Freedom of Speech and the Video Game Censorship Debate

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Abstract:
This dissertation examines the academic approaches that have been undertaken in the study of free expression and applies them to the debates about video game regulation. This has been done in an effort to demonstrate that a greater understanding of the issues surrounding the debate can be reached through the application of theories of free expression. The piece will outline the pre-existing theories before discussing the nature of video games as a medium for political expression. Having established this, the debates surrounding the issue will be explored to show what parallels can be drawn with the literature and the extent to which theories of free expression can contribute to a greater understanding of video game regulation.
Introduction

In 2005, Californian Senator Leland Yee introduced a law intended to prevent violent video games from being sold to minors (Boyd 2010). The law would have required a large 18+ sticker to be placed on each game labelled as violent by the government, which would have been in addition to the voluntary industry rating issued by the ESRB (Boyd 2010). In response to the law, the Entertainment Software Association brought the case before a federal district court where the ESA won a preliminary injunction to prevent the law from being enacted on the grounds that it violated the First Amendment (Boyd 2010). After a series of unsuccessful appeals, California appealed to the Supreme Court to overturn the decision (Boyd 2010). The Supreme Court heard oral arguments for the case of ‘Schwarzenegger v. EMA’ on November 2, 2010 and the outcome is expected to be announced in June 2011 (Boyd 2010).

The law has been resisted staunchly by the ESA and the video games industry as a whole because the definition of what the state government considers to be a game violent enough to be deserving of the 18+ rating is incredibly unclear. In fact, the state supported the law with research that considered Super Mario Brothers, which is usually thought of as completely harmless, to be an example of a violent game (Hoffman 2010). This has caused developers to fear that the state government’s interpretation of violent content will be too broad and games that reasonably deserve a 15+ rating or lower will be given Adult ratings by the overzealous state legislature (Hoffman 2010). This is especially worrying for the industry because games with 18+ ratings have traditionally done much worse financially than lower rated games and by allowing the government to classify games as 18+, members of the industry fear that this law would hurt them financially; they also worry that this will allow the government to effectively dictate what games the industry are capable of producing (Crecente 2005).

The industry feels that this law would violate their constitutional right to freedom of expression: because the state will effectively be limiting the creative capacity of developers to develop the games that they want to by financially punishing them for creating games with specific kinds of content. There is also a deep distrust of the state and many in the industry feel that this law would symbolise the beginning of a gradual erosion of the rights of the video game industry. On top of all this, the industry feels unfairly singled out when compared to a medium such as film, which no longer faces as strict opposition from the state despite commonly including similarly violent content.
Of course this is not the first time that video games have come under scrutiny from the censors; there is a long history of attempts to regulate the classification and distribution of games in the US (Leonard 2006: 51). A large percentage of these attempts have been justified as an attempt to protect children from the harms of violent video games, following various preliminary studies that suggest a link between violent media and violent behaviour (Boyd 2010; Kennelly 2005). However this research has been found to be largely inconclusive or methodologically suspect and many doubt its legitimacy as a reason for further regulation (Boyd 2010; Kennelly 2005). There are also many cases of games being banned outright in countries across the world, usually due to sexual or violent content (Meikleham 2009). In fact, the Venezuelan government recently passed a law banning all violent video games, in an effort to lower the country’s high rate of violent crime (Devereux 2009).

Across the world, we can observe a battle between two sides; on the one hand the political institutions, that feel that video games must be controlled or restricted in order to prevent the harms of overtly sexual or obscenely violent content; and on the other hand, there are the members of the video game industry who feel victimised and who argue that they have become the target of unfair and unfounded attempts to deprive them of their right to free expression.

What this dissertation intends to do is to enlighten this debate by discussing pre-existing philosophical and theoretical approaches to the issue of freedom of speech and applying them to the current debates about video game regulation. Its aims are: firstly, to show that a theoretical approach can offer valuable insight into the issue; secondly, that contrary to the opinion of many, video games should be treated as objects capable of exhibiting legitimate expressive value; and finally, that applying theories of freedom of expression can lead to a greater understanding of the various arguments on both sides of the debate.

