is in duplicate and in a format required by the department; and

(3) the notice is sent within 48 hours of the completed forfeiture.

However, upon transfer to another person the appropriate agency shall promptly execute assignment and warranty of title and mail or deliver to the transferee or the department the certificate, if available, the affidavit, and other documents required to be sent to the department by the appropriate agency.

[EFFECTIVE DATE.] This section is effective the day following final enactment.

Sec. 2. Minnesota Statutes 2004, section 169A.52, subdivision 4, is amended to read:

Subd. 4. [TEST FAILURE; LICENSE REVOCATION.] (a) Upon certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the person submitted to a test and the test results indicate an alcohol concentration of 0.08 or more or the presence of a controlled substance listed in schedule I or II, other than marijuana or tetrahydrocannabinols, then the commissioner shall revoke the person's license or permit to drive, or nonresident operating privilege:

(1) for a period of 90 days;

(2) if the person is under the age of 21 years, for a period of six months;

(3) for a person with a qualified prior impaired driving incident within the past ten years, for a period of 180 days; or

(4) if the test results indicate an alcohol concentration of 0.20 or more, for twice the applicable period in clauses (1) to (3).

(b) On certification by the peace officer that there existed probable cause to believe the person had been driving,

operating, or in physical control of a commercial motor vehicle with any presence of alcohol and that the person submitted to a test and the test results indicated an alcohol concentration of 0.04 or more, the commissioner shall disqualify the person from operating a commercial motor vehicle under section 171.165 (commercial driver's license disqualification).

(c) If the test is of a person's blood or urine by a laboratory operated by the Bureau of Criminal Apprehension, the laboratory may directly certify to the commissioner the test results, and the peace officer shall certify to the commissioner that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 and that the person submitted to a test. Upon receipt of both certifications, the commissioner shall undertake the license actions described in paragraphs (a) and (b).

[EFFECTIVE DATE.] This section is effective August 1, 2006, and applies to blood and urine test samples analyzed on or after that date.

Sec. 3. Minnesota Statutes 2004, section 169A.60, subdivision 10, is amended to read:

Subd. 10. [PETITION FOR JUDICIAL REVIEW.] (a) Within 30 days following receipt of a notice and order of impoundment under this section, a person may petition the court for review. The petition must include proof of service of a copy of the petition on the commissioner. The petition must include the petitioner's date of birth, driver's license number, and date of the plate impoundment violation, as well as the name of the violator and the law enforcement agency that issued the plate impoundment order. The petition must state with specificity the grounds upon which the petitioner seeks rescission of the order for impoundment. The petition may be combined with any petition filed under section 169A.53 (administrative and judicial review of license revocation).

(b) Except as otherwise provided in this section, the judicial review and hearing are governed by section 169A.53 and

must take place at the same time as any judicial review of the person's license revocation under section 169A.53. The filing of the petition does not stay the impoundment order. The reviewing court may order a stay of the balance of the impoundment period if the hearing has not been conducted within 60 days after filing of the petition upon terms the court deems proper. The court shall order either that the impoundment be rescinded or sustained, and forward the order to the commissioner. The court shall file its order within 14 days following the hearing.

(c) In addition to the issues described in section 169A.53, subdivision 3 (judicial review of license revocation), the scope of a hearing under this subdivision is limited to:

~~(1) whether the violator owns, is the registered owner of, possesses, or has access to the vehicle used in the plate impoundment violation;~~

~~(2) whether a member of the violator's household has a valid driver's license, the violator or registered owner has a limited license issued under section 171.30, the registered owner is not the violator, and the registered owner has a valid or limited driver's license, or a member of the registered owner's household has a valid driver's license; and~~

~~(3) if the impoundment is based on a plate impoundment violation described in subdivision 1, paragraph (c), clause (3) or (4),~~ whether the peace officer had probable cause to believe the violator committed the plate impoundment violation ~~and whether the evidence demonstrates that the plate impoundment violation occurred.~~

(d) In a hearing under this subdivision, the following records are admissible in evidence:

(1) certified copies of the violator's driving record; and

(2) certified copies of vehicle registration records bearing the violator's name.

[EFFECTIVE DATE.] This section is effective August 1, 2005.

Sec. 4. Minnesota Statutes 2004, section 169A.60, subdivision 11, is amended to read:

Subd. 11. [RESCISSION OF REVOCATION~~,~~ AND DISMISSAL OR ACQUITTAL; NEW PLATES.] If:

(1) the driver's license revocation that is the basis for an impoundment order is rescinded; and

(2) the charges for the plate impoundment violation have been dismissed with prejudice~~,~~ or

~~(3)~~ the violator has been acquitted of the plate impoundment violation;

then the registrar of motor vehicles shall issue new registration plates for the vehicle at no cost, when the registrar receives an application that includes a copy of the order rescinding the driver's license revocation~~,~~ and either the order dismissing the charges~~,~~ or the judgment of acquittal.

[EFFECTIVE DATE.] This section is effective the day following final enactment.

Sec. 5. Minnesota Statutes 2004, section 169A.63, subdivision 8, is amended to read:

Subd. 8. [ADMINISTRATIVE FORFEITURE PROCEDURE.] (a) A motor vehicle used to commit a designated offense or used in conduct resulting in a designated license revocation is subject to administrative forfeiture under this subdivision.

(b) When a motor vehicle is seized under subdivision 2, or within a reasonable time after seizure, the appropriate agency shall serve the driver or operator of the vehicle with a notice of the seizure and intent to forfeit the vehicle. Additionally, when a motor vehicle is seized under subdivision 2, or within a reasonable time after that, all persons known to have an ownership, possessory, or security interest in the vehicle must be notified of the seizure and the intent to forfeit the vehicle. For those vehicles required to be registered under chapter 168, the notification to a person known to have a security interest in the vehicle is required only if the vehicle is registered under chapter 168 and the interest is listed on the vehicle's title. Notice mailed by certified mail to the address shown in Department of Public Safety records is sufficient notice to the registered owner of the vehicle. For

motor vehicles not required to be registered under chapter 168, notice mailed by certified mail to the address shown in the applicable filing or registration for the vehicle is sufficient notice to a person known to have an ownership, possessory, or security interest in the vehicle. Otherwise, notice may be given in the manner provided by law for service of a summons in a civil action.

(c) The notice must be in writing and contain:

(1) a description of the vehicle seized;

(2) the date of seizure; and

(3) notice of the right to obtain judicial review of the forfeiture and of the procedure for obtaining that judicial review, printed in English, Hmong, and Spanish. Substantially the following language must appear conspicuously: "IF YOU DO NOT DEMAND JUDICIAL REVIEW EXACTLY AS PRESCRIBED IN MINNESOTA STATUTES, SECTION 169A.63, SUBDIVISION 8, YOU LOSE THE RIGHT TO A JUDICIAL DETERMINATION OF THIS FORFEITURE AND YOU LOSE ANY RIGHT YOU MAY HAVE TO THE ABOVE-DESCRIBED PROPERTY. YOU MAY NOT HAVE TO PAY THE FILING FEE FOR THE DEMAND IF DETERMINED YOU ARE UNABLE TO AFFORD THE FEE. IF THE PROPERTY IS WORTH $7,500 OR LESS, YOU MAY FILE YOUR CLAIM IN CONCILIATION COURT. YOU DO NOT HAVE TO PAY THE CONCILIATION COURT FILING FEE IF THE PROPERTY IS WORTH LESS THAN $500."

(d) Within 30 days following service of a notice of seizure and forfeiture under this subdivision, a claimant may file a demand for a judicial determination of the forfeiture. The demand must be in the form of a civil complaint and must be filed with the court administrator in the county in which the seizure occurred, together with proof of service of a copy of the complaint on the prosecuting authority having jurisdiction over the forfeiture~~,~~ and the appropriate agency that initiated the forfeiture, including the standard filing fee for civil actions unless the petitioner has the right to sue in forma pauperis under section 563.01. If the value of the seized property is $7,500 or less, the claimant may file an action in conciliation court for recovery of the seized vehicle. A copy

of the conciliation court statement of claim must be served personally or by mail on the prosecuting authority having jurisdiction over the forfeiture, as well as on the appropriate agency that initiated the forfeiture, within 30 days following service of the notice of seizure and forfeiture under this subdivision. If the value of the seized property is less than $500, the claimant does not have to pay the conciliation court filing fee.

No responsive pleading is required of the prosecuting authority and no court fees may be charged for the prosecuting authority's appearance in the matter. The prosecuting authority may appear for the appropriate agency. Pleadings, filings, and methods of service are governed by the Rules of Civil Procedure.

(e) The complaint must be captioned in the name of the claimant as plaintiff and the seized vehicle as defendant, and must state with specificity the grounds on which the claimant alleges the vehicle was improperly seized, the claimant's interest in the vehicle seized, and any affirmative defenses the claimant may have. Notwithstanding any law to the contrary, an action for the return of a vehicle seized under this section may not be maintained by or on behalf of any person who has been served with a notice of seizure and forfeiture unless the person has complied with this subdivision.

(f) If the claimant makes a timely demand for a judicial determination under this subdivision, the forfeiture proceedings must be conducted as provided under subdivision 9.

[EFFECTIVE DATE.] This section is effective August 1, 2005, and applies to forfeiture actions initiated on or after that date.

Senator ..... moves to amend S.F. No. 778 as follows:

Delete everything after the enacting clause and insert:

"Section 1. Minnesota Statutes 2004, section 169A.52, subdivision 4, is amended to read:

Subd. 4. [TEST FAILURE; LICENSE REVOCATION.] (a) Upon certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the person submitted to a test and the test results indicate an alcohol concentration of 0.08 or more or the presence of a controlled substance listed in schedule I or II, other than marijuana or tetrahydrocannabinols, then the commissioner shall revoke the person's license or permit to drive, or nonresident operating privilege:

(1) for a period of 90 days;

(2) if the person is under the age of 21 years, for a period of six months;

(3) for a person with a qualified prior impaired driving incident within the past ten years, for a period of 180 days; or

(4) if the test results indicate an alcohol concentration of 0.20 or more, for twice the applicable period in clauses (1) to (3).

(b) On certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a commercial motor vehicle with any presence of alcohol and that the person submitted to a test and the test results indicated an alcohol concentration of 0.04 or more, the commissioner shall disqualify the person from operating a commercial motor vehicle under section 171.165 (commercial driver's license disqualification).

(c) If the test is of a person's blood or urine by a laboratory operated by the Bureau of Criminal Apprehension, or authorized by the bureau to conduct the analysis of a blood or urine sample, the laboratory may directly certify to the commissioner the test results, and the peace officer shall

certify to the commissioner that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 and that the person submitted to a test. Upon receipt of both certifications, the commissioner shall undertake the license actions described in paragraphs (a) and (b).

[EFFECTIVE DATE.] This section is effective August 1, 2006, and applies to blood and urine test samples analyzed on or after that date.

Sec. 2. Minnesota Statutes 2004, section 169A.60, subdivision 10, is amended to read:

Subd. 10. [PETITION FOR JUDICIAL REVIEW.] (a) Within 30 days following receipt of a notice and order of impoundment under this section, a person may petition the court for review. The petition must include proof of service of a copy of the petition on the commissioner. The petition must include the petitioner's date of birth, driver's license number, and date of the plate impoundment violation, as well as the name of the violator and the law enforcement agency that issued the plate impoundment order. The petition must state with specificity the grounds upon which the petitioner seeks rescission of the order for impoundment. The petition may be combined with any petition filed under section 169A.53 (administrative and judicial review of license revocation).

(b) Except as otherwise provided in this section, the judicial review and hearing are governed by section 169A.53 and must take place at the same time as any judicial review of the person's license revocation under section 169A.53. The filing of the petition does not stay the impoundment order. The reviewing court may order a stay of the balance of the impoundment period if the hearing has not been conducted within 60 days after filing of the petition upon terms the court deems proper. The court shall order either that the impoundment be rescinded or sustained, and forward the order to the commissioner. The court shall file its order within 14 days following the hearing.

