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## **GAMING THE SYSTEM: THE SEVENTH CIRCUIT PREFERS ITS VIDEO GAMES VIOLENT, NOT SEXY**

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### INTRODUCTION

The First Amendment proscribes Congress from enacting laws that restrict the content of speech.<sup>1</sup> Despite the unequivocal language of the First Amendment, the United States Supreme Court has consistently held that it does not protect obscenity.<sup>2</sup> The Court has offered two primary reasons for not protecting obscenity: 1) obscenity contributes nothing to society; and 2) obscenity was simply never intended to be protected.<sup>3</sup>

In contrast to obscene speech, violent speech gets full First Amendment protection.<sup>4</sup> While the Court states that obscenity categorically contributes nothing to society, it reasons that even the

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<sup>1</sup> U.S. CONST. amend. I, § 2.

<sup>2</sup> *Roth v. United States*, 354 U.S. 476, 485 (1957); *Miller v. California*, 413 U.S. 15 (1973).

<sup>3</sup> *See Roth*, 354 U.S. at 483-84.

<sup>4</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447, 449 (1969).

most despicable, hateful, violent speech benefits society in some way, and is thus deserving of constitutional protection.<sup>5</sup>

In 2005, the U.S. District Court for the Northern District of Illinois ruled that two Illinois statutes aimed at restricting the sale of violent and sexually explicit video games to minors violated the First Amendment.<sup>6</sup> The court determined that both the Illinois Violent Video Games Law (“VVGL”) and Illinois Sexually Explicit Video Games Law (“SEVGL”) were content-based restrictions that could be justified only by compelling interests and narrowly tailored plans.<sup>7</sup> The State appealed the SEVGL ruling only, and the U.S. Court of Appeals for the Seventh Circuit affirmed the district court’s ruling that the SEVGL required and did not pass strict scrutiny.<sup>8</sup>

While both statutes failed strict scrutiny at trial, the VVGL and SEVGL failed for different reasons. The district court determined the VVGL did not encompass a compelling interest,<sup>9</sup> whereas the SEVGL did encompass a compelling interest, but was not narrowly tailored.<sup>10</sup> The court recognized the importance of protecting minors from violent content, but held that it did not provide a constitutional basis to regulate speech.<sup>11</sup>

While the VVGL got hung up in compelling interest analysis, the trial court simply assumed protecting children from sexual-themed content is compelling, and moved on to narrow tailoring analysis.<sup>12</sup> The Seventh Circuit applied the same cursory compelling interest analysis to the SEVGL.<sup>13</sup>

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<sup>5</sup> See *Roth*, 354 U.S. at 484.

<sup>6</sup> *Entm’t Software Ass’n v. Blagojevich (ESA I)*, 404 F. Supp. 2d 1051, 1055 (N.D. Ill. 2005), *aff’d*, 469 F.3d 641 (7th Cir. 2006).

<sup>7</sup> *Id.* at 1072, 1078.

<sup>8</sup> *Entm’t Software Ass’n v. Blagojevich (ESA II)*, 469 F.3d 641, 644 (7th Cir. 2006).

<sup>9</sup> *ESA I*, 404 F. Supp. 2d at 1073-76.

<sup>10</sup> *Id.* at 1080.

<sup>11</sup> *Id.* at 1073-76.

<sup>12</sup> *Id.* at 1080.

<sup>13</sup> *ESA II*, 469 F.3d at 646.

This Note will contend that while both the trial court and Seventh Circuit's ruling were consistent with Supreme Court precedent, the disparate levels of protection afforded violent and sexually explicit speech are legally and logically inconsistent. This inconsistency presents different problems for adults and minors, and requires different remedies. For adults, obscenity should be afforded the same constitutional protection as violent content. And in the realm of minors, the notion of protecting children from harmful content should apply with as much rigor to violent content as it does to sexually explicit content.

Section I will detail the relevant history of First Amendment protection of violent and sexually explicit materials. Section II will examine the district court and Seventh Circuit applications of the relevant First Amendment and obscenity tests in *ESA I & ESA II*, respectively. Section III will explore how the Seventh Circuit and Supreme Court should alter obscenity law for adults and content restrictions for minors.

## I. THE FIRST AMENDMENT PROTECTS VIOLENT SPEECH BUT DOES NOT PROTECT OBSCENITY

### *A. Content-based Restrictions*

With limited exceptions, the First Amendment prevents the government from enacting laws that restrict expression because of its content.<sup>14</sup> As a result, any restriction on the content of speech or expression is presumptively invalid.<sup>15</sup>

Our political system and culture depend on the principle that citizens, rather than government, decide what messages are worth stating or receiving.<sup>16</sup> Instead, citizens bear this responsibility individually, and any attempt by the government to restrict expression

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<sup>14</sup> *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>15</sup> *Id.*

<sup>16</sup> *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

poses the risk that it is attempting to stifle unpopular ideas.<sup>17</sup> Thus, courts apply the most stringent tool of analysis, strict scrutiny, to any content-based restriction.<sup>18</sup> Strict scrutiny demands that content-based restrictions “must be narrowly tailored to promote a compelling government interest.”<sup>19</sup>