The first chapter takes the form of a literature review which outlines and discusses the pre-existing debates surrounding the issue of freedom of speech. It will look at the arguments and theories of Justice Holmes, J.S Mill, Frederick Schauer, T.M. Scanlon and Ronald Dworkin. The second chapter will attempt to establish video games as a legitimate medium for free
expression, dispelling opinions that suggest otherwise. Having established this, the third chapter will attempt to understand the video game regulation debate in the light of the theories discussed in the first chapter.

**Academic Approaches to Freedom of Expression**

In the 1919 case of Schenck v. United States, Justice Oliver Wendell Holmes expressed the view that the American government could and should curtail an act of political expression only when it presented what he termed: ‘a clear and present danger’ (Dworkin 1996: 198; Meiklejohn 1960: 30). He illustrated his point by explaining that the First Amendment would not protect someone from ‘falsely shouting fire in a crowded theatre’ (Scanlon 2003: 12). Essentially, Justice Holmes view is that if a particular act of expression can be shown to be significantly harmful to society, then the government are completely justified in silencing it to prevent that harm. This assertion set a precedent and informed a way of thinking about freedom of speech, and the First Amendment in particular, which has prevailed in the minds of many legislators and politicians from then until now.

One aspect of the ‘clear and present danger’ philosophy proposed by Holmes is that it seems to implicitly suggest that expression and speech should be thought of as directed actions (Meiklejohn 1960: 39). This concept is at the heart of Holmes’ philosophy: the idea that an expression is not merely the voicing of an opinion but that it can compel others to act as they would not have done otherwise, or cause significant emotional or physical harm as a result of its message. One result of conceiving of expression in this way, is that it means that certain ‘acts’ of expression could come to be classified as constituting criminal behaviour (Meiklejohn 1960: 40). For, if by expressing myself in a certain way I come to, knowingly or through negligence, cause someone else to act criminally when they would not have otherwise, could I not be held equally responsible for the crime committed? That is the consequence of the ‘clear and present danger’ doctrine because it comes to judge political expression not by its message but by its effect.

However, there are reasons to doubt this conception of harmful expression as criminal behaviour. As Meiklejohn (1960: 41) points out, all political expression could be thought of as incitement, as when an idea is heard and believed it is usually acted upon. In fact, sometimes
we cannot be sure what results a particular expression will have. For instance, if I was to criticise the leader of our government and I am heard by someone who then on the basis of my criticism decides to assassinate that leader, can I really be held responsible? And if I was not held criminally responsible, thinking back retrospectively, should my criticism have been silenced because there was a possibility it would have resulted in an assassination? It is clear that Justice Holmes’ doctrine is subject to interpretation and it seems likely that certain interpretations would extend the definition of ‘clear and present danger’ further than others. In fact, in a later revision of his earlier views, Holmes (cited in Meiklejohn 1960: 46) was quoted as saying:

‘The fact that speech is likely to result in some violence or destruction of property is not enough to justify its suppression. There must be probability of serious injury to the State.’

Louis Brandeis, a fellow judge of the Supreme Court, expressed even more stringent provisions for Holmes’ doctrine, arguing that freedom of speech should only be abridged on the basis of the ‘clear and present danger’ philosophy in the most pressing civil or military emergencies when the usual processes of civil society were unable to function (Meiklejohn 1960: 49). This evidences the different extents to which Holmes’ philosophy can be applied and although defining exactly which types of harmful expression should be censored and which should not is an almost impossibly difficult task, politicians and legislators still commonly discuss restricting free speech on the basis of the expected harms. In fact, much of the literature that deals with freedom of speech, which will be described here, could be considered a response to the ‘clear and present danger’ doctrine and an attempt to provide protection for freedom of speech against that way of thinking.