(c) In addition to the issues described in section 169A.53, subdivision 3 (judicial review of license revocation), the scope of a hearing under this subdivision is limited to:

~~(1) whether the violator owns, is the registered owner of, possesses, or has access to the vehicle used in the plate impoundment violation;~~

~~(2) whether a member of the violator's household has a valid driver's license, the violator or registered owner has a limited license issued under section 171.30, the registered owner is not the violator, and the registered owner has a valid or limited driver's license, or a member of the registered owner's household has a valid driver's license; and~~

~~(3)~~ if the impoundment is based on a plate impoundment violation described in subdivision 1, paragraph ~~(c)~~ (d), clause (3) or (4), whether the peace officer had probable cause to believe the violator committed the plate impoundment violation and whether the evidence demonstrates that the plate impoundment violation occurred; and

(2) for all other cases, whether the peace officer had probable cause to believe the violator committed the plate impoundment violation.

(d) In a hearing under this subdivision, the following records are admissible in evidence:

(1) certified copies of the violator's driving record; and

(2) certified copies of vehicle registration records bearing the violator's name.

[EFFECTIVE DATE.] This section is effective August 1, 2005.

Sec. 3. Minnesota Statutes 2004, section 169A.60, subdivision 11, is amended to read:

Subd. 11. [RESCISSION OF REVOCATION~~,~~ AND DISMISSAL OR ACQUITTAL; NEW PLATES.] If:

(1) the driver's license revocation that is the basis for an impoundment order is rescinded; and

(2) the charges for the plate impoundment violation have been dismissed with prejudice~~,~~ or

~~(3)~~ the violator has been acquitted of the plate

impoundment violation;

then the registrar of motor vehicles shall issue new registration plates for the vehicle at no cost, when the registrar receives an application that includes a copy of the order rescinding the driver's license revocation~~,~~ and either the order dismissing the charges~~,~~ or the judgment of acquittal.

[EFFECTIVE DATE.] This section is effective the day following final enactment.

Sec. 4. Minnesota Statutes 2004, section 169A.63, subdivision 8, is amended to read:

Subd. 8. [ADMINISTRATIVE FORFEITURE PROCEDURE.] (a) A motor vehicle used to commit a designated offense or used in conduct resulting in a designated license revocation is subject to administrative forfeiture under this subdivision.

(b) When a motor vehicle is seized under subdivision 2, or within a reasonable time after seizure, the appropriate agency shall serve the driver or operator of the vehicle with a notice of the seizure and intent to forfeit the vehicle. Additionally, when a motor vehicle is seized under subdivision 2, or within a reasonable time after that, all persons known to have an ownership, possessory, or security interest in the vehicle must be notified of the seizure and the intent to forfeit the vehicle. For those vehicles required to be registered under chapter 168, the notification to a person known to have a security interest in the vehicle is required only if the vehicle is registered under chapter 168 and the interest is listed on the vehicle's title. Notice mailed by certified mail to the address shown in Department of Public Safety records is sufficient notice to the registered owner of the vehicle. For motor vehicles not required to be registered under chapter 168, notice mailed by certified mail to the address shown in the applicable filing or registration for the vehicle is sufficient notice to a person known to have an ownership, possessory, or security interest in the vehicle. Otherwise, notice may be given in the manner provided by law for service of a summons in a civil action.

(c) The notice must be in writing and contain:

(1) a description of the vehicle seized;

(2) the date of seizure; and

(3) notice of the right to obtain judicial review of the forfeiture and of the procedure for obtaining that judicial review, printed in English, Hmong, and Spanish. Substantially the following language must appear conspicuously: "IF YOU DO NOT DEMAND JUDICIAL REVIEW EXACTLY AS PRESCRIBED IN MINNESOTA STATUTES, SECTION 169A.63, SUBDIVISION 8, YOU LOSE THE RIGHT TO A JUDICIAL DETERMINATION OF THIS FORFEITURE AND YOU LOSE ANY RIGHT YOU MAY HAVE TO THE ABOVE-DESCRIBED PROPERTY. YOU MAY NOT HAVE TO PAY THE FILING FEE FOR THE DEMAND IF DETERMINED YOU ARE UNABLE TO AFFORD THE FEE. IF THE PROPERTY IS WORTH $7,500 OR LESS, YOU MAY FILE YOUR CLAIM IN CONCILIATION COURT. YOU DO NOT HAVE TO PAY THE CONCILIATION COURT FILING FEE IF THE PROPERTY IS WORTH LESS THAN $500."

(d) Within 30 days following service of a notice of seizure and forfeiture under this subdivision, a claimant may file a demand for a judicial determination of the forfeiture. The demand must be in the form of a civil complaint and must be filed with the court administrator in the county in which the seizure occurred, together with proof of service of a copy of the complaint on the prosecuting authority having jurisdiction over the forfeiture~~,~~ and the appropriate agency that initiated the forfeiture, including the standard filing fee for civil actions unless the petitioner has the right to sue in forma pauperis under section 563.01. If the value of the seized property is $7,500 or less, the claimant may file an action in conciliation court for recovery of the seized vehicle. A copy of the conciliation court statement of claim must be served personally or by mail on the prosecuting authority having jurisdiction over the forfeiture, as well as on the appropriate agency that initiated the forfeiture, within 30 days following service of the notice of seizure and forfeiture under this subdivision. If the value of the seized property is less than $500, the claimant does not have to pay the conciliation court

filing fee.

No responsive pleading is required of the prosecuting authority and no court fees may be charged for the prosecuting authority's appearance in the matter. The prosecuting authority may appear for the appropriate agency. Pleadings, filings, and methods of service are governed by the Rules of Civil Procedure.

(e) The complaint must be captioned in the name of the claimant as plaintiff and the seized vehicle as defendant, and must state with specificity the grounds on which the claimant alleges the vehicle was improperly seized, the claimant's interest in the vehicle seized, and any affirmative defenses the claimant may have. Notwithstanding any law to the contrary, an action for the return of a vehicle seized under this section may not be maintained by or on behalf of any person who has been served with a notice of seizure and forfeiture unless the person has complied with this subdivision.

(f) If the claimant makes a timely demand for a judicial determination under this subdivision, the forfeiture proceedings must be conducted as provided under subdivision 9.

[EFFECTIVE DATE.] This section is effective August 1, 2005, and applies to forfeiture actions initiated on or after that date.

Sec. 5. Minnesota Statutes 2004, section 169A.70, subdivision 3, is amended to read:

Subd. 3. [ASSESSMENT REPORT.] (a) The assessment report must be on a form prescribed by the commissioner and shall contain an evaluation of the convicted defendant concerning the defendant's prior traffic and criminal record, characteristics and history of alcohol and chemical use problems, and amenability to rehabilitation through the alcohol safety program. The report is classified as private data on individuals as defined in section 13.02, subdivision 12.

(b) The assessment report must include:

(1) a diagnosis of the nature of the offender's chemical and alcohol involvement;

(2) an assessment of the severity level of the involvement;

(3) a recommended level of care for the offender in accordance with the criteria contained in rules adopted by the commissioner of human services under section 254A.03, subdivision 3 (chemical dependency treatment rules);

(4) an assessment of the offender's placement needs;

~~(2)~~ (5) recommendations for other appropriate remedial action or care, including aftercare services in section 254B.01, subdivision 3, that may consist of educational programs, one-on-one counseling, a program or type of treatment that addresses mental health concerns, or a combination of them; ~~or~~ and

~~(3)~~ (6) a specific explanation why no level of care or action was recommended, if applicable.

[EFFECTIVE DATE.] This section is effective August 1, 2005, and applies to chemical use assessments made on or after that date.

Sec. 6. Minnesota Statutes 2004, section 169A.70, is amended by adding a subdivision to read:

Subd. 6. [METHOD OF ASSESSMENT.] (a) As used in this subdivision, "collateral contact" means an oral or written communication initiated by an assessor for the purpose of gathering information from an individual or agency, other than the offender, to verify or supplement information provided by the offender during an assessment under this section. The term includes contacts with family members, criminal justice agencies, educational institutions, and employers.

(b) An assessment conducted under this section must include at least one personal interview with the offender designed to make a determination about the extent of the offender's past and present chemical and alcohol use or abuse. It must also include collateral contacts and a review of relevant records or reports regarding the offender including, but not limited to, police reports, arrest reports, driving records, chemical testing records, and test refusal records. If the offender has a probation officer, the officer must be the subject of a collateral contact under this subdivision. If an assessor is

unable to make collateral contacts, the assessor shall specify why collateral contacts were not made.

[EFFECTIVE DATE.] This section is effective August 1, 2005, and applies to chemical use assessments made on or after that date.

Sec. 7. Minnesota Statutes 2004, section 169A.70, is amended by adding a subdivision to read:

Subd. 7. [PRECONVICTION ASSESSMENT.] (a) The court may not accept a chemical use assessment conducted before conviction as a substitute for the assessment required by this section unless the court ensures that the preconviction assessment meets the standards described in this section.

(b) If the commissioner of public safety is making a decision regarding reinstating a person's driver's license based on a chemical use assessment, the commissioner shall ensure that the assessment meets the standards described in this section.

[EFFECTIVE DATE.] This section is effective August 1, 2005, and applies to chemical use assessments made on or after that date."

Delete the title and insert:

"A bill for an act relating to crimes; permitting Bureau of Criminal Apprehension to certify chemical test results directly to commissioner of public safety for driver's license action; further limiting scope of judicial review of license plate impoundment order; expanding proof of service requirement for petitioner appealing license plate impoundment or vehicle forfeiture order; clarifying conditions under which new license plates may be issued following plate impoundment; strengthening the process for assessing chemical dependency of impaired driving violators; amending Minnesota Statutes 2004, sections 169A.52, subdivision 4; 169A.60, subdivisions 10, 11; 169A.63, subdivision 8; 169A.70, subdivision 3; by adding subdivisions."

Senators Hottinger, Lourey and Berglin introduced--

S.F. No. 102: Referred to the Committee on Crime Prevention and Public Safety.

A bill for an act

relating to criminal justice; adopting certain model penal code provisions relating to criminal responsibility of persons with a mental disease or defect; amending Minnesota Statutes 2004, section 611.026.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2004, section 611.026, is amended to read:

611.026 [CRIMINAL RESPONSIBILITY OF MENTALLY ILL OR DEFICIENT.]

Subdivision 1. [COMPETENCY TO PROCEED.] No person shall be tried, sentenced, or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or making a defense~~;-but-the-person-shall-not-be excused-from-criminal-liability-except-upon-proof-that-at-the time-of-committing-the-alleged-criminal-act-the-person-was laboring-under-such-a-defect-of-reason;-from-one-of-these causes;-as-not-to-know-the-nature-of-the-act;-or-that-it-was wrong~~.

Subd. 2. [INSANITY DEFENSE.] (a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacks substantial capacity either to appreciate the criminality of the person's conduct or to conform the person's conduct to the requirements of law.

(b) As used in this subdivision, the terms "mental disease" and "defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

[EFFECTIVE DATE.] This section is effective August 1, 2005, and applies to crimes committed on or after that date.

Senator ..... moves to amend S.F. No. 102 as follows:

Delete everything after the enacting clause and insert:

"Section 1. Minnesota Statutes 2004, section 611.026, is amended to read:

611.026 [CRIMINAL RESPONSIBILITY OF MENTALLY ILL OR DEFICIENT.]

Subdivision 1. [COMPETENCY TO PROCEED.] No person shall be tried, sentenced, or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or making a defense~~;-but-the-person-shall-not-be excused-from-criminal-liability-except-upon-proof-that-at-the time-of-committing-the-alleged-criminal-act-the-person-was laboring-under-such-a-defect-of-reason,-from-one-of-these causes,-as-not-to-know-the-nature-of-the-act,-or-that-it-was wrong~~.

Subd. 2. [INSANITY DEFENSE.] (a) A person is not responsible for criminal conduct if, at the time of the conduct and as a result of mental disease or defect, the person was unable to appreciate the wrongfulness of the conduct.

(b) As used in this subdivision, the terms "mental disease" and "defect" include:

(1) impairments of mind, whether enduring or transitory; or

(2) mental retardation.

[EFFECTIVE DATE.] This section is effective August 1, 2005, and applies to crimes committed on or after that date."

Criminalization of Mental Illness
As the number of people with mental illness in our prisons increase, there has been a call to review the way we look at punishment versus treatment. In addition to the establishment of crisis teams, police training, jail diversion programs and mental health courts, it is also important to discuss the standard that should be used to determine if someone should be held responsible for their actions.

It's important to remember that while crimes by people with mental illness often appear on the front page of the newspaper, few violent crimes are committed by people with mental illness.