There are, however, several limited exceptions to the First Amendment’s ban on content-based restrictions.<sup>20</sup> Namely, the First Amendment does not protect child pornography<sup>21</sup> or libel.<sup>22</sup>

And although obscenity was long assumed unprotected, it wasn’t until 1957 when the Supreme Court expressly ruled in *Roth v. United States* that the Constitution affords obscene content no protection.<sup>23</sup> In *Roth*, the Court first explained that the “unconditional phrasing of the First Amendment” is not actually unconditional.<sup>24</sup> It also explained that the purpose of the First Amendment is “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>25</sup>

Thus, the First Amendment protects all speech of social importance, regardless of its nature or content, because it furthers the constitutional purpose of promoting social and political discourse.<sup>26</sup> But the Court determined that any value obscenity might provide “is clearly outweighed by the social interest in order and morality.”<sup>27</sup> And because obscenity is not protected, the Court decided it didn’t need to

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<sup>17</sup> *Id.*

<sup>18</sup> *See id.* at 642.

<sup>19</sup> *U.S. v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000).

<sup>20</sup> *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

<sup>21</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002).

<sup>22</sup> *Beauharnais v. People of State of Ill.*, 343 U.S. 250, 266 (1952).

<sup>23</sup> 354 U.S. 476, 481, 485 (1957).

<sup>24</sup> *Id.* at 483.

<sup>25</sup> *Id.* at 484.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (internal quotation marks omitted) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

consider exactly how obscenity diminishes order or morality.<sup>28</sup> This form of circular reasoning pervades obscenity law and is representative of the underlying problem with obscenity law.<sup>29</sup>

Although the Court was certain that obscenity is per se excluded from First Amendment protection, it was not as certain of just how to define obscenity.<sup>30</sup> It ultimately held that obscenity is not synonymous with sex, but rather “deals with sex in a manner appealing to prurient interest.”<sup>31</sup> This, of course, begs the question of what exactly “prurient” means. The Court cited several sources to define prurient and prurieny.<sup>32</sup> These definitions include:

- “material having a tendency to excite lustful thoughts;”<sup>33</sup>
- “uneasy with desire or longing;”<sup>34</sup>
- “lascivious desire or thought;”<sup>35</sup>
- “[a] thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.”<sup>36</sup>

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<sup>28</sup> See *Roth*, 354 U.S. at 486-87.

<sup>29</sup> See, e.g., *id.* at 486-87 (arguing that it is irrelevant whether obscenity actually causes harm because it is not protected).

<sup>30</sup> *Id.* at 487-88.

<sup>31</sup> *Id.* at 487.

<sup>32</sup> *Id.* at 488 n.20.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 488 n.20 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY (Unabridged, 2d ed. 1949)).

<sup>35</sup> *Roth*, 354 U.S. at 488 n.20 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY (Unabridged, 2d ed. 1949)).

<sup>36</sup> *Roth*, 354 U.S. at 488 n.20 (citing MODEL PENAL CODE § 207.10(2) (Tentative Draft No. 6 1957)).

The Court concluded its analysis of obscenity generally by stating that government intrusion on freedom of speech must only occur when necessary to protect more important interests.<sup>37</sup> Obscenity, the Court decided, encroached on more important interests.<sup>38</sup> While it does not explicitly state what those interests were, the opinion suggested the interests were “social order and morality.”<sup>39</sup> But how obscenity diminishes social order and morality went unexplored by the Court. We’re essentially left to take the Court’s word for it.

Interestingly, the Court conceded that states may regulate obscenity merely for the “lustful thoughts” it provokes, and not because it causes lawlessness, harm, or even “antisocial conduct.”<sup>40</sup> This stands in stark contrast to the Court’s stance on violent speech, which cannot be regulated merely for thoughts provoked or advocated.<sup>41</sup>

## *B. Evolution of Obscenity Law*

### *1. Ginsberg v. New York*

In 1968, the Court decided the seminal case *Ginsberg v. New York*.<sup>42</sup> Today, *Ginsberg* stands for the proposition that states may regulate sexual materials intended for minors that they would not be able to regulate for adults.<sup>43</sup>

In *Ginsberg*, the Court upheld the constitutionality of a New York statute regulating sales of sexually explicit magazines to minors.<sup>44</sup> The

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<sup>37</sup> *Roth*, 354 U.S. at 488.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.* at 485.

<sup>40</sup> *Id.* at 486.

<sup>41</sup> *C.f.*, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (statutes regulating “mere advocacy” of violence “fall[] within the condemnation of the First and Fourteenth Amendments”).

<sup>42</sup> 390 U.S. 629 (1968).

<sup>43</sup> *See id.* at 637.

<sup>44</sup> *Id.* at 631, 633.