In some instances we might feel certain that a particular opinion is wrong and we might also fear that if this opinion was to be expressed publicly that it could come to be widely believed. It seems reasonable to think that the widespread belief of a false opinion would be harmful to society and therefore, by the doctrine of ‘clear and present danger’, we would be justified in silencing that false opinion.
However, John Stuart Mill disagrees with the view that it is legitimate to restrict the expression of an opinion on the grounds that it is known to be false. He states that to silence an opinion because it is false suggests an assumption that the silencer is either completely certain that the opinion is wrong or that the silencer is completely infallible in his judgement (Riley 1998: 57). Mill suggests that we could only ever be justified in censoring an opinion if we were absolutely certain that the opinion was wrong, or alternatively, if we were completely confident that our judgement in these matters was infallible (McKinnon 2006: 122). Since we can never be completely certain about anything and no human being could ever claim to be truly infallible, Mill argues that we can never justifiably silence an opinion on the grounds that we believe it to be false (Riley 1998: 57). He also feels that because we can never be completely sure that our judgement is correct, that if we were to restrict the expression of an opinion we considered to be false, that we would be removing the ability of others to make their own judgements on the value of that particular opinion (Riley 1998: 57). Therefore, from Mills view, it is not only wrong to silence a false opinion because we can never be completely certain of our judgement, it is also wrong because we would effectively be imposing our own imperfect judgement on others and removing their ability to decide for themselves (Riley 1998: 57).

However, some commentators find fault with this particular argument of Mills. Catriona McKinnon (2006: 122) notes that Mill seems to claim that it is impossible for us to be certain about anything at all; she argues that unless we are prepared to concede that we can never be sure about even the simplest things, that there must surely be some things that we can be adequately certain about. Riley (1998: 61) suggests that there is reason to believe we can be certain about things such as 'mathematical truth' because to divine the truth of a mathematical proposition only requires that the proposition is properly explained to us. It certainly seems implausible to suggest that we could ever question the truth of something so clearly evident as '2+2=4'. Mill himself even acknowledges that mathematical truths are an exception to his stance on infallibility but feels that other more complicated and subjective opinions will always be subject to a certain degree of doubt (Riley 1998). What this objection highlights is that, although Mill suggests otherwise, in practical terms there must be a distinction between opinions that we can confidently identify as false and opinions that we might disagree with but cannot certainly say are wrong. For instance, in Justice Holmes example of someone
‘falsely shouting fire in a theatre and causing a panic’, it seems ludicrous to suggest that we could ever be mistaken about the fallacy involved and yet Mill might argue that it would be unjust to silence him because we are not infallible and therefore unfit to judge. Conversely, Mill’s view could offer a very legitimate defence of a harmful expression about a complicated issue like capital punishment or abortion because the ‘correct’ or truthful opinion in these cases is very uncertain. Ronald Dworkin (1996: 204) argues that arguments such as Mill’s do not account for the ability of legislators to differentiate between speech that is blatantly offensive and speech that may be controversial or disagreeable but which we cannot be certain is false. He feels that contrary to Mill, there are instances such as in the case of excessively racist or sexist expression, where we can be adequately certain that the opinions being expressed are offensively harmful and wrong. Dworkin seems to feel that there are two distinct classes of expression in this respect: those that are undoubtedly false and those which we cannot be sure of. Of course, in more complicated and unclear cases, where the line between certainty and uncertainty is blurred, establishing a principle with which to distinguish accurately between the two presents a difficult task. However, what is clear is that we have reason to doubt the universal application of Mill’s view on fallibility as justification for the protection of political expression.