M'Naughten Standard
The M'Naughten Standard is used under Minnesota law. This standard came out of a case involving Daniel M'Naughten in 1843 in the British Courts. The M'Naughten standard basically means that if an individual is so mentally ill that he or she could not understand right from wrong, then they are not guilty by reason of insanity. Thus the legal test has nothing to do with a diagnosis of mental illness, the delusions he/she may have been having at the time or if he/she was hearing voices.

Minnesota law states that: "No person shall be tried, sentenced, or punished for any crime while mentally ill of mentally deficient so as to be incapable of understanding the proceedings or making a defense: but the person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that is was wrong."

Probably less than 1% of the cases in Minnesota ever even bring this up and only when both the prosecutor and the defense attorney agree. It's important to note that people don't go "free" they are committed for treatment, sometimes longer than their prison sentence would have been.

Irresistible Impulse
Many states (including Colorado and Iowa) use the M'Naughten standard coupled with the irresistible impulse doctrine. The standard is very similar to the straight M'Naughten test, but also acknowledges that someone may not be able to stop oneself due to their delusions.

Guilty but Mentally Ill
Some states now have a "guilty but mentally ill." The guilty but mentally ill standard holds the individual criminally responsible for their acts but provides for treatment while the individual is incarcerated. NAMI opposes the adoption of "guilty but mentally ill" because it absolves the judge or jury from determining a person's responsibility for the act.

American Law Institute
A large number of states (including Indiana, Illinois, Michigan and Wisconsin) have adopted the American Law Institute standard. Under the ALI standard, the individual is not criminally responsible if he lacks substantial capacity to understand the extent of his wrongful conduct: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law." Some people have a problem with the part of the ALI standard related to "conforming conduct" stating that it is very difficult to use in court.

American Bar Association
The American Bar Association also recommends a standard: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect was unable to appreciate the wrongfulness of such conduct." This is a change from the M'Naughten standard because it goes beyond knowing an action is wrong, and it does not include the "conforming conduct" provision of the ALI standard.

National Alliance for the Mentally Ill of Minnesota
800 Transfer Road, Suite 7A
St. Paul, MN 55114
651-645-2948

Statement from NAMI

Treatment, not punishment:

NAMI believes that persons who have committed offenses due to states of mind or behavior caused by a brain disorder require treatment, not punishment. NAMI believes that a prison or jail is never an optimal therapeutic setting. NAMI believes that mental health systems have an obligation to develop and implement systems of appropriate care for individuals whose untreated brain disorders may cause them to engage in inappropriate or criminal behaviors.

Treatment while in correctional settings:

NAMI believes that states and communities have legal and ethical obligations to provide people with brain disorders humane and effective treatment while in correctional settings.

Training and education:

NAMI believes that education about brain disorders at all levels of judicial and legal systems is crucial to the appropriate disposition of cases involving offenders with brain disorders. Judges, lawyers, police officers, correctional officers, parole and probation officers, law enforcement personnel, court officers, and emergency medical transport and service personnel should be required to complete at least 20 hours of training about these disorders. Consumers and family members should be a part of this educational process.

Violence:

NAMI believes that, in the overwhelming majority of cases, dangerous or violent acts committed by persons with brain disorders are the result of neglect or inappropriate or inadequate treatment of their illness.

Insanity defense:

NAMI supports the retention of the "insanity defense" and favors the two-prong test that includes the volitional as well as the cognitive standard. NAMI opposes the adoption of "guilty but mentally ill" statutes. NAMI supports systems that provide comprehensive, long-term care and supervision in hospitals and in the community to individuals found "not guilty by reason of insanity," "guilty except for insanity, or any other similar terminology used in state statutes pertaining to the insanity defense.

Parole and probation, transitional services:

NAMI believes that states must adopt systems for assisting individuals with serious brain disorders who have served sentences and are eligible for release on parole with appropriate treatment and services to aid their transition back into the community.

Nov/Dec 94

M'Naughton Rule Outdated

By Christine Townsend

I am a prisoner at Shakopee Correctional Facility. Up until January of 1994 I was working at Anoka-Metro Regional Treatment Center as a Registered Nurse on a MICD unit designed to treat people with a mental illness and chemical dependency.

I worked intensely gaining experience with many disorders, becoming involved with the quality improvement team, and eventually being prepared for a supervisory position which regrettably was quashed, secondary to lack of funds.

Why do I tell you this? To explain my background and viewpoint concerning the law of Minnesota and mental illness.

I am advocating for a change in the sentencing/indictment process for the mentally ill.

Along with working with the mentally ill, I was one. I have suffered from depression and an eating disorder for years. Unfortunately, the old adage is true about treating yourself - you can't. I began a downward spiral due to a combination of stresses and couldn't come up. It seemed I was entangled in an irreparable, meaningless, hopeless mess.

On Jan. 7, 1994, I cracked. I tried to "save" my daughter and myself from all the pain that seemed unbearable. My daughter died; I did not. I am trying to continue for my family's sake and for my patients, of which I am one.

I have met some of my patients here, and know of many others who, in my view, do not belong in prison. We are not getting treatment for the cause of our crimes — mental illness. The message is given loud and clear — we don't matter.

If I can change what is occurring in our judicial system, then perhaps this tragedy will not be for nought.

My argument is against the M'Naugton rule, regarding a person's cognitive capacity in determining right from wrong. This formula does not comport with modern medical knowledge that an individual is a mentally complex being with varying degrees of awareness. It fails to attack the problem presented in a case wherein an accused may have understood his actions but was incapable of controlling his behavior.

In this so called progressive health state, we are still using an archaic tool. Citing from Durham vs. United States: An accused is not criminally responsible if his unlawful act was the product of a mental illness or defect.

The Durham Court of Appeals case found M'Naughton to be inadequate because it did not take sufficient account of psychic realities and scientific knowledge, being based instead on one symptom that could not be validly applied in all circumstances. This was in 1954! Are we going forward or backwards!

There are federal and state courts who understand this and have engaged other methods to determine the *cause* of a crime and act accordingly.

I have read about the work being done to update and teach correctional staff on mental illness. I applaud this. The fact remains, however, that this will not change the directive of the Dept. of Corrections. That is, to separate and control its inmates and to protect the rest of society. This goal is commendable. It does not provide for treatment, though, to those who need it. This is why we need to change our statutes. To continue in the same way is to allow a person to remain a danger to himself and/or society. The possibilities of success, once released are dismal.

I implore your help. This is a problem that affects every one of us — as my case shows clearly, it's a thin line between composer and chaos.

"She Gets No Help and She Will Die..."

By Chuck Krueger

The tragic death of Christine Townsend is a stinging example of how the criminal justice system has failed to acknowledge the medical needs of mentally ill persons in prison.

Townsend, whose letters appeared in the Mental Health ADVOCATE last December, ended her life by overdosing on medications in the Shakopee Prison on April 23. She was 27.

Townsend had worked as a nurse at the Anoka Regional Treatment Center, helping persons with mental illness while she herself suffered from depression and an eating disorder. In Jan. 1994, she suffered a major depressive episode and tried to kill herself. She was found unconscious from an overdose, alongside her was her 2-year old smothered child. She was convicted of 2nd degree murder and sentenced to 25 years in prison.

Her funeral was held April 26, with several members of AMI's Forensic Network in attendance. Memorials given in her name have been dedicated to NARSAD (National Research on Schizophrenia and Depression).

In the Nov/Dec 94 issue of the Mental Health ADVOCATE, Townsend criticized the system of justice for its failures to recognize mental illness and help those affected. She also wrote about her own situation, predicting her own bitter fate:

When a crime is committed because of a mental illness... the person is, more often than not, sentenced to prison where he lives in an environment as inconducive to promoting well being as is possible. Most likely, he is

in much worse condition when released, and has developed secondary symptoms to his mental illness. If this doesn't cause some reflection on your part, what about a case in which a suicidal person is allowed to kill himself in prison?

This year there was a woman charged with a crime who suffered from a "significant major depressive episode". Two psychiatrists evaluated her while the indictment process went on. One stated she was not a danger to society, but was an "extremely high risk to taker her own life..." The second doctor concurred, adding that she needed help: "...argue for continued supervision and psychiatric treatment."

This woman had decided to take her own life and felt that the only way to protect her child was for them to "leave" together. Her daughter died; she lived. From a hospital she was brought to jail and indicted by the Grand Jury for murder.

She was not "insane," therefore, she was sent to prison. Even though deemed mentally ill and at a high risk for suicide she is receiving no treatment. Even though the act would not have occurred had she not had a severe depressive episode, she gets no help.

She wanted to die before. Why would she not attempt it again now that "the most beautiful thing in the world" for her is gone and she knows that she was the one who caused this to happen?"

Everyone that knew her described this tragedy as unbelievable and totally unlike her nature. Still, she is not M'Naughton material. Therefore, she gets no help and she will die.

The prison system, like the justice system, was unable to assess or address her mental illness.

This past January, Dawn Lenvik, a Richfield mother suffering from delusions attempted to drown her two children to "save them from going to hell." It was very fortunate that her own mother was able to intervene and call the police. Three weeks prior to the incident, Lenvik had sought voluntary hospitalization but had been turned away without being evaluated by a psychiatrist.

Like Townsend, Lenvik was sent to jail where she faced attempted manslaughter charges. On April 16, she was found to be not guilty by reason of insanity and was committed to a mental hospital.

For Lenvik, it means a chance for treatment and possible recovery. Her case is the exception. The vast preponderance of such cases end with the mentally ill person being sent to jail, like Christine Townsend, and with that person receiving little if any treatment. Less than 2% of those persons pleading not guilty by reason of insanity are acquitted.

In the Dec./Nov. 1994 ADVOCATE, Townsend, who had failed with her insanity plea, also reflected: *"On Jan. 7, 1994, I cracked. I tried to 'save' my daughter and myself from all the pain that seemed unbearable. My daughter died; I did not. I am trying to continue for my family's sake and for my patients, of which I am one."*

The lack of treatment that Shakopee prison was able to provide enhanced the likelihood of Townsend's suicide. The prison system, like the justice system was unable to assess or address her mental illness.

Because of cases like those mentioned above, the AMI/MN Forensic Network was formed to advocate for better treatment of persons with mental illness in jails. The network also holds support groups for family members. Started just four years ago, this Network is on of the leading networks of its kind in the country.

For information about the AMI/MN Forensic Network, call JoAnn Zwack at 612-484-8218.

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The Insanity Defense

How can a person who admits committing a crime be found "not guilty by reason of insanity?"

In this context, "not guilty" does not mean the person did not commit the criminal act for which he or she is charged. It means that when the person committed the crime, he or she could not tell right from wrong or could not control his or her behavior because of severe mental defect or illness. Such a person, the law holds, should not e held criminally responsible for his or her behavior. The legal test for insanity varies from state to state.

Are "sane" and "insane" medical terms?

No. The word "insane" is a legal term. Because research has identified many different mental illnesses of varying severities, it is now too simplistic to describe a severely mentally ill person merely as "insane." Although most people with mental illness do not commit crimes, of those who do, the vast majority would be judged "sane" if current legal tests for insanity were applied to their criminal behaviors.

Don't many criminals try to use the insanity defense to escape severe punishment?

No. First, the insanity defense is not often used, and when used is frequently unsuccessful. According to a 1991 eight-state study funded by the National Institute of Mental Health, the insanity defense was used in less than one percent of the cases in a representative sampling of cases before those states' county courts. The study showed that only 26 percent of those insanity pleas were argued successfully. Most studies show that in approximately 80 percent of the cases where a defendant is acquitted on a "not guilty by reason of insanity" finding, it is because the prosecution and defense have agreed on the appropriateness of the plea before trial. That agreement occurred because both the defense and prosecution agreed that the defendant was mentally ill and met the jurisdiction's test for insanity. Clearly, the implication is that the insanity defense is rarely used successfully by malingerers.

Other studies over the past two decades report similar findings. According to Myths and Realities: A Report of the National Commission on the Insanity Defense, in 1982 only 52 of 32,000 adult defendants represented by the Public Defender's office in New Jersey--less than two tenths of one percent--entered the insanity plea, and only 15 were successful. A similar number of insanity defense pleadings--"far less than one percent"--were entered in Virginia during the same period. A 2001 study in Manhattan (Kirschner and Galperin) noted that over a ten year period, psychiatric defenses were offered by only 16 out of every 10,000 indicted defendants. More than 75% of the time that a psychiatric defense was successful, it was the result of the prosecutors' consent. Out of nearly 100,000 felony indictments during that period, only 17 juries heard arguments concerning the insanity defense and their deliberations resulted in only 4 insanity acquittals. These authors concluded, "if the prosecutor does not accept the defense, the judge or the jury is not very likely to accept it either."