New York statute adapted the three-part test for determining obscenity from *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of the Commonwealth of Massachusetts* in order to define obscenity "on the basis of its appeal to minors."<sup>45</sup>

By upholding the constitutionality of the statute, the Court also upheld the concept of "variable obscenity."<sup>46</sup> Variable obscenity is the notion that content that is merely indecent when intended for adults may be obscene when intended for children.<sup>47</sup>

Notably, the Court premised its decision on the basis of potential harm sexually explicit materials may cause to minors.<sup>48</sup> This represents a departure from *Roth*, which allowed obscenity restrictions solely for the "lustful thoughts" provoked.<sup>49</sup> In *Ginsberg*, the Court held that states may regulate sales of sexually explicit materials to minors by finding a rational basis for the conclusion that the material is harmful to minors.<sup>50</sup> While this does not require scientific certainty of harm,<sup>51</sup> by premising the decision on potential harm rather than mere thoughts incited, *Ginsberg* required more of legislatures than *Roth*.

## 2. *Miller v. California*: The modern test for obscenity.

While the Court held in *Roth* that obscenity is not protected speech,<sup>52</sup> it did not set a clear test for determining what constitutes

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<sup>45</sup> *Id.* at 635.

<sup>46</sup> *Id.* at 636.

<sup>47</sup> *Id.* ("[T]he concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined." (internal quotation marks omitted) (quoting *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75 (1966))).

<sup>48</sup> *Ginsberg*, 390 U.S. at 640-41.

<sup>49</sup> *Roth v. United States*, 354 U.S. 476, 486 (1957).

<sup>50</sup> *Ginsberg*, 390 U.S. at 641.

<sup>51</sup> *Id.* at 642-43.

<sup>52</sup> *Roth*, 354 U.S. at 485.

obscenity until 1973 when it decided *Miller v. California*.<sup>53</sup> In *Miller*, the Court articulated a three-part test for juries to apply to determine whether content is obscene:<sup>54</sup>

- (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, or scientific value.<sup>55</sup>

This test, while very similar to the *Memoirs* formulation and the *Ginsberg* test, differs in one principal way.<sup>56</sup> The final prong of the *Miller* test requires triers of fact consider “whether the work, taken as a whole, lacks serious literary, artistic, or scientific value,” while the *Memoirs* test used the term “utterly without redeeming social importance.”<sup>57</sup>

*Miller*’s primary legacy is its test for obscenity, but the Court also took great pains in the opinion to affirm *Roth*.<sup>58</sup> It stated that categorizing obscenity as a part of the “free and robust exchange of ideas and political debate” demeans the First Amendment and all that it represents.<sup>59</sup> It further stated that First Amendment protection was designed to allow the exchange of ideas to stimulate political and

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<sup>53</sup> See *Ashcroft v. ACLU*, 535 U.S. 564, 574 (2002) (“Ending over a decade of turmoil, this Court in *Miller* set forth the governing three-part test for assessing whether material is obscene and thus unprotected by the First Amendment”); see also *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>54</sup> *Miller*, 413 U.S. at 24.

<sup>55</sup> *Id.*

<sup>56</sup> See *ESA II*, 469 F.3d 641, 648 (7th Cir. 2006).

<sup>57</sup> *Miller*, 413 U.S. at 24-25.

<sup>58</sup> See *id.* at 34-35.

<sup>59</sup> *Id.* at 34.

social change.<sup>60</sup> But rather than recognize the potential role obscenity could play in bringing about change in society's attitudes toward sex, the Court decided that obscenity cannot contribute to this exchange or stimulate social change.<sup>61</sup>

Furthermore, *Miller* also represents a step backward from *Ginsberg* because the Court spoke in *Ginsberg* to the harms sexually explicit materials may cause minors as a basis for regulation, but the Court abandoned this line of reasoning in *Miller*. Rather, the Court reverted back to the *Roth* line of reasoning that obscenity may be regulated simply because it is offensive.<sup>62</sup>

*C. Violent speech receives full First Amendment protection.*

In contrast to obscene speech, the Supreme Court has held that the Constitution affords the full protection of the First Amendment to violent expression.<sup>63</sup> This means that states may only regulate violent speech where it is “directed to inciting or producing imminent lawless action” and “is likely to incite or produce such action.”<sup>64</sup> This test immunizes advocacy of violence from government control.<sup>65</sup> For government regulation to succeed, the expression must do more than merely “increase[] the chance an unlawful act will be committed at some indefinite time in the future.”<sup>66</sup> In this way, the test distinguishes between mere advocacy of violence and words designed to incite imminent lawless action.<sup>67</sup>

This test, of course, differs significantly from the *Miller* test for obscenity, which only requires a showing that content appeals to

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<sup>60</sup> *Id.* at 34-35 (citing *Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

<sup>61</sup> *See Miller*, 413 U.S. at 35.

<sup>62</sup> *See id.*

<sup>63</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 448.

<sup>66</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (internal quotation marks omitted).