Mill presents another justification for the universal protection of free speech which is referred to by McKinnon (2006: 123) as the ‘argument from truth’. According to Mill, given that we are fallible beings in nature, the only way that we can rationally assure ourselves that we are right is if we have absolute freedom of expression. Mill explains that it is only through being presented with views that conflict with our own that we can strengthen our beliefs in a rational manner (Riley 1998: 58). Without freedom of expression we would simply be accepting opinions blindly as fact, with no rational basis with which to justify our beliefs. Therefore, to silence an opinion or an expression, even an offensive or incorrect one, is a grave mistake because it will impede the process of refining and improving public knowledge (Riley 1998: 58). Mill views the goal of civilised civilization as being the discovery of knowledge and the pursuit of truth, and as a result he fears that censorship and coercion by an institutional body would prevent social progress (McKinnon 2006: 123). Mill is also concerned that if the political institutions are allowed to control expression that it could lead to hierarchy and elitism because the institutions would have the power to control popular
opinion by limiting the public's access to conflicting opinions (McKinnon 2006: 124). Essentially, Mill feels that truth and knowledge are an incredibly important part of civilised society and he argues that absolute freedom of expression is justified because it is the only way that we can hope to secure our right to pursue truth and knowledge.

Mill’s argument from truth is a strong one because it justifies freedom of expression in terms of both the harm of silencing an opinion as well as the social good that freedom of expression can provide. However, there are still objections and criticisms that can be directed at Mill’s argument. For instance, it seems that Mill’s view only extends protection to acts of expression that contribute to the acquisition of truth. It is argued that Mill’s argument can only be used as justification for the protection of political speech and does not apply to other acts of expression with non-truth based content (Dworkin 1996: 201; McKinnon 2006: 123). For some this objection could narrow the potential applications of Mill’s argument because it cannot be applied to expressive acts which are not truth based; it could be argued that his argument does not provide protection for those acts which seek, for example, to communicate an emotional state or produce laughter in an audience (McKinnon 2006: 124). One response to this objection is to argue that these non-truth based acts of expression are protected from coercion by Mill’s view, but only because they derive their value from political speech. In this view, forms of non-truth based expression such as artistic expression are only protected as long as they come to bear on political discussions (McKinnon 2006: 124). Therefore, a specific expressive act is only justified in receiving freedom from censorship if it can contribute towards the acquisition of the truth, even if it does not explicitly express any truth-based values.

Another view that stems from the objection that Mill’s argument from truth only applies to political speech is that the limited scope of Mill’s argument actually acts as a valid definition of the distinction between acts of expression to which the protection of free speech should apply and those acts which it should not apply to (McKinnon 2006: 124). It could be argued from this view that political speech should be the only form of expression to which absolute freedom can be justifiably awarded and the freedom of all other expressive acts is up to the political institutions to decide upon (Dworkin 1996: 201).
Mills argument from truth can be described as utilitarian or consequentialist in the sense that it acknowledges the harms that can result from political expression but feels that the harm of restricting expression is greater than any harm political expression could cause (Scanlon 2003: 6-7). Frederick Schauer presents another consequentialist argument for the protection of political expression from those who would seek to curtail it but his views question those of Mill. Schauer argues that justifications such as Mills are concerned with the values which protecting free expression will promote; for instance, Mill feels that freedom of expression will reinforce human rationality and aid the acquisition of knowledge (McKinnon 2006: 128). However, Schauer is sceptical about the extent to which unlimited expression will realise these particular values; instead he proposes a view that shares more in common with Mills argument from fallibility than his argument from truth (McKinnon 2006). He suggests that we should protect freedom of expression because any political representative will be unfit to decide which acts of expression should be restricted and which should not (McKinnon 2006: 129). He feels that the consequences of allowing any governmental figure control over political expression would be a slippery slope where gradually more and more acts of expression would come to be included in a definition of restricted speech (McKinnon 2006: 129). He argues that allowing complete freedom of speech would be a better alternative to giving control to any political representative.

Schauer feels that his argument is a better one in practical terms because the set of actions protected by legislation such as the First Amendment are not identical to the set of actions that would promote the values appealed to in Mills argument from truth (McKinnon 2006: 129). Essentially, Schauer feels that legislation like the First Amendment was enacted primarily for the purpose of removing tyranny over the citizens by the government and not for the pursuit of human rationality (McKinnon 2006: 129). Therefore, he feels his justification for protecting free speech is stronger because it is rooted in the established democratic order and is perhaps seemingly less utopian than Mills views.