The insanity defense is used in defending against many charges, not just murder. The eight-state study found that while half of those pleading insanity in the surveyed cases had been indicted for violent crimes, less than 15 percent were charged with murder. The rest were charged with robbery, property damage, or minor felonies. Of the 15 New Jersey cases described above which successfully used the defense, only three involved murder. More than 25 percent of Missouri insanity verdicts reviewed by the National Commission for its report involved less serious crimes such as auto theft or bad checks, and one involved the theft of a cheap pen.

How long are persons found "not guilty by reason of insanity" committed to a mental hospital?

What happens to a defendant after a judge or jury returns a finding of insanity depends on the crime committed, and on the state in which the trial takes place. Usually, those found "not guilty by reason of insanity (NGRI)" are confined for treatment in a special hospital for severely mentally ill persons who have committed crimes. After a period of time, the person may request a hearing to determine if he or she is no longer a danger to self or others or no longer mentally ill, and is therefore eligible to be released.

Studies show that persons found not guilty by reason of insanity, on average, are held at least as long as--and

often longer than--persons found guilty and sent to prison for similar crimes. In a 1983 case (Jones v. United States), the US Supreme Court held that an NGRI acquittee "could be confined to a mental hospital for a period longer than he could have been incarcerated had he been convicted."

The insanity defense got a lot of attention when John Hinckley--the man who shot President Reagan to impress the actress Jody Foster--used it in his trial. Has that had any impact on the way the states look at it?

Yes. In the wake of the attention John Hinckley's trial received, many states and the Congress sought ways to restrict use of the defense. Many people worried that those found not guilty by reason of insanity might be released too easily from secure hospitals and would cause harm again. To answer this concern, some states have created review boards--much like parole boards--that take administrative responsibility for those who have come to institutions after a successful insanity plea. The boards oversee the treatment provided and can set conditions that must be met if a person is to be released or is to remain in the hospital.

In Connecticut, for instance, in cases where the insanity defense is successfully argued, the presiding judge determines the amount of time the person would have been incarcerated had they been found sane and convicted for the crime they committed. The judge then specifies that the state's review board has control of the convicted person until this period lapses. Other states apply a rule that these people must be held until an evaluation finds them no longer dangerous or mentally ill.

So different states look at the insanity defense differently?

Yes. Each of the fifty states and the District of Columbia has its own statute. Each jurisdiction applies similar principles, but the procedures and criteria used for a finding of insanity vary.

The American Academy of Psychiatry and the Law has developed a practice guideline for insanity defense evaluations that offers a useful review of historical and current practices [Journal Am Acad Psychiatry Law 30 (Supp 2), 2002]. According to that review, about one third of the states have adopted a test for the insanity defense modeled on a standard written during the 1950's by the American Law Institute (ALI).That test holds that a person would "not [be] responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law." About half the states currently use some variation of the narrower M'Naghten Rule, an insanity definition derived from English case law, which holds that a person is "innocent by reason of insanity [if] at the time of committing the act, he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing what was wrong." Three states have added a reference to "irresistible impulse," and four states (Montana, Idaho, Utah, and Kansas) have legislatively abolished the insanity defense. New Hampshire's standard is the now rare "product of mental illness test," i.e., defendants can be found NGRI if their criminal behavior is determined to have resulted from their disorder.

Following the Hinckley case, Congress altered the U.S. Federal and military standards for the insanity defense, limiting it to the so-called "cognitive prong" of the ALI test--- that a defendant would not be responsible if "as a result of severe mental disease or defect, [he] was unable to appreciate the nature and quality or the wrongfulness of his acts." Altogether, ¾ of the states and the Federal government have imposed some form of insanity defense reform since Hinckley's 1982 acquittal.

In 1982, the American Psychiatric Association endorsed another standard, written by Richard Bonnie, a legal expert at the University of Virginia, which states:

A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense. As used in this standard, the terms "mental disease" or "mental retardation" include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances.

The APA does not endorse the "irresistible impulse" test for insanity.

In recent years, some states have replaced the "not guilty by reason of insanity" plea with a "guilty but mentally ill" plea, or added a finding of " guilty but mentally ill" as an additional option. Why?

This plea has arisen out of the perception that juries have had difficulty grappling with the issues of factual guilt and defendants' ability to judge the morality of their actions. The "guilty but mentally ill" verdict is seen by some as one way the jury may sidestep these questions, shuttling those who might otherwise "escape" into an insanity plea into a new category where they can be judged "guilty." It is the APA's position that, while the "guilty but mentally ill" category may seem to make the jury's job easier, it avoids one of our criminal justice system's most important functions--deciding, through its deliberations, how society defines responsibility. Moreover, since persons found guilty but mentally ill (GBMI) are punished in the same way as those found guilty, use of this verdict may mislead jurors about the consequences of their decisions. Persons found GBMI typically do not receive specialized mental health services beyond what is normally available in a prison setting. The APA does not support the "guilty but mentally ill" plea as a substitute for, or supplement to, the insanity defense.

Shouldn't psychiatrists be the ones to determine whether someone with a mental illness is really responsible for his or her actions? After all, they're the experts.

No. Psychiatrists' years of training and experience make them experts at diagnosing and treating mental illnesses. They can offer testimony on the probable nature and severity of the defendant's illness at the time of the crime, and offer other medical and psychological explanations for behavior. But that is the extent of their expertise: they are trained in medicine, not the law. It is the job of the judge or jury, as society's representative, to determine criminal responsibility.

If psychiatrists who testify for the prosecution and the defense give different opinions during a trial, doesn't that imply there's a lot of guesswork in psychiatric diagnoses?

The use of experts is part of our adversarial court system--lawyers for the prosecution and the defense often employ experts, such as heart surgeons, radiologists or engineers, who will give differing testimony during a trial. A difference of opinion among testifying psychiatrists doesn't imply that the doctors have a murky understanding of mental illnesses. Studies show that psychiatric diagnoses, especially of severe illnesses, are about 80 percent reliable--on a par with diagnoses of other medical illnesses. As with other medical problems--such as cancer or a back injury--a mental illness can have different effects on different people. Even two psychiatrists who disagree on the fine points of a defendant's illness might be in complete agreement on its basis and effect.

For further detail, see: APA "Statement on the Insanity Defense" December 1982

For further information, contact:

American Academy of Psychiatry and the Law
P.O. Box 30
One Regency Dr.
Bloomfield, CT 06002
(860) 242-5450
www.aapl.org

American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5000
www. Abanet.org

How to Order "Let's Talk Facts About ..." Pamphlets
APA Consumer Resources List

First posted: 1/9/96; revised 9/03
Email comments or questions

	Insanity Test	Bifurcated Trial	Verdict(s)	Treatment (D=discretionary M=mandatory)	Release Authority
Alabama	M'N	N	NGBD	D	Court
Alaska	M'N (nature and quality prong only)[1]	N	NGBI/GBMI	D for NGBI; M for GBMI	Court
Arizona	M'N (nature and quality)[2]	N	NGBI/GBI	D	Court
Arkansas	A.L.I. (minus "substantial")	N	NGBD	D	Court
California	M'N	Y	NGBI	D	Court
Colorado	M'N and irresistible impulse	N	NGBI	M	Court
Connecticut	A.L.I (requires lack of capacity to conform behavior)	N	NGBD	D	Court
Delaware	A.L.I. (criminal prong only)	N	NGBI	M	Court
District of Columbia	A.L.I.	Y	NGBI	M	Court
Florida	M'N	Y[3]	NGBI	D	Court
Georgia	M'N and delusional comparison	N	NGBI/GBMI/GBMR	M for NGBI; D for GBMI/GBMR	Court
Hawaii	A.L.I.[4]	N	Acquitted for physical or mental disorder	D	Court
Idaho[5]			GBI	D	Court
Illinois	A.L.I. (requires lack of substantial capacity to conform)	N	NGBI	D	Court
Indiana	A.L.I. (no control prong)[6]	N	Not responsible by Insanity	D	Court
Iowa	M'N	N	NGBI	M	Court
Kansas	M'N	N	NGBD	M	Court
Kentucky	A.L.I.	N	NGBI	D	Court
Louisiana	M'N	N	NGBI	M	Court
Maine	A.L.I. (no control prong)[7]	Y	Not responsible for mental defect reasons	M	Court
Maryland	A.L.I.	Y	Not responsible by reason of insanity	D	Court
Massachusetts	A.L.I.	N	NGBI	D	State Hospital[8]
Michigan	A.L.I.	N	NGBI	M	N/S
Minnesota	M'N	Y	NGBI	M	Court
Mississippi	M'N	Y	ABI	D	N/S
Missouri	M'N and incapacity to conform conduct to requirements of law	N	NGBD	M	Court
Montana[9]	N/A		GBI	D	Court
Nebraska	M'N	N	NGBI	D	Court
Nevada	N/S	N	GBMI	D	
New Hampshire	[10]	Y	NGBI	M	Court

New Jersey	M'N	N	NGBI	D	Court
New Mexico	M'N or Irresistible Impulse	N	NGBI	D	Court
New York	A.L.I.	N	Not responsible by reason of mental defect	D	Court
North Carolina	M'N	N	NGBI	M	Court
North Dakota[11]	A.L.I.	Y	NG, lack of criminal responsibility	D	Court Annual Review
Ohio	M'N	N	NGBI	D	Court
Oklahoma	M'N	Y	AGI	D	Court
Oregon	A.L.I.	N	Guilty except for insanity	D	Psych. Security Review Board
Pennsylvania	M'N	Y	NGBI	D[12]	Court
Puerto Rico	A.L.I.	N	NGBI	D	Court
Rhode Island	A.L.I.	N	NGBI	D	Court
South Carolina	M'N	N	NGBI	M (120 days)	Chief Admin. Judge
South Dakota	M'N	N	NGBI	D	Court
Tennessee	A.L.I.	N	NGBI	M	Court
Texas	M'N and Irresistible Impulse	N	NGBI	D for nonviolent, M for violent	Court
Utah[13]			GBI	D	Court
Vermont	A.L.I.	N	NGBI	D	Dev/Men Health Services[14]
Virginia	M'N and Irresistible Impulse	N	NGBI	D	Court
Washington	M'N	N	NGBI	D	Court
West Virginia	A.L.I.	N	NGBD	M	Court
Wisconsin	A.L.I.	Y	NGBD	D	Court
Wyoming	A.L.I.	N	NGMI/D	D	Court
Federal	M'N	N	NGBI	M[15]	Court[16]

MENTALLY ILL CRIMINALS AND THE INSANITY DEFENSE

A Report to the Minnesota Legislature

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October 1999

MENTALLY ILL CRIMINALS AND THE INSANITY DEFENSE

Executive Summary

This report is about how the criminal justice system deals with people who have a severe mental illness, such as schizophrenia, bipolar (manic-depressive) illness, or depression. These brain diseases cause a profound loss of a person's ability to plan, think, and make decisions. The law recognizes that some people may be too mentally ill to know what they are doing when they commit a crime and, therefore, cannot be held morally responsible. In a criminal trial, such a person can use the insanity defense and plead "not guilty by reason of insanity." The legal test for insanity, however, is not the same as a medical diagnosis of mental illness. Minnesota uses a test for insanity that came from a 19th century English court case.

Many people in the state's prisons and jails are mentally ill but not legally insane. Indeed, the number of mentally ill people in prisons and jails is a substantial problem in Minnesota, as it is throughout the country. In 1997 about 685 of 5,300 prison inmates in Minnesota (13%) were mentally ill. Many authorities believe that deinstitutionalization of mental hospitals, highly restrictive civil commitment laws, and the lack of community services have resulted in a shift of mentally ill people from the mental health system to the criminal justice system.

The number of mentally ill people in the criminal justice system, and the fact that mentally ill people sometimes commit highly sensational crimes, raise public concerns about what should be done with mentally ill people who commit crimes. Should they be punished like other criminals, or treated more like people who are sick? The challenge for public policy is to find the right balance between these two options. In this report we discuss some of the alternatives.