<sup>67</sup> *Brandenburg*, 395 U.S. at 448-49.

prurient interests.<sup>68</sup> Obscenity need not actually have any causal relationship with harm,<sup>69</sup> but violence, on the other hand, must be shown that it is both designed to cause and likely to cause imminent harm.<sup>70</sup>

## II. APPLICATION OF THE *BRANDENBURG* TEST FOR VIOLENT SPEECH AND THE *GINSBERG/MILLER* TEST FOR OBSCENITY IN *ESA I & II*

### A. ESA I

The Seventh Circuit recently had the rare opportunity to apply both the *Brandenburg* test for violent content and the *Ginsberg/Miller* paradigm for sexually explicit content when it affirmed a case from the Northern District of Illinois.<sup>71</sup>

*ESA I* involved a challenge to two statutes restricting the sale of certain video games to minors.<sup>72</sup> Groups representing developers, distributors, and retailers of video games challenged the constitutionality of the Illinois Violent Video Game Law (“VVGL”) and the Sexually Explicit Video Game Law (“SEVGL”).<sup>73</sup>

#### 1. VVGL did not include any compelling interests.

All parties in *ESA I* agreed the VVGL was a content-based restriction subject to strict scrutiny analysis.<sup>74</sup> But the state claimed it had five compelling interests in regulating violent video games for minors:

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<sup>68</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>69</sup> See *Ginsberg v. New York*, 390 U.S. 629, 642 (1968).

<sup>70</sup> *Brandenburg*, 395 U.S. at 447.

<sup>71</sup> *ESA I*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005) *aff'd*, 469 F.3d 641 (7th Cir. 2006).

<sup>72</sup> *Id.* at 1055-56.

<sup>73</sup> *Id.* at 1055.

<sup>74</sup> *Id.* at 1072.

- 1) preventing violent, aggressive, and asocial behavior;
- 2) preventing psychological harm to minors who play such games;
- 3) eliminating societal factors that may inhibit the physiological and neurological development of its youth;
- 4) facilitating the maturation of Illinois' children into law-abiding, productive adults; and,
- 5) assisting parents in protecting their children from such games.<sup>75</sup>

While the district court agreed that these interests were important, it countered that the statute could only regulate violent speech when the State demonstrates that the anticipated “harms are real, not merely conjectural.”<sup>76</sup> Thus, the State had to prove that the video games it sought to regulate actually caused the listed harms.<sup>77</sup>

Under *Brandenburg*, states must do more than assert that violent video games increase the likelihood that children will commit acts of violence at some undetermined time.<sup>78</sup> Rather, the State may only restrict the sale of violent video games to minors if the games are “directed to inciting or producing imminent lawless action, and [are] likely to incite or produce such action.”<sup>79</sup>

The district court held the VVGL failed the *Brandenburg* test because the State offered no evidence that the purpose of violent video games is to incite violence, and because the expert testimony and evidence offered at trial did not provide a causal link between playing

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (internal quotation marks omitted) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994)).

<sup>77</sup> *ESA I*, 404 F. Supp. 2d at 1072.

<sup>78</sup> *Id.* at 1073.

<sup>79</sup> *Id.* (internal quotation marks omitted) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

the games and minors committing acts of violence.<sup>80</sup> For these reasons, the district court found the VVGL did not promote a compelling government interest.<sup>81</sup>

Additionally, the interests of preventing developmental harm to minors and assisting parents in shielding children from inappropriate material also failed as compelling interests.<sup>82</sup> Specifically, the interest of preventing developmental harm failed because controlling access to “allegedly dangerous” speech is the responsibility of parents, not the State.<sup>83</sup> Further, the interest of assisting parents in this responsibility is under-inclusive as applied in the VVGL because it did not assist parents with other media, such as TV and movies.<sup>84</sup>

The court also dismissed the State’s argument that *Ginsberg* should apply in this matter, which would allow it to regulate content that is inappropriate for minors.<sup>85</sup> The court rejected the State’s argument because it failed to account for the fact that the statute at issue in *Ginsberg* did not regulate protected speech—it regulated obscenity, which is unprotected.<sup>86</sup>

In addition to failing the compelling interest prong of strict scrutiny, the district court also determined that even if the statute had encompassed a compelling interest, it would have failed strict scrutiny on narrow tailoring grounds.<sup>87</sup> The court agreed that the statute did not intrude on the rights of adults, but the court still concluded that the plan was not narrowly tailored because the statute’s definition of violence would likely lead video game developers to diminish the amount of violence in the games to avoid regulation.<sup>88</sup> This, in turn,

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<sup>80</sup> *ESA I*, 404 F. Supp 2d at 1073-74.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1074-75.

<sup>83</sup> *Id.* at 1075 (internal quotation marks omitted).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1075-76.