The difference between Schauer and Mills theories highlights a distinction between two different types of justification for free speech advanced by T. M. Scanlon. Scanlon (2003: 7) argues that theories of free speech can be distinguished as either ‘Artificial’ or ‘Moral’. Firstly, he describes theories which are based on what he calls ‘artificial grounds’; these are theories which legitimate acts of expression as a part of a democratic society or in relation to
particular constitutions (Scanlon 2003). Schauers argument could be described in this way because it seems to extend from legislation such as the First Amendment. The second type of theory described by Scanlon is those based on ‘moral grounds’; simply put, these are theories which appeal to some moralistic principle (Scanlon 2003: 8). Mills argument from truth clearly falls into this category.

However, Scanlon also argues that the most valuable part of Mills theory is not that it espouses the moral importance of truth and the acquisition of knowledge but that it presents a view of humans as rational agents who take personal responsibility for their own education and knowledge (Scanlon 2003: 14). Scanlon builds upon Mills arguments, among others, redefining and strengthening them in reference to a theory of what he refers to as human autonomy; in effect Scanlon reshares and adds to Mills ideas, turning his theory from a moral one into an artificial one.

Scanlon argues that state power must be limited to the point where citizens can recognise the authority of the state while still considering themselves as ‘equal, autonomous, rational agents’ (McKinnon 2006: 125; Scanlon 2003: 16-17). He outlines the basis of this equal and autonomous rationality by describing ‘the principle of autonomy’. He gives support to Mills argument from truth by stating that a person must be sovereign in deciding what to believe, and additionally, argues that a citizen must be given the freedom to weigh up competing opinions in deciding what to believe (Scanlon 2003: 15). However, he extends the meaning of Mills argument by stating that this agency in the role of deciding what to believe is essential to legitimate membership of a democratic society (Scanlon 2003: 16). In doing so, he strengthens the argument by basing it on artificial as well as moral grounds.

Essentially, Scanlon (2003: 17) feels that any legitimate state must allow its citizens to rationally decide whether they agree with the judgement of the state; the state would be unjustified in silencing opinions which they disagreed with because it would remove the autonomous rationality of the citizens which is necessary for a genuinely democratic society. However, one exception to this principle could be suggested, where a citizen is aware of their own poor judgement and recognises that they have a tendency to act wrongly when presented with misleading or false information (Scanlon 2003: 18-19). In this case, would it be
acceptable for this individual to willingly delegate their autonomy to another person in order to protect themselves from their own poor judgement? This is argued to be an analogy for the relationship between the state and the citizen in regards to censorship; that as a member of a society, we recognise our poor judgement and sacrifice some of our autonomy to the much wiser state in order to protect us from harmful information and opinions (Scanlon 2003: 18-19). Scanlon, echoing both Mill and Schauer, argues that this is not an accurate representation of the relationship between state and citizen because the state are imperfect and will restrict information based on their own rationality and their own will and not truly in the interests of the citizens (Scanlon 2003: 18-19). Therefore, because the restriction of information does not reflect the interests of the citizens, it does not represent their rationality and unlike the analogy suggests, their autonomy is not transferred to the state but it is simply deprived from them.

Supporters of the ‘clear and present danger’ doctrine could suggest that in the example of someone shouting fire in a crowded theatre, the rationality of the theatre-goers is diminished and their decision making is based not on the weighing of conflicting evidence but simply on emotional panic (Scanlon 2003: 18-19). In this case, could it not be argued that, as the preservation of rationality is of great importance to a democratic society, that the punishment of an act of expression is justified if it serves to promote rationality? Scanlon (2003: 18-19) feels that this example may present an exception but also notes that the diminished capacity for rational thought is extremely short lived and questions whether there are any other acts of expression that can clearly be shown to have no value beyond simply compromising the rationality of its audience for a significant period of time. In other examples where an expression could induce panic, such as the distribution of documentation foretelling the apocalypse, we can see that there is also a claim that stopping the distribution would impact on citizen rationality, by removing their ability to rationally decide whether they believe the apocalypse is actually coming. Therefore, this objection lacks any real strength as an exception to Scanlons theory of autonomy because it is only really applicable in a very specific situation.