The report begins with a review of the relationship between mental illness and violence, and then examines how often mentally ill people are acquitted for insanity in criminal

cases. We find that there is a small but significant connection between serious mental illness and crime. We also learn that in Minnesota it is very rare for someone to be acquitted by reason of insanity. This happens so infrequently, in fact, that it raises questions about the viability of the insanity defense here. A comparison of Minnesota with other states shows that it is more difficult to prove insanity under Minnesota law than in many other states, but other factors may also inhibit use of the insanity plea.

Some states have adopted an alternative to the verdicts of guilty or not guilty by reason of insanity — the "guilty but mentally ill" verdict. Its purpose is to reduce the number of insanity acquittals by giving jurors another option when a defendant is mentally ill. We examine the effect of "guilty but mentally ill" in states that have it and project what might happen if it were adopted in Minnesota. Because insanity acquittals are rare in Minnesota, however, we conclude that it would not have much impact here.

The report also discusses ways to restore viability to Minnesota's insanity defense. Even if changes were made to the insanity defense, however, the criminal justice system will still have to deal with substantial numbers of mentally ill people. Correctional institutions in Minnesota provide mental health treatment to inmates, but there is a gap in services for mentally ill offenders when they return to their communities. Few community mental health programs are suited to the mentally ill offender, who often has the dual diagnosis of chemical dependency and may be violent or disruptive. The report describes model programs in other parts of the country that provide a continuum of specialized treatment for mentally ill offenders in the community. Such programs can benefit both the public and the offender.

This report fulfills a request from the 1998 Minnesota Legislature for a study of the "guilty but mentally ill" verdict and "other issues involving mental health and the criminal justice system." The Legislature commissioned this report in establishing the Center for Applied Research and Policy Analysis at the School of Law Enforcement, Criminal Justice and Public Safety, Metropolitan State University.

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MENTALLY ILL CRIMINALS AND THE INSANITY DEFENSE

A Report to the Minnesota Legislature

This report is about how the criminal justice system deals with people who have a severe mental illness. Mental illness is a conundrum for the courts. People with schizophrenia, for example, have a profound loss of ability to think, plan, and make decisions because their brains don't work correctly. Some may have a delusion that their life is in danger and commit a crime to protect themselves. Others may hear over-powering voices commanding them to do something wrong. Are such people competent to stand trial or agree to a plea bargain? Do they meet the legal standard of intent to commit a crime? Does their illness excuse them or mitigate the severity of punishment? What should happen to them if convicted, or if not convicted?

Because no clear answers exist to these questions, states have taken different legal paths with mental illness. Minnesota, for instance, uses a legal test for judging whether someone is not guilty by reason of insanity that came from a 19th century British court case. Other states, however, have adopted newer tests for insanity or have added the verdict "guilty but mentally ill." Some states allow a defendant to claim mental illness as a mitigating factor; others do not. A few states have abolished the insanity defense. Usually these changes reflect shifting public sentiments about whether mentally ill criminals should be punished or treated for their illness, and about how best to protect the public from mentally ill criminals.

New discoveries about mental illness might also cause us to re-examine the treatment of mentally ill people in criminal justice. Until recently, the biological basis of serious mental illness was virtually unknown. Now, high-tech brain scans show the exact areas of a sick brain that are not working properly, and biochemists have discovered some of the

chemical pathways in the brain that malfunction in mental illness. These discoveries have increased public awareness of mental illness and helped reduce the social stigma that is often attached to those who suffer these illnesses.

In 1998 the Minnesota Legislature appropriated funds to Metropolitan State University to establish the Center for Applied Research and Policy Analysis in the School of Law Enforcement, Criminal Justice and Public Safety (*Laws 1998*, Chapter 367). The Legislature asked the Center to:

> conduct a study of the guilty but mentally ill verdict . . . (and) consider other issues involving mental health and the criminal justice system such as the mental illness defense, current mental health treatment provided to inmates at state correctional facilities, and current use of the civil commitment process.

The Legislature called for a preliminary report in March 1999 and a final report in November 1999. This is the final report, and it covers the following issues:

- **The connection between mental illness and crime.**
- **The frequency that people are acquitted by reason of insanity.**
- **How criminal law deals with mental illness in Minnesota and other states.**
- **Outcomes for mentally ill defendants in states with the "guilty but mentally ill" verdict, and the potential impact if it were adopted in Minnesota.**
- **Policy and program alternatives for mentally ill criminals.**

The analysis draws primarily on empirical and legal research that others have done on the relationship between crime and mental illness, the insanity defense, and the "guilty but mentally ill" verdict. We also compare what happens to mentally ill defendants in

Minnesota with those in other states and review the availability of services for mentally ill offenders. The report concludes with ideas for the Legislature on improving the insanity defense and treatment of mentally ill criminals.

Severe Mental Illness

Authorities distinguish severe or serious mental illnesses, which are physical diseases of the brain, from less serious mental conditions that are usually psychological but not physical in origin.[1] Serious mental illness includes schizophrenia, bipolar (manic-depressive) illness, and major depression. Obsessive-compulsive disorder and panic attacks are often added to the list. Together, these illnesses are more common than cancer or heart disease and, over a lifetime, affect one in five families. About 20 percent of the nation's hospital beds are taken by people with a mental illness. Severe brain disorders have both hereditary and environmental causes that are not yet fully understood.

Serious mental illness does not include mental retardation, hyperactivity, multiple personality, personality or character disorder, psychopathic personality, sexual psychopathology, pedophilia, addiction, or similar conditions, although research points increasingly to the likelihood that some of these, too, are related to brain disorders.

Serious mental illness disrupts a person's ability to think, feel, and relate to other people and the physical environment. Many people with a severe mental illness lose their jobs, become estranged from their families, are homeless, or commit suicide. About 160,000 people with severe mental illnesses are in the nation's jails and prisons.[2]

Schizophrenia is the most chronic and disabling mental illness, affecting 1 percent of the population. It usually strikes people in their late teens or early twenties, although victims may have subtle signs of brain dysfunction in childhood. Typical symptoms are hallucinations, delusions, and bizarre thinking, collectively referred to as psychosis. People with the illness may believe that their thoughts are under control of someone else

or coming from outside their head. Poor brain functioning also causes a breakdown of social relationships, poor communication skills, and lack of motivation. Schizophrenia has different subtypes; one is paranoid schizophrenia, in which the victim has intense fears or feelings of persecution accompanying hallucinations. Although many people with schizophrenia are helped by drug therapy and social assistance, few recover from the disease.

Bipolar illness and depression affect a person's mood more than thinking ability. In bipolar illness, a person's mood cycles between extreme depression, normal mood, and extreme euphoria or mania. In the manic stage a person may have grandiose delusions or psychotic thought processes similar to those of schizophrenia and may abuse illegal drugs or alcohol. At the other extreme, a person who is extremely depressed may feel life is hopeless and have difficulty concentrating or making decisions; suicide is a strong possibility. Mood disorders can usually be treated successfully with drugs and electroconvulsive therapy, but the illness may return intermittently.

Mental Illness and Crime

Crimes by mentally ill people are sometimes very sensational, which may give the public the misperception that mentally ill people often commit violent crimes. Researchers have closely examined the link between mental illness and violent crime. They have found that most people who commit violent crimes are not mentally ill and most mentally ill people do not commit crimes. One study found that about 3 percent of the variation in violent crime in the United States is related to mental illness.[3] In general, mentally ill people are more likely to be victims of violent crime than perpetrators. But research has pointed to a small group of people with severe mental illness who are at higher risk for violent behavior.

People with psychoses — bizarre thinking, hallucinations, and delusions — as found in schizophrenia and, less often, in mood disorders, are more likely to commit violent

crimes than people with no mental disorder. This has been reported in many research studies.[4] A connection with violence also applies to people with some neurological brain diseases, such as Huntington's chorea, and to people who have had head injuries that damaged the brain.

A recent study of mentally ill people looked at their use of medication and alcohol in relation to violence.[5] Results showed that when mentally ill people stop taking their medicine and abuse alcohol or illegal drugs, they are more likely to be violent. Violent behavior is also more likely among people with paranoia who hear command voices telling them to kill someone, or who believe their mind is dominated by forces beyond their control. The victims of mentally ill people are often members of their own family.

Frequency of Insanity Pleas and Acquittals

For centuries the law has encompassed the widely held belief that some people are too mentally deranged to know what they are doing and, therefore, cannot be held morally responsible for a crime. This principle came from English common law, which presumed that an illegal act was not a crime unless performed with criminal intent. In a criminal trial, a mentally ill person might be found not guilty by reason of insanity, despite proof that the person had committed a crime.

Insanity pleas and acquittals are relatively uncommon. An eight-state study of 581,000 indictments found 8,979 insanity pleas — a rate of 1.5 percent.[6] A different study of insanity cases in four states (California, Georgia, Montana, and New York) showed that of 586,000 felony indictments, only 5,300 (0.9%) had a plea of insanity by the defendant.[7] And of the 5,300 insanity pleas, there were 1,385 acquittals by reason of insanity — 0.23 percent of indictments and 26 percent of insanity pleas. A study of adult defendants represented by the Public Defender's office in New Jersey found 52 insanity pleas for 32,000 defendants (less than 0.2%) and of the 52 cases, 15 were successful.[8]

The connection between serious mental illness and successful insanity pleas is well documented. The eight-state study of almost 2,600 criminal defendants who were found not guilty by reason of insanity (NGRI) reported that 68 percent had schizophrenia and 16 percent had a severe mood disorder — a total of 84 percent with a severe mental illness.[9] The others were mentally retarded (5%), had another mental illness (5%), a personality disorder (3.5%), or were chemically dependent. The crimes they had been charged with were murder (15%), physical assault (38%), other violent crimes (12%), robbery (7%), property crimes (18%), and other minor crimes (10%).

Successful insanity pleas in Minnesota are very rare. We obtained data from Minnesota's Supreme Court administration on the frequency of successful insanity pleas in recent years. (No data is available in the state's judicial information system on unsuccessful insanity pleas.) For 1995 and 1997, there were no insanity acquittals; in 1996 there was one acquittal in a felony case.[10] It is more likely for a defendant to be found mentally incompetent to stand trial than to be acquitted. Court data shows, for example, that in 1997 there were 12 felony cases where the defendant was found mentally incompetent to stand trial or the case was dismissed because of mental incompetence.

The rarity of insanity acquittals in Minnesota is a puzzle. A contributing factor is certainly the stringent requirements that a defendant must meet to prove insanity — requirements that go well beyond the medical standards for severe mental illness. But as we look at the standards, and information from other states, we will see that there must be other reasons why so few defendants in Minnesota are acquitted by reason of insanity.

Mentally Ill Persons in Minnesota's Prisons

In sharp contrast to the infrequency of insanity acquittals, many of Minnesota's prison inmates are mentally ill — as many as a large state hospital for the mentally ill might have, or did have in the past before deinstitutionalization of the mentally ill. A mental health survey of inmates by the Minnesota Department of Corrections in 1997 found that 685 of 5,262 adult inmates (13%) had a "thought" or "mood" disorder, which would be

consistent with a severe mental illness.[11] And of the 685 mentally ill inmates, 153 were acutely ill — 2.9 percent of adult inmates. Similarly, a survey of prison inmates in 1994 reported that 441 of 4,028 (11%) were using psychiatric medications.[12]

Minnesota is similar to other states in the rate of mental illness among prisoners. A new report by the federal Bureau of Justice Statistics estimated that 10 percent of inmates in the nation's state prisons and 10 percent of those in local jails currently have a mental illness; another 6 percent have previously had a mental condition.[13] These data are based on self-reporting by inmates in a national survey. About 19 percent of inmates reported that they have taken a prescribed medication for a "mental or emotional condition." Mental illness was reported more often by female prisoners than males, and more often by white prisoners than other races. Alcohol and drug use were more strongly associated with mentally ill inmates than others, and nearly 6 of 10 mentally ill inmates reported that they were under the influence of alcohol or drugs at the time of their current offense. Mentally ill inmates in state prisons serve longer than average sentences because they are more frequently involved in fights and have more disciplinary problems than other inmates.