<sup>86</sup> *Id.* at 1076.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

would affect the rights of adults by reducing the number of violent titles available to them.<sup>89</sup>

The court also found that the VVGL's definition of violent video games was unconstitutionally vague.<sup>90</sup> The statute defined violent video games as those "including depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human."<sup>91</sup> While the court would have normally found this definition sufficiently clear, it found it unclear in the "fanciful" context of video games because of the blurry line in the video game world among humans, zombies, and mutants.<sup>92</sup>

This was not the first time a federal court in the Seventh Circuit examined a statute regulating violent video games for minors.<sup>93</sup> As the district court noted, *ESA I* was governed by *American Amusement Machine Ass'n v. Kendrick* ("AAMA").<sup>94</sup> In *AAMA*, the Seventh Circuit analyzed the constitutionality of an ordinance that limited minors' access to violent video game machines located in public places.<sup>95</sup>

## 2. SEVGL did not include a narrowly tailored plan.

Just as it did with the VVGL, the district court held the SEVGL was unconstitutional because it did not satisfy strict scrutiny.<sup>96</sup> But unlike with the VVGL, the court struck down the statute on narrow tailoring grounds, not because it lacked a compelling interest.<sup>97</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1077.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See id.* at 1072 (citing *Am. Amusement Mach. Ass'n v. Kendrick* ("AAMA"), 244 F.3d 572 (7th Cir. 2001)).

<sup>94</sup> *ESA I*, 404 F. Supp. 2d at 1072.

<sup>95</sup> *AAMA*, 244 F.3d 572.

<sup>96</sup> *ESA I*, 404 F. Supp. 2d at 1081.

<sup>97</sup> *See id.*

In applying strict scrutiny, the court assumed the statute satisfied the compelling interest requirement without offering any analysis.<sup>98</sup> But it found the statute failed on narrow tailoring grounds.<sup>99</sup> The court premised this conclusion on the statute's failure to include certain elements of *Ginsberg/Miller* test for obscenity.<sup>100</sup> Namely, the statute failed to include the "as a whole" language of the second prong of the *Ginsberg/Miller* test and excluded the third prong entirely.<sup>101</sup> By omitting the last prong of the *Ginsberg/Miller* test, the statute would necessarily regulate "large amounts of nonpornographic material with serious education or other value."<sup>102</sup> Without the final prong, the statute would regulate games based "on one scene without regard to the value of the game as a whole."<sup>103</sup> Such a broad statute cannot be justified even by the compelling interest of protecting harm to minors.<sup>104</sup>

*B. ESA II: The Seventh Circuit affirms the district court's ruling.*

In *ESA I*, the district court struck down both the VVGL and SEVGL on First Amendment grounds.<sup>105</sup> The State of Illinois then appealed the district court's decision regarding the SEVGL only.<sup>106</sup> Judge Williams, writing for the Seventh Circuit and joined by Judge Bauer and Judge Rovner, affirmed the district court's ruling primarily because she found the SEVGL insufficiently narrowly tailored.<sup>107</sup>

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<sup>98</sup> *Id.* at 1079.

<sup>99</sup> *Id.* at 1080.

<sup>100</sup> *Id.* at 1080.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 877 (1997)) (internal quotation marks omitted).

<sup>103</sup> *ESA I*, 404 F. Supp. 2d at 1080.

<sup>104</sup> *See id.*

<sup>105</sup> *Id.* at 1076, 1081.

<sup>106</sup> *ESA II*, 469 F.3d 641, 643 (7th Cir. 2006).

<sup>107</sup> *Id.*

The Seventh Circuit agreed with the district court that the SEVGL was a content-based restriction and thus demanded strict scrutiny under the First and Fourteenth Amendments.<sup>108</sup>

The court held the State’s asserted interest—“shielding children from indecent sexual material and in assisting parents in protecting their children from that material”<sup>109</sup>—was most surely a compelling interest.<sup>110</sup>

It then moved on to narrow tailoring and referred back to *AAMA*, in which the court held that legislation shall not unduly burden the First Amendment rights of minors.<sup>111</sup> Moreover, it is not enough that a statute not affect the First Amendment rights of minors.<sup>112</sup> Rather, the State must choose the least restrictive means available to regulate indecent material for minors.<sup>113</sup> Whether a statute employs the least restrictive means possible is determined by applying either *Ginsberg* or *Miller*.<sup>114</sup>

Because the SEVGL’s definition of “sexually explicit” did not conform to the full three-part test from either *Ginsberg* or *Miller*, “the State failed to narrowly tailor the statute and created a statute that is unconstitutionally overbroad.”<sup>115</sup> The SEVGL did not include the third

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<sup>108</sup> *Id.* at 646.

<sup>109</sup> *ESA II*, 469 F.3d at 646 (internal quotation marks omitted) (citing Br. of Pet’r-Appellant Governor Rod Blagojevich at 16, *ESA II*, 469 F.3d 641 (7th Cir. 2006) (No. 06-1012), 2006 WL 652392).

<sup>110</sup> *ESA II*, 469 F.3d at 646 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 675 (2004) (“To be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials”).

<sup>111</sup> *ESA II*, 469 F.3d at 646 (quoting *AAMA*, 244 F.3d 572, 576 (7th Cir. 2001) (“Children have *First Amendment* Rights”) (emphasis in original).

<sup>112</sup> *ESA II*, 469 F.3d at 646.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 648-49 (“That is to say, somewhere between *Ginsberg* and *Miller* we arrive at the basement for constitutionality of a statute criminalizing the distribution of sexually oriented materials to minors”).

<sup>115</sup> *Id.* at 649.

prong of either *Ginsberg* or *Miller*, and also omitted the language requiring the regulated works to be evaluated as a whole.<sup>116</sup>

And because the SEVGL did not require the State to evaluate each video game as a whole or consider the literary, educational, or artistic value the games may have provided, the statute needlessly encompassed video games that have “social importance for minors.”<sup>117</sup> The game *God of War*, is one example of a game that the SEVGL would regulate because it renders images of exposed female breasts.<sup>118</sup> But taken as whole, the game provides some social importance for minors, and should escape regulation.<sup>119</sup>

### III. THE SUPREME COURT SHOULD REEVALUATE *ROTH* AND *MILLER/GINSBERG*

#### *A. The Supreme Court should reevaluate Roth and hold that the First Amendment protects obscenity.*

The Court’s refusal to afford First Amendment protection to obscenity is unsupported by precedent, policy, and logic. To understand why, we must first look to *Roth v. U.S.*, in which the Supreme Court firmly established that obscenity is not protected speech.<sup>120</sup>

The general thrust of *Roth* is two-fold: 1) obscenity does not contribute meaningfully to society, and is thus not deserving of protection;<sup>121</sup> and 2) it is implicit that the First Amendment does not protect obscenity.<sup>122</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 649-50.

<sup>118</sup> *Id.* at 650 (discussing the game *God of War*, which is similar in content and theme to Homer’s *Odyssey*).

<sup>119</sup> *Id.* at 650.

<sup>120</sup> 354 U.S. 476, 485 (1957).

<sup>121</sup> *See id.* at 484.

<sup>122</sup> *See id.* at 483.

But the Court never fully establishes why and how obscene speech does not contribute to society. And the idea that “implicit in the history of the First Amendment is the rejection of obscenity” is illogical and ultimately unsupportable.<sup>123</sup> Although the Court cited dozens of cases to support this proposition, one need look no further than the first case cited to determine that the support is strained, at best.

The Court first cited to *Ex Parte Jackson*, a case from 1877 concerning a statute regulating use of the mails.<sup>124</sup> In *Jackson*, the Court found it was without question that the mails could not be used to send “obscene, lewd, or lascivious” materials.<sup>125</sup> But using this passage to support the proposition that obscenity was never meant to be protected by the First Amendment strains reason. Consider that in the very same passage, the Court also held that states could prevent the use of the mail system to send materials regarding birth control, abortion, indecency, and lotteries.<sup>126</sup>

Because *Jackson* proscribed use of the mails for many purposes now allowed, logic cannot sustain the inference that *Jackson* supports an entire category of speech being exempted from First Amendment protection. While *Jackson* is merely one case of many cited by the Court in *Roth*, it illustrates the utter lack of logic underlying its holding. The Court attempts to rely on precedent to support its holding, but no clear precedent exists.<sup>127</sup>

Furthermore, while it may have once been assumed that obscenity was not intended for First Amendment protection, this alone should not suffice to support the excising of an entire category of speech from

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 481 (citing *Ex Parte Jackson*, 96 U.S. 727, 736-37 (1877)).

<sup>125</sup> 96 U.S. at 736.

<sup>126</sup> *Id.*

<sup>127</sup> See *Roth*, 354 U.S. at 481 (noting that *Roth* presented a question of first impression).

First Amendment protection.<sup>128</sup> Many ideas and policies once accepted have long since been rejected.<sup>129</sup>

In an attempt to address just what it is about obscenity that distinguishes it from other objectionable forms of expression, the Court endorsed the Model Penal Code's definition of obscenity: "A thing is obscene if . . . it goes substantially beyond customary limits of candor in description or representation of [nudity, sex, or excretion]." <sup>130</sup> But this definition contradicts the Court's own reasoning with language within the same opinion. The Court took great care in *Roth* to note that "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion-have the full protection of the [First Amendment]." <sup>131</sup> This explanation of the First Amendment certainly seems to encompass that which "goes substantially beyond customary limits of candor." <sup>132</sup> Yet, the Court refuses to conform to its own logic. This internal contradiction and inconsistency exemplifies the overarching contradictory nature of obscenity jurisprudence.

The *Roth* Court also went to great lengths to avoid expressly answering the question of why obscenity is judged on the basis of offensiveness and not its likelihood of inciting lawless action. <sup>133</sup> And it did so by offering a stunningly circular argument: obscenity is judged on the basis of offensiveness rather than any harm it may cause because it is not protected speech, and it is not protected because it is not judged on the harm it may cause. <sup>134</sup> Not only is this argument

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<sup>128</sup> See *id.* at 484.

<sup>129</sup> See, e.g., U.S. CONST. amend. XIII, § 1; U.S. CONST. amend XV, § 1; *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

<sup>130</sup> *Roth*, 354 U.S. at 488 n. 20 (quoting MODEL PENAL CODE § 207.10(2) (Tentative Draft No. 6 1957)).

<sup>131</sup> *Roth*, 354 U.S. at 484.

<sup>132</sup> *Id.* at 488.