Legal Dimensions of Mental Illness and Crime

The large numbers of mentally ill inmates in jails and prisons show that the legal concept of "insanity" is not the same as a medical diagnosis of mental illness, such as schizophrenia or paranoia. In fact, few people who are mentally ill meet the legal standard of insanity. The courts use one of several legal tests — not medical tests — to determine whether people meet the standard of insanity that would excuse them from guilt for a crime. The legal tests vary depending on the state or federal court. States also differ on several other dimensions of the legal process:

- Which side has to prove insanity — defense or prosecution.

- The standard of proof, as by a preponderance of evidence or beyond a reasonable doubt.
- Trial procedure.
- Whether mental illness can be a mitigating factor.
- Dispositions available for people found not guilty by reason of insanity.

We first review the most common tests for insanity, then other dimensions of legal process.

McNaughtan test

In 1843 Daniel McNaughtan shot and killed the secretary of the British Prime Minister by mistake while intending to kill the Prime Minister. At trial, McNaughtan was found "not guilty, on the ground of insanity." Public outcry and royal concern about the acquittal led a panel of justices to establish a standard for insanity, which is still used by British courts. The test was meant to be used by a jury after hearing medical testimony from prosecution and defense experts. Under this rule a defendant was presumed sane unless the defense proved that:

> At the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know what he was doing was wrong.[14]

About half of American states, including Minnesota, use the test.[15] Notice, however, that it does not excuse mentally ill people who knew what they did was wrong but were unable to control their actions. To allow for this possibility, several states have added an exculpatory provision for a person who could not control himself because of an "irresistible impulse."

American Law Institute test

In 1972 the Court of Appeals for the District of Columbia endorsed a Model Penal Code standard, which the American Law Institute had proposed in the 1950s. Under the ALI test,

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.[16]

The ALI test is less stringent than McNaughtan because it does not require a total lack of self-control or inability to know right from wrong, but only that someone with mental illness "lacks substantial capacity" to act and reason normally. The ALI test is used in about 20 states, and it was used in federal courts until 1984, when a more stringent test was adopted.

Appreciation test

In 1984 the appreciation test was made law in all federal courts by act of Congress.[17] A few states have adopted similar laws. These changes were largely a response to public dismay when John Hinckley was found NGRI after his attempted assassination of President Reagan. Federal law requires that a defendant prove by clear and convincing evidence that:

> At the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.[18]

The requirement of "unable to appreciate" is tougher than ALI's "lacks substantial capacity."

No test

Three states have abolished the insanity defense: Utah, Montana, and Idaho. In these states, however, defendants can offer evidence at trial that they lacked the mental capacity to form the intent to commit the crime they are charged with.[19] The prosecution must rebut this claim beyond a reasonable doubt.

Civil commitment test

Sometimes mentally ill persons who commit crimes go through the civil commitment process instead of being prosecuted. This option might be pursued by the county attorney after an arrest for a misdemeanor, or a mentally ill person might be diverted into the medical system without being arrested or charged for the crime. Mentally ill persons can be committed to supervision and care by the state in a state hospital when they are a danger to themselves or others. (Commitment is also possible for mentally ill persons who are unable to care for themselves.) Behavior that meets the test of dangerousness for civil commitment overlaps with behavior that might be prosecuted as a criminal offense.

Several decades ago, the standards for civil commitment were less stringent than today, and people with a severe mental illness were often committed to care in a state hospital before they would have met today's test of dangerousness. Now, restrictive commitment laws make it more likely that people with severe mental illness are caught up in the criminal justice system. This is a well recognized and often debated national phenomenon.[20]

The Legislature moderated the state's commitment policy in 1997, when it allowed court-ordered early intervention for mentally ill people under limited circumstances before they

reach the level of dangerousness required for commitment.[21] A mentally ill person who refuses appropriate treatment and is overtly disturbed may meet the criteria for early intervention if the person has been committed twice in the previous three years for similar reasons, and can be reasonably expected to deteriorate to the point where commitment is needed. Mentally ill persons with grossly disturbed behavior who cannot care for themselves can also be eligible if they would have chosen similar treatment under these circumstances. In practice, these requirements — especially for two prior commitments in three years — severely limit the number of mentally ill people who meet these criteria. After about the first half year of operation in 1998 under this law, Hennepin County had not identified a single person who met the criteria for early intervention.[22]

Burden of proof

After John Hinckley's acquittal in 1982, many states changed their laws on the insanity defense to make acquittal more difficult, as the federal government had done. By 1990, 36 states, including Minnesota, had put the burden of proof on the defense.[23] This had the intended result. Researchers have shown that fewer defendants are likely to claim insanity when they must prove it rather than the state, and in these cases a serious mental illness is virtually a prerequisite to success.[24]

Standard of proof

In general, the standard of proof varies from one state to another and depends on whether the burden of proving insanity is on the defense or prosecution. As of 1990, 32 states required proof of insanity by a "preponderance of the evidence" (in each case by the defense); this is the lowest standard. Another 3 states used "clear and convincing evidence" as the standard (by the defense), and 14 used "beyond a reasonable doubt" — all with the state having the burden of proof. Minnesota uses preponderance of the evidence.[25]

Trial procedure

Trial procedures are another difference among states. Some states, including Minnesota, have a two-stage or bifurcated trial if the defendant pleads both not guilty to the crime and NGRI. The first stage deals with the alleged crime. If the defendant is found to have committed the crime, the insanity issue is taken up at the second stage.[26] Evidence about the defendant's mental state can be introduced only at the second stage. If the defendant pleads mental illness as a defense but does not choose to bifurcate the trial in Minnesota, all evidence as to the guilt of the defendant must be heard in court prior to the defendant offering evidence relating to mental capacity.[27]

The standard of competency to stand trial was decided by the U.S. Supreme Court and also applies to plea bargaining. A mentally ill defendant is not competent who lacks sufficient ability to consult with a reasonable degree of rational understanding with defense counsel, or is so mentally ill as to be incapable of understanding the proceedings or participating in the defense.[28] The Court also decided that the appropriate standard for defendants to rebut the presumption of competency to stand trial should be "preponderance of the evidence."[29]

Dispositions

In the 1970s and 1980s many states were concerned that they might not be able to keep dangerous mentally ill criminals locked up if they were found NGRI. Increasingly, courts at that time were treating them like people who had a civil commitment.[30] Under rules for civil commitment, once persons who had been under treatment no longer posed a risk of violence, they had to be released. In 1983, however, the U.S. Supreme Court ruled that an insanity acquittal is enough to justify automatic commitment when the defense has the burden of proof, and that the maximum sentence has no bearing on the decision to release.[31] Furthermore, the court ruled that persons found NGRI do not have the same

protections as persons under civil commitment and can be confined for longer, indeterminate periods.

Minnesota also places more stringent requirements on NGRI acquittees in felony and gross misdemeanor cases than in civil commitments. If the person is already under a civil commitment when found NGRI, the court continues the civil commitment; if the person is not under commitment, the court institutes it. But the trial court retains continuing supervision over the case and must be informed about any proposed discharge of commitment.[32]

Mitigation

The idea of mitigation for mental illness is not to excuse the defendant but to reduce the charge or ameliorate the sentence. English law, for example, stipulates that a person whose mental illness, disease, or defect substantially impairs his mental responsibility for a murder can be convicted only of manslaughter.[33] That is, a mentally ill defendant might be incapable of the premeditation required for a murder charge. A similar approach has been taken in a number of American states. In 1992 the Minnesota Supreme Court identified 24 states that allow psychiatric evidence on the question of whether a mentally ill defendant intended, or had the necessary mental state, to commit the crime charged.[34] But courts in Minnesota and many other states have rejected the concept of diminished or partial responsibility for a crime owing to mental illness. A problem for many courts is that it is hard to connect a person's mental illness, which is a general condition, with the specific mental state at the time of the crime.

Tougher laws against mentally ill criminals after the Hinckley case also resulted in more jurisdictions refusing to accept the defense of diminished responsibility. Congress abolished this defense in federal courts in the Insanity Defense Reform Act of 1984.[35] California, which had been a leader in setting legal precedents for diminished responsibility, abolished it as a defense in 1982.[36] The California Supreme Court has

since upheld the constitutionality of this change, just as it had upheld the principle of diminished responsibility before the California legislature changed the law.

Minnesota courts do not allow the defense of diminished responsibility for mentally ill defendants. The state's Supreme Court has ruled decisively on this in several cases.[37] This is consistent with the court's stand against allowing expert psychiatric testimony on the mental state of the defendant during the first stage of a trial, which deals with elements of the crime. On this point, the Minnesota Supreme Court stated:

> The law recognizes no degree of sanity. Applying socially and morally acceptable standards a line has been drawn — on one side are the legally sane, on the other side are the legally insane.[38]

The court went on to acknowledge, however, that:

> There are exceptions. An example is intoxication. *See* Minn. Stat. 609.075 (1980). There are, however, significant evidentiary distinctions between 'partial or relative insanity' and conditions such as intoxication, medication, epilepsy, infancy, or senility. These are susceptible to quantification and lay understanding.[39]

In support of this view, the court's opinion cited a 1973 federal court decision that "The esoterics (*sic*) of psychiatry are not within the ordinary ken."[40]

The court's opinion that, unlike intoxication, degrees of insanity and psychiatry are beyond lay understanding seems to be contradicted in a more recent decision: " . . . expert opinion testimony about the general effects of mental illness or intoxication is ordinarily inadmissible because most jurors have some experience with these conditions."[41] Here the court put mental illness and intoxication in the same category with regard to knowledge by lay jurors. The court asserted, therefore, that not that all testimony on the defendant's mental state might be disallowed in the first stage of a trial, but *expert* testimony is forbidden, and testimony by psychiatrists is expert testimony.

Minnesota's policy on mentally ill criminals

Minnesota's policy on mentally ill criminals is based on its statutes, court rules, and legal precedents.[42] In comparison with other states, Minnesota has one of the most stringent policies, making it very difficult for a mentally ill person who has committed a crime to be acquitted by reason of insanity. Minnesota uses the strict McNaughtan test for insanity, with the burden of proof on the defense, and forbids any psychiatric testimony that might mitigate the seriousness of the crime charged. The rarity of insanity acquittals in Minnesota supports this interpretation.

Despite the court's denial of diminished responsibility for mental illness, this is not fundamentally an issue of law but of public policy. Other states have decided to allow diminished responsibility or have changed their policy from one view to the other with shifting public sentiments.

Keeping in mind Minnesota's current policy and practices on the use of the insanity verdict, we next consider the potential impact of adopting another policy option, the verdict of guilty but mentally ill (GBMI), which is available in several other states.

The "Guilty but Mentally Ill" Verdict (GBMI)

The GBMI verdict is an alternative to guilty, not guilty, and NGRI; it is not meant to replace NGRI. Proponents of GBMI have asserted that it will reduce the frequency of NGRI verdicts and give juries an option between guilty and NGRI.[43] If more mentally ill defendants are found guilty, the argument goes, this will enhance public safety by allowing them to be imprisoned for longer periods than they would be under confinement following an insanity acquittal. Some advocates of GBMI believe it will lead to better care of mentally ill people once they are in correctional institutions.

GBMI statutes typically say that a defendant must first raise the insanity defense to take advantage of the GBMI law. Then, the court orders the defendant to undergo a psychiatric exam to find out whether there is a factual basis for claiming mental illness at the time the crime was committed. The statute must define mental illness, which will not be the same definition used for insanity. A defendant may plead to GBMI, if accepted by the court, or the defendant may go to trial.

At trial, the defendant may be found not guilty, not guilty by reason of insanity, guilty, or guilty but mentally ill. The prosecution has to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. The defense must prove that the defendant was mentally ill. The insanity defense must also be decided, however. Depending on which side has the burden of proof of insanity in the state, a guilty or GBMI verdict also presumes that either the defense fails to prove insanity, or it requires the prosecution to prove that the defendant was not legally insane when the crime was committed. Different legal standards may apply depending on state law about which side has to prove what. A jury may find, for example, that the defendant is guilty of the crime charged beyond a reasonable doubt, was mentally ill when he committed the crime by preponderance of evidence, and that the state proved beyond a reasonable doubt that the defendant was not insane — therefore, GBMI.

The GBMI verdict was first enacted in Michigan in 1975.[44] This happened because of a unique situation in Michigan when the state Supreme Court ruled that the state could not automatically commit people who were found NGRI. Immediately about 150 people were released from custody. Two of these people soon committed violent crimes, and the Michigan legislature responded to public outrage by changing the law. A few other states followed the Michigan lead. The Hinckley case stimulated adoption of GBMI by additional states, bringing the total to 13.[45] GBMI has been adopted by states that use different tests and standards for insanity, although there are minor variations in their GBMI statutes.