<sup>133</sup> *Id.* at 486-87.

<sup>134</sup> *Id.* (quoting *Beauharnais v. People of State of Ill.*, 343 U.S. 250, 266 (1952)) ("Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of [harm it causes]").

circular, but it contradicts the Court's own reasoning in other First Amendment cases.<sup>135</sup>

There exists an even greater problem with the *Roth* decision, as noted by Justice Douglas.<sup>136</sup> The Court's decision allows states to punish for "thoughts provoked, not for overt acts nor antisocial conduct."<sup>137</sup> This position allows states to regulate materials merely for the thoughts they provoke rather than harms they cause, a position otherwise rejected by the Supreme Court.<sup>138</sup> The standard authorized in *Roth* conflicts with the First Amendment, and "[c]ertainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?"<sup>139</sup>

The Court has not yet answered this question and neither has the Seventh Circuit. In light of this, it makes little sense to apply a different standard to obscenity than to violent expression. The Court should remedy this by answering Justice Douglas' question or providing First Amendment protection to obscenity.

*B. States' compelling interest in preventing harm to minors should apply equally to violent and sexual content.*

The district court and the Seventh Circuit correctly applied Supreme Court precedent in *ESA I* and *ESA II*, respectively. The law is clear regarding sexually explicit materials: shielding minors from

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<sup>135</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (stating "the fact that society may find speech offensive is not a sufficient reason for suppressing it").

<sup>136</sup> *Roth*, 354 U.S. at 508-14 (1957) (Douglas, J. dissenting) ("It is no answer to say, as the Court does, that obscenity is not protected speech").

<sup>137</sup> *Id.* at 509.

<sup>138</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct").

<sup>139</sup> *Roth*, 354 U.S. at 512 (Douglas, J. dissenting).

sexually explicit content is a compelling interest.<sup>140</sup> The law is equally clear regarding violent content: states may not regulate violent expression absent a showing that the speech is directed at causing imminent violence and is likely to do so.<sup>141</sup>

Less clear is the reason why it is compelling to protect children from sexually explicit materials, but not violent materials. This is especially true given the overarching compelling interest of “protecting the physical and psychological well-being of minors.”<sup>142</sup> Judge Posner attempted to explain this distinction in *AAMA* in 2000, but his explanation falls short.<sup>143</sup>

As Judge Posner explained, the concerns animating obscenity laws and violent expressions are very different.<sup>144</sup> Obscenity is not denied constitutional protection because of the harm it causes, but rather simply because it is offensive.<sup>145</sup> Unlike with nearly all other categories of expression, states need not demonstrate that obscenity is likely to incite lawlessness or cause harm in order to regulate it.<sup>146</sup> With obscenity, “[o]ffensiveness is the offense.”<sup>147</sup>

But as Judge Posner pointed out, a statute regulating violent expression based on offensiveness could not withstand judicial scrutiny.<sup>148</sup> Protecting citizens from violence is a compelling interest, but unlike obscenity law, protecting them from violent images is not.<sup>149</sup>

Judge Posner dispensed with this seemingly arbitrary distinction between sex and violence by asserting that protecting people from violent images is a novel idea, while protecting people from sexually

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<sup>140</sup> See *Ashcroft v. ACLU*, 542 U.S. 656, 675 (2004).

<sup>141</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>142</sup> *Sable Comm’n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>143</sup> See generally 244 F.3d 572 (7th Cir. 2000).

<sup>144</sup> *Id.* at 574.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 575.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942)).

explicit images is the traditional concern of obscenity laws.<sup>150</sup> This is true, but it does not explain why this distinction exists; it merely explains that it does exist.

The central holding of *Ginsberg* is that potential psychological harm to minors is a sufficient basis for shielding children from sexual expression.<sup>151</sup> The Court remarked that this finding was not “an accepted scientific fact.”<sup>152</sup> But the Court held that it did not require scientific proof; it was enough for the Court that it merely not be irrational to conclude that sexual materials may harm children.<sup>153</sup>

Judge Posner referenced this basis in *AAMA* when he suggested that an ordinance regulating violent video games premised on harm to children must meet the same standard from *Ginsberg*.<sup>154</sup> If this were true, then a mere showing of potential harm from exposing juveniles to violent images would suffice to regulate violent content. But he then contradicted himself and completely misstated *Ginsberg* by stating that “[t]he grounds must be compelling not merely plausible.”<sup>155</sup>

This internal inconsistency from *AAMA* is representative of the logic, or lack thereof, regarding whether harm to minors is a compelling interest.

In *Ginsberg*, the Court found no causal link between sexually explicit materials and harm to children, but did not require such a link to find the statute constitutional.<sup>156</sup> The Court even stated, “[w]e do not demand of legislatures scientifically certain criteria of legislation.”<sup>157</sup> But both the Supreme Court and the Seventh Circuit demand this scientific rigor when it comes to statutes regulating

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<sup>150</sup> *AAMA*, 244 F.3d. at 575-76.

<sup>151</sup> *Id.* at 576.

<sup>152</sup> *Ginsberg v. New York*, 390 U.S. 629, 641 (1968).