The GBMI verdict has been upheld in virtually every state and federal court challenge, whether on grounds of equal protection, due process, cruel and unusual punishment, ex post facto law, or right to treatment.[46] In 1986 the U.S. Supreme Court dismissed an appeal of a conviction under Michigan's GBMI statute for want of a substantial federal question.[47] In 1987 the Seventh Circuit of the U.S. Court of Appeals ruled Illinois' GBMI statute constitutional.[48] In 1998 the Tenth Circuit upheld New Mexico's GMBI statute.[49] A lone state appeals court in 1997 in Illinois ruled the state's GBMI statute unconstitutional because it encourages compromise verdicts based on jurors' misperceptions and misunderstandings, which is a violation of due process.[50]

The court rulings have affirmed that GBMI is essentially *no different than a conventional guilty plea or verdict.* It does not guarantee a right to treatment for a mentally ill defendant, and it does not imply any diminished responsibility for the crime.

Opponents of GBMI

Despite its success in court challenges, many people remain opposed to this verdict. The American Bar Association and the American Psychiatric Association, among other groups, have declared their opposition to GBMI.[51] The ABA's position is that it does not achieve the intended goals, while adding a meaningless and unnecessary element to the criminal justice system.[52] The ABA holds that GBMI ". . . is not a proper verdict at all. Rather it is a dispositional mechanism transferred to the guilt determination phase of the criminal process."[53]

Research findings

Researchers have studied the impact of GMBI in several of the states that adopted it, investigating whether it met the goals of reducing insanity acquittals and keeping dangerous mentally ill criminals in prison for longer periods. Most of the research has

been done in Michigan — which has the longest experience with GBMI — and, to a lesser degree, in Georgia and Illinois.

A study in Michigan showed that, despite adoption of GBMI, the rate of NGRI verdicts remained stable over a ten-year period. Before GBMI was introduced, 0.024 percent of adult male defendants were found NGRI; seven years after GBMI was adopted, the percentage of NGRI verdicts was 0.032 percent.[54] This finding contradicts that belief that GBMI would decrease the rate of insanity acquittals. In the four years before GBMI, the number of insanity acquittals averaged 59 per year; in the first four years with GBMI, acquittals averaged 54 per year. The study also found that about 60 percent of GBMI cases were settled through plea bargains, while only 20 percent went to a jury. Researchers found this somewhat surprising because the verdict was supposed to help juries in their decision-making about insanity.

The researchers concluded that most defendants receiving GBMI verdicts probably would have had been found guilty without availability of the GBMI verdict. As to treatment for mental illness after conviction, over 75 percent of defendants found GBMI got no psychiatric treatment, and most of the others had only cursory psychiatric check-ups. Psychiatric testing at one Michigan prison found that only 50 percent of GBMI convicts showed signs of mental disorder.

A 1996 report in a Michigan newspaper also described the lack of treatment given to persons convicted as GBMI.[55] Of 308 inmates on GBMI convictions, 41 (13%) were receiving in-patient care; the rest got no treatment or as few as one psychiatric appointment every 60 days.

Unlike the results for Michigan, a study in Georgia found a decline in insanity verdicts as a result of GBMI.[56] Georgia and Minnesota have the same legal test and standards for insanity; Michigan uses the ALI test. The study compared pleas and verdicts from 1976 to 1981 (before GBMI) with those from 1982 to 1985 (after GBMI) and reported that the NGRI rate went from 20 percent of pleas down to 12 percent. Acquittals averaged 48 per

year before GBMI and 32 afterwards. Some defendants accused of violent crimes who formerly would have been found NGRI were being found GBMI, and they got longer sentences.

The GBMI option also affected plea bargaining in Georgia. Initially there was an increase in plea bargaining to GBMI by defendants faced with a possible death sentence if they went to trial. Later, plea bargaining appeared to decline, perhaps because defense attorneys saw that their clients who pleaded to GBMI were likely to get longer sentences. The medical treatment of GBMI prisoners was no different from other mentally ill prisoners; Georgia does not mandate treatment but it does allow sentencing to the state's Department of Human Services for confinement in a state hospital instead of prison, depending on the person's mental condition.

In Illinois the Governor's Commission to Revise the Mental Health Code of Illinois called for abolition of the verdict.[57] The commission argued that it had failed to achieve its intended goals and that it had a number of negative consequences. There was little evidence that it had reduced the number of insanity acquittals and provided no special treatment for mentally ill offenders beyond what other prisoners received.[58] The commission also found that it stigmatized people in prisons, causing their maltreatment by other prisoners.

A 1997 investigation by *The Times*, an Indiana newspaper, recounted problems with the state's GBMI verdict.[59] According to the report, GBMI has practically eliminated the insanity verdict in Indiana. A person, for example, facing the death penalty is more likely to plead to GBMI than risk going for an insanity acquittal at trial. But other defendants who pleaded to GBMI did so on advice of their defense attorneys, believing that they would receive treatment for their illness — treatment often not forthcoming in prison. Indiana's Supreme Court has also ruled that a person convicted of GBMI can be executed. According to the reporter, "Growing evidence points toward an inescapable conclusion: Indiana's prisons soon will displace state mental hospitals as the dominant long-term institutional care for the seriously mentally ill." And Indiana's Department of Corrections

acknowledged that it does not have the resources to properly treat the numbers of mentally ill prisoners.

Potential impact on Minnesota

What would happen if GBMI were adopted in Minnesota? Not much. Because Minnesota already has almost no insanity acquittals, GBMI would have virtually no impact on the number. And Minnesota does not have a problem keeping persons under indeterminate commitment if they have been acquitted for insanity, so GBMI is not necessary for that purpose. If better treatment of mentally ill inmates is the goal, the Legislature could ensure that without GBMI.

GBMI might have an impact on plea bargaining, as it has in other states. The likely result would be that some people who now plead guilty would plead to GBMI instead. This might result in longer sentences for them, however, if they plead to GBMI instead of to a reduced charge under a conventional guilty plea. As seen in other states, defendants sometimes plead to GBMI under the mistaken hope or poor advice that they will receive treatment for their mental illness.

What Happens to Mentally Ill Criminals in Minnesota?

Insanity acquittals are so rare in Minnesota that it raises a question of what's going on. The strictness of Minnesota's insanity standards is certainly a contributing factor. But compare Minnesota and Georgia, which have the same insanity standards. Georgia has about 50 percent greater population than Minnesota and averaged about 40 insanity acquittals per year before GBMI was adopted. Michigan, with a population twice Minnesota's, has over 50 NGRIs per year. Given the rates in Georgia and Michigan, and Minnesota's population, one might expect to see about 25 insanity acquittals in Minnesota each year.

We also know that schizophrenia has a relatively constant rate of 1 percent in the population and that it is the illness of most insanity acquittees. So one cannot assume there are fewer severely mentally ill people in Minnesota than in other states. As discussed earlier, about 13 percent of Minnesota's prison inmates are mentally ill.

An explanation for the very low rate of insanity acquittals in Minnesota may be that mentally ill defendants find an advantage in not trying for an insanity acquittal. Consider the choices of a mentally ill defendant. The defendant can plead guilty, possibly to a reduced charge, or go to trial on the crime charged, pleading insanity. The defendant acquitted for insanity, however, still faces a potentially long indeterminate period of confinement under a mental illness commitment. Given the choices, the defendant might well choose to accept a plea bargain with jail time or a determinate prison sentence, as specified under Minnesota's sentencing guidelines, to avoid prolonged confinement for mental illness.

End of the Insanity Defense?

The rarity of insanity acquittals and the large number of mentally ill people in prison show that, in practice, Minnesota is making little use of the insanity defense for defendants with serious mental illness. Despite substantial medical progress in the understanding of mental illness, the centuries-old concept that a person can be too mentally ill to be morally accountable for a crime seems to have fallen into disregard. Since this has not happened by specific legislative intent, the Legislature might wish to consider whether the viability of the insanity defense should or could be restored.

To restore viability to the insanity defense, the Minnesota Legislature might consider the following options:

- Changing the insanity standard from McNaughtan to ALI.
- Shifting the burden on proving insanity from defense to prosecution.
- Allowing mitigation for mental illness.

We propose these ideas as being worthy of further, more comprehensive review by legislators, legal scholars, and the judiciary.

Changing the standard or burden of proof would be relatively straightforward options that are used in other states — and were used more widely before the Hinckley case. Mitigation is a much more complicated legal issue, but it opens the door to a broader approach to mentally ill defendants.

Mitigation might take the British approach of reducing murder charges to manslaughter. Or it might mean allowing psychiatric or non-expert testimony on a defendant's mental illness in the guilt-determining stage of a trial. Mitigation at sentencing might include a downward departure of sentence length under sentencing guidelines. Alternatively, a sentence might be stayed or suspended and probation granted on condition that a defendant voluntarily and faithfully keep on prescribed medication for his or her illness and abstain from alcohol and illegal drugs. Research has showed that these conditions greatly reduce the threat of violence. This option would require intensive supervision but might have the added benefit of being less costly than prison.

Services for Mentally Ill Criminals

Regardless of what type of insanity defense is allowed in Minnesota, the state must still consider how best to confine, treat, and return to the community the hundreds of mentally ill people who commit serious crimes. Their numbers are only partly related to the insanity defense and infrequency of insanity acquittals. Many people with severe mental illness are in the criminal justice system as a consequence of civil commitment laws and U.S. Supreme Court rulings that make it virtually impossible to commit mentally ill people until they become dangerous or violent — a legal situation that is unlikely to change in the near future.

The state's prisons and jails offer mental health services to prisoners; this is a legal requirement, as it is for other types of health care. Prisoners cannot be forced to take

medication for their mental illness, however, unless they are committed separately for mental illness. The Department of Corrections also has a special needs unit at Lino Lakes correctional facility that houses mentally ill inmates, offers them specific programs, and assists with placement on release from prison.

The most significant gap in services occurs when mentally ill prisoners return to the community. According to a recent study on Hennepin County, for example, there are no community corrections programs that focus on the mentally ill offender.[60] More typically, programs exist for sex offenders, chemical dependency treatment, or as halfway houses for those released from prison. Community services for all people with mental illness are deficient, but mentally ill offenders present special challenges. Many of the residential treatment programs for mentally ill people (Rule 36 programs) are less willing to admit offenders and may not be prepared to treat them.[61] Mentally ill offenders often have a dual diagnosis of chemical dependency, which should be treated simultaneously with their mental illness treatment. Another problem in returning mentally ill offenders to the community is they are often homeless at the time of their arrest.

Several jurisdictions around the country have developed model programs for the mentally ill offender. Maryland has the Community Criminal Justice Treatment Program, a multiagency collaborative that provides long-term housing, case management, and treatment services to mentally ill offenders in their communities.[62] The program was initiated to serve the jailed mentally ill but has been expanded to include persons on probation and parole, and it also has a pretrial diversion program. It will take people who are chemically dependent in addition to having a serious mental illness. In 1996, the program served 1,700 people, with a budget of about $14 million drawn from local, state, and federal sources.

Broward County (Florida) has started a "mental illness court," which is analogous to drug courts in other jurisdictions.[63] The Florida court deals with both the legal and medical issues of offenders who are mentally ill. It can divert misdemeanor offenders into treatment programs, structure and monitor the mental health treatment of convicted

offenders, ensure the competence of mentally ill defendants to stand trial, and see that the criminal justice and mental health systems work together for the benefit of offenders and the community.

In 1998 the California legislature set up a grant program to assist local communities in dealing with mentally ill offenders.[64] Initial funding was $27 million to the State Board of Corrections, which administers the program. Communities that wish to compete for the grants must establish local strategy committees of law enforcement and mental health agencies chaired by a sheriff or corrections director. The goal is to develop more cost-effective programs that provide a continuum of responses to mentally offenders, from prevention to intervention and incarceration.

These examples show that other states are beginning to respond to the problem of having large numbers of mentally ill people in the criminal justice system, while trying to promote the safety of the community when they are released from confinement. The model programs show that the criminal justice system, working in coordination with the mental health system, can build a more humane and effective path to dealing with mentally ill criminals.

NOTES

[1] National Institute of Mental Health, <<http://www.nimh.nih/gov/>>; and National Alliance for the Mentally Ill (NAMI), <<http://www.nami.org/>> are good sources of information on mental illness.
[2] NAMI.
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[4] American Psychiatric Association, <<http://www.psych.org/public_info/>>. G. M. Asnis, et al., "Violence and homicidal behaviors in psychiatric disorders," *Psychiatr. Clin. North Am.*, 20 (June 1997): 405-425. Henrik Belfrage, "A ten-year follow-up of criminality in Stockholm mental patients: New evidence for a relation between mental disorder and crime," *British Journal of Criminology*, 38 (Winter 1998): 145-156. Lynn Lambert, "Mental illness and violent acts: Protecting the patient and the public," *Journal of the American Medical Association*, 280 (August 5, 1998): 407-408.
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[14] Ingo Keilitz, "Researching and reforming the insanity defense," *Rutgers Law Review*, 39 (Winter/Spring 1987): 289-323.
[15] For Minnesota, see M.S. 611.026.
[16] Keilitz: 296.
[17] Keilitz: 296-7; it was part of the 1984 Comprehensive Crime Control Act.
[18] 18 U.S.C. Sec. 17.
[19] Keilitz: 303-4.
[20] H. Richard Lamb and Linda E. Weinberger, "Persons with severe mental illness in jails and prisons: A review," *Psychiatric Services,* 49 (April 1998): 483-492. And E. Fuller Torrey, *Out of the Shadows: Confronting America's Mental Illness Crisis*, Wiley, 1996.
[21] *Laws* 1997, Ch. 217, Art. 1. Or M.S. 253B.064-066.
[22] Martin Marty, Hennepin County staff person, speaking to a meeting of the Hennepin County Alliance for the Mentally Ill.
[23] Steadman: 37,40.
[24] Steadman: 85.
[25] Minnesota Court Rule 20.02, subd. 6(4).
[26] Minnesota Court Rule 20.02, subd. 6(2,3).
[27] *State of Minnesota v David Francis Hofman*, Supreme Court of Minnesota, 328 N.W. 2d 709 (1982).
[28] *Minnesota Court Rules*, Rule 20.01.
[29] *Cooper v Oklahoma*, 116 S. Ct. 1373 (1996).

[30] Richard Singer, "The aftermath of an insanity acquittal: The Supreme Court's recent decision in *Jones v. United States*," in *Annals of the American Academy of Political and Social Science*, 477 (January 1985).
[31] Steadman. The court case was *Jones v United States* (1983).
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[35] Steadman: 41.
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[46] Callahan, et al.; McGraw, et al.
[47] *People v Hardesty*, 424 Mich. 877, 477 U.S. 902 (1986).
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[49] *Neely v Newton*, Tenth Circuit, No. 97-2161 (June 24, 1998); <<http://lawlib.wuacc.edu/ca10/1998/06/97-2161.htm >>.
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LETTERS, WE GET LETTERS ... 1987

Frequently, agencies like to point the finger at each other regarding the lack of resources and programs for the chronically mentally offender. The gentlemen who wrote (Help-Mi Monitor December 1987) expresses many valid concerns and demonstrates the need for coordinated treatment programming between Corrections and the Mental Health systems. His concerns much like your own, have caused our systems to some mutual problem solving to address these issues.

Although far from extensive, a new 10-bed residential program for chronically mentally ill offenders has just been started! This program housed at the Orange Street Community Corrections Center is designed to aid the severely impaired client in learning independent living skills, facilitating entry into various disability programs, achieving a more gradual re-entry into the community and establishing appropriate levels of therapeutic intervention.

In Utah a team approach is taken in supervising and treating the mentally ill offender. When the offender is paroled from prison and taken up residence in Salt Lake County, he is assigned to a specialized supervision unit within the Parole Office. The Mental Health Parole Officer (MHPO) makes a direct referral to the Salt Lake Valley Mental Health Forensic Unit, who do the initial intake, schedule medication evaluation and assign a primary therapist. The MHPO, the Salt Lake Valley Mental Health Forensic Unit, and the mental health primary therapist all coordinate their efforts to provide appropriate services in order to assist the client in his/her adjustment from prison.

We realize that this program may not reach every mentally ill offender in the prison right now, but we are working hard to do so in the future.

Donna Moxley Castleton, D.S.W.
Salt Lake Valley Mental Health
Peter Nelson
Utah State Department of Corrections

From a prisoner in Utah . . . I think I'll close for now and as I do I'd like to wish you and your colleagues good luck in your efforts to us here at the prison and I'd like to wish you a Happy Easter.

"I Am Ashamed to be An American"

K. ZWACK:

My husband and I have a son who is mentally ill. I did not believe there was a possibility he'd go to prison.

My husband, Joe, is a chemical engineer with 3M and travels to prisons where license plates are made. I've been in various prisons and I'm well aware of what goes on.

I feel rage, that my son is in that filthy, barbaric, punitive T D C. I'm certain in Minnesota he would not have gone to prison. I did not realize in other states, also, people who are obviously mentally ill go to prisons. How backward is America!

In Texas everyone waves the flag with "justice" for who? Darn few, certainly not all. A joke! I'd like information on joining and literature (if you have some). How many people like myself are involved? We are deeply in debt and are appealing. So far, I've been unable to get him into Ellis II, a mental unit on TDC, but **will not give up** (he needs meds). Guards come at Kyle with a "pretend gun" to shoot him for fun.

Breakfast is at 3:30 a.m. A. One does not have to go to breakfast. B. The "slaves can hit the slave plantation" at the break of dawn, as they are not paid a penny, nor are inmates issued a fan. Fans are $20. My son has money (many have no one on the outside, no fan). 38,000 plus inmates.

Unlike the Hinckleys, we knew he was mentally ill and signed commitment papers, but they could not hold him, "as he hasn't committed a crime" and was 21.

The laws are more insane than the people.

JoAnn Zwack

Note:
The above letter and picture is of Kyle Zwack submitted by his mother, JoAnn M. Zwack. He became ill in Minnesota and was picked up by the police after his mother called them because of a crisis and was released because he had not committed a crime yet. The psychiatrist said he was a walking time bomb. He became very paranoid about the police trying to get him and fled to Texas. He wore a bullet-proof vest and armed himself for protection. On February 11, 1986, officers were trying to arrest Kyle for violating his parole by carrying a weapon. A gun battle pursued. The police fired over 40 shots at Kyle and he fired 28 at them. Because of his bullet proof vest, he only received superficial wounds to his neck and back. The only injury the police received was a shot hitting one officer in the buttocks while still in his car. The jury rejected the insanity plea and sentenced Kyle to 49 years in prison. Kyle is a man with an illness that needs medications but is denied treatment. The Houston Chronicle referred to him as a "troubled man" who "hates police". It is not hard to understand why his parents are bitter when they tried to get him committed knowing he was ill and needing help, but could not because he had only threatened to harm someone. Not only did the commitment laws fail in this case, but also the jury rejected the insanity plea after defense attorneys presented documents and psychiatrists testimony to the contrary. We receive more tragic calls for support from Texas than any other state in the Union. Our work has just begun.

Editor

A history of Kyle Zwack, #46356-079, in the Federal Bureau of Prisons:

Federal Marshals picked up our son Kyle Zwack in March of 2004 from Oak Park Heights Prison, Stillwater, MN. Kyle had completed 18 years of a 45-year sentence from Texas. We all knew he was going to be picked up any day and I told Kyle to call us collect when he arrived at his destination. We did not hear from him for a number of days, so we called our local Representative, Mindy Greiling. Mindy's office staff located Kyle at Terre Haute, IN, a maximum-security prison. We later found out it is the policy of that prison not to allow any phone calls for 30 days. While he was at Terre Haute he had raw sewage back up into his cell two times. Kyle was given supplies to clean up the mess, as well as disinfectant.

The chief psychologist stood in front of Kyle's cell and said, "I don't believe you're mentally ill." Another psychologist took away his anti-depressant that had been prescribed for him by a psychiatrist. Kyle wrote a kite (enclosed) and begged to have his antidepressant back, but had to wait for three months to see a telepsychiatrist, available only once a quarter on a TV screen before it was reinstated. He also had to wait another two weeks to actually receive it, although there was a pharmacy on the premise.

While Kyle was at Terre Haute he and his cellie were put in the same cell in segregation. As they said a weapon was found in their cell. Kyle has now been in prison 19 long years and he hasn't hurt a soul since he first went to prison in Texas in 1987. We offered to pay for a polygraph test but this was denied. He and his cellie were locked up 23 1/2 hours for 33 or 35 days. During that time, having nothing to do, Kyle wrote Senator Ted Kennedy. "He was the only one I could think of," Kyle told us. Unbeknown to Kyle, Senator Kennedy is a good friend of Senator Bayh from Indiana. During this time Kyle's and his cellies possessions were taken away. When all charges were dismissed and their possessions were returned, lotion in Kyle's bag was poured over his bible and other possessions and also over his cellie's stuff (his cellie had no lotion in his bag)

Kyle was assigned to work in the kitchen, which was loaded with cockroaches, and he would see many dead mice caught in traps when he came in the morning. A guard woke him up each morning at 5:00 or 5:30. He would often fall asleep in the kitchen when there was no work to do. Kyle was correctly diagnosed as having sleep apnea and was told he would get a C-Pap machine. To this day, he has not received the machine. We would be willing to pay for it.

Terre Haute was a good 13 hour drive for us one way. When Kyle was in Minnesota, it was rare that we missed seeing him every week. THERE ARE MANY FEDERAL INMATES IN THE MINNESOTA PRISON SYSTEM THAT DO NOT EVEN HAVE RELATIVES HERE.

We believe that Senator Bayh got Kyle transferred from Terre Haute to Pekin, IL, a medium classified prison. Because he committed a violent crime, for seven days a week from 7:00 am until nine at night he must report to an officer every two hours. Kyle forgot the time and was late one day, his punishment was he had to go out and pick up cigarette butts in the snow for one hour (Kyle has never smoked). Kyle is very afraid and nervous

that he'll forget and go to the hole as another inmate has. Kyle wrote a grievance to a regional office about the two-hour reporting, which my husband and I think is ridiculous and demeaning. A Lt. called Kyle in and threatened to kill him for writing the grievance. Kyle told him "I'll pray for you," and the Lt. indicated he didn't want him to. Kyle said, "God wants me to." Kyle should come up for a review for parole in March of this year. He recently asked the Captain if he knew when it would be. The Captain used the "F" word and said F--- you, don't be writing any more letters. Kyle never swears, so shouldn't the staff model decent language to the inmates?

Kyle applies for various jobs but works in the "electrical dept." Three of them go together to change light bulbs or to fix small appliances. There are about 20 in the department and most days there's nothing to do. Kyle sleeps on the cement floor for an hour at a time as the supervisor is rarely in the room.

Kyle is housed in a 10 man dorm (a former TV room). He is very tired and bored at Pekin. Kyle's paying job at Oak Park Heights was to tutor inmates and to help them get a GED. Kyle was in his 3rd year of mechanical engineering when he became paranoid schizophrenic, at the age of 21. We tried to get him committed, but the laws are more insane than the people. As a volunteer in the federal prison, he teaches basic math to inmates who want to get a GED. Kyle was in the honor unit for years at Oak Park, he is a Christian, and tithes his money. We love him with all our hearts and pray he comes to Minnesota so we can see him regularly. He is all we have. We are both seniors with medical problems and it's difficult to travel nine hours.

Joseph R. Zwack JoAnn M. Zwack

Feb. 14, 2005

Enclosures

.055 **INMATE REQUEST TO STAFF** CDFRM

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U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Psych	DATE: 5-16-04
FROM: Kyle B. [illegible]	REGISTER NO.: 46356-074
WORK ASSIGNMENT: FSA Mail	UNIT: [illegible]

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. ~~Your failure~~ to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Dear Doctors:

I'm in desperate need of a psychiatrist. I cry for no reason all the time. If I can't get the old address and can't have PLEASE, PLEASE have a new one! I also want to see my medical records.

(Do not write below this line)

DISPOSITION:

You were just seen in Telepsychiatry clinic (5-4-04). You have been scheduled for follow-up on 8-3-04.

Please address access to your medical records w/ Health Services.

Signature Staff Member	Date
[signature]	5-20-04

ecord Copy - File; Copy - Inmate
This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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