<sup>153</sup> *Id.*

<sup>154</sup> *AAMA*, 244 F.3d at 576.

<sup>155</sup> *Id.*

<sup>156</sup> *Ginsberg*, 390 U.S. at 642.

<sup>157</sup> *Id.* at 642-43 (internal quotation marks omitted).

violent images.<sup>158</sup> In fact, this lack of a scientific causal connection between violent video games and increased aggression in minors who play such games was central to the district court striking down the VVGL in *ESA I*.<sup>159</sup>

As a matter of legal consistency, the courts should apply the same level of scrutiny to all expression aimed at minors. If it is so clearly a compelling interest to protect the psychological and physical welfare of minors,<sup>160</sup> then the specific category of expression should not matter. If the potential harm to children stemming from exposure to sexually explicit images is enough to regulate sexual expression aimed at juveniles, then the potential harm to children stemming from exposure to violent images should also be enough to regulate violent expression aimed at juveniles.

The Seventh Circuit's response to this idea has been that concern over sexual images has long been a concern of the people, but not so for violent images.<sup>161</sup> But as Justice Harlan highlighted, the fact that obscenity is not protected speech does not answer the question why it is not protected.<sup>162</sup>

Additionally, much of the logic Judge Posner uses to justify exposing minors to violent images works equally well to sexual images.<sup>163</sup> Judge Posner argued quite sensibly that violence is often a matter of politics, and young voters should be allowed access to uncensored speech prior to becoming voting age "so that their minds are not a blank when they first exercise the franchise."<sup>164</sup> "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual

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<sup>158</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *AAMA*, 244 F.3d at 579.

<sup>159</sup> *ESA I*, 404 F. Supp. 2d, 1051, 1073-74 (N.D. Ill. 2005).

<sup>160</sup> *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>161</sup> *AAMA*, 244 F.3d 572, 575-76 (7th Cir. 2001).

<sup>162</sup> *Roth v. United States*, 354 U.S. 476, 507 (Harlan, J. dissenting).

<sup>163</sup> *AAMA*, 244 F.3d at 577-78.

<sup>164</sup> *Id.* at 577.

bubble.”<sup>165</sup> This argument works just as well if the topic becomes sexually explicit materials, rather than violent materials.

Judge Posner continued to argue against regulating violent images aimed at children because violence is a significant human interest.<sup>166</sup> This is no doubt true, but it is no less true of sex, and the Supreme Court admitted as much even when holding that the First Amendment does not protect obscenity.<sup>167</sup> If humankind’s interest in violence is equaled by its interest in sex, and violent expression is afforded protection on the basis of human interest, then obscenity should also be afforded that protection.

Finally, Judge Posner argued that “shield[ing] 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.”<sup>168</sup> Again, because sex is a recurrent interest of humankind, this statement can apply with equal force to sexual expression. Young adults face great exposure to sexual content, and to shield minors from access to this material is no less quixotic.

Ultimately, the district court and the Seventh Circuit correctly struck down both the VVGL and SEVGL, but the SEVGL was given a free pass on the compelling interest prong of strict scrutiny whereas the VVGL was found not to encompass a compelling interest. This disparity is troubling from a policy and parental perspective, but also inconsistent legally.

The logical conclusion is not necessarily that sexual expression should be afforded the same high level of scrutiny as violent expression in the context of minors, but rather that the interest in protecting minors from violent expression should equal that of sexual expression.

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Roth*, 354 U.S. at 487 (“Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern”).

<sup>168</sup> *AAMA*, 244 F.3d at 577.

## CONCLUSION

Nearly all forms of expression demand full First Amendment protection, yet obscenity continues to fall outside the cover of this protective shield.

Currently, states may regulate obscenity merely for thoughts provoked and not for harms it may cause. But as the Court has noted, “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”<sup>169</sup>

In order to uphold the virtues and purpose of the First Amendment, the Court should change course and afford obscenity the full protection of the First Amendment, just as it does other categories of objectionable and offensive speech.

This is not the only change the Court should make in First Amendment law. The Court justifiably holds that protecting children from sexually indecent materials is a compelling interest strong enough to withstand strict scrutiny because of potential psychological harm such materials may cause children.<sup>170</sup> And it allows regulations on this basis absent a causal link between the sexually explicit materials and such harm.

But courts are not able to apply this same standard to violent materials aimed at minors. Instead, when it comes to violent materials, legislatures must demonstrate a causal link between the violent content and imminent violent conduct.<sup>171</sup>

This disparity between sexual and violent content makes little sense in light of the compelling interest of protecting the psychological welfare of minors.<sup>172</sup> So if sexual materials directed to minors may be

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<sup>169</sup> Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

<sup>170</sup> See Ashcroft v. ACLU, 542 U.S. 656, 675 (2004).

<sup>171</sup> ESA I, 404 F. Supp. 2d 1051, 1073 (N.D. Ill. 2005).

<sup>172</sup> Sable Comm’ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

regulated so as to prevent mere potential harm, then so too should violent materials.