Building further upon his conception of autonomy, Scanlon introduces his theory of ‘interests’, which he argues allows us to formulate judgements about the value of particular
arguments for or against freedom of speech based on various categories of expression or ‘interests’ (Scanlon 2003: 154-155). Interests are based on particular values that we have as autonomous members of a democratic society that we strive to protect. Interests, as Scanlon describes them, relate to various positions that we may occupy within the process of free expression. Scanlon lists four distinct categories of interests, which McKinnon (2006: 125) labels as participant, audience, bystander and citizen interests. Participant interests are interests we have as speakers and writers in having an opportunity to communicate with those who wish to hear us as well as those who have not specifically chosen to hear us (Scanlon 2003: 155). Audience interests are interests we have as receivers of a wide range of expressions that we have both chosen and not chosen to be exposed to, for the good of our own rationality (McKinnon 2006: 125). Bystander interests refer to our interest in living in a society in which the right to freedom of speech is intact and in which we enjoy the resultant benefits (McKinnon 2006: 125). It also includes our interest in not being significantly and unfairly disrupted by expression which we have not chosen to be exposed to (McKinnon 2006: 125). Finally, citizen interests represent our interest in having an equal opportunity to participate in a fair and effective democratic system (McKinnon 2006: 125; Scanlon 2003: 155). As Scanlon (2003: 155) argues that freedom of expression is the tool with which these values can be protected, this means we possess a significant interest in protecting freedom of speech.

It is argued that the only way to justify the restriction of an act of expression is to understand the ways in which a specific expression supports or violates various interests (McKinnon 2006: 125). If an act clearly violates one of the four interests in a significant way, then it is argued that this could provide adequate justification for restriction but alternatively, if a specific act of government restriction would violate one of these interests, this would render the act unjustified (McKinnon 2006: 125). For instance, in the case of pornography, Feinberg (1985: 170) argues that to ban or restrict pornographic materials would violate the right of an autonomous citizen to watch pornography if he wished too; this represents an audience interest. However, if an act violates one interest, but also supports another, then the situation is much more complicated and the extent to which autonomy is harmed by the act of expression has to be carefully weighed. However, as mentioned above, the real aim of Scanlons theory of interests is to provide a conceptual framework with which we can discuss
the issue of free speech, within the context of government and democratic society, without making reference to subjective personal morality (Scanlon 2003: 156).

Ronald Dworkin (1996: 201) agrees with Scanlon that any defence of free speech that appeals to concepts of democracy and equality is stronger than a defence based on instrumental moral concerns. However, he expresses the view that democratic decision making as it pertains to freedom of expression, should not be informed by majoritarian concerns, but instead by a ‘constitutional conception’ of democracy (McKinnon 2006: 126). What he means by this is that even if the majority of citizens were to agree to restrict specific acts of expression, that this would still not provide ample justification for that restriction. Instead, he argues, decision making to do with free speech should be made by political institutions that treat all citizens with equal concern and respect (McKinnon 2006: 126). Dworkin’s view is similar to Scanlon’s conception of autonomy in that it insists that the state has a commitment to providing certain conditions necessary for a democratic society. However, while Dworkin (1996: 127) certainly acknowledges the importance of citizen autonomy to democratic society, he feels that the most important aspect of a democratic system is the preservation of a fair and equal political community. Dworkin possesses a particular view of ‘political community’ which he describes as: ‘a matter of a collection of individuals acting together in a way that merges their separate actions into a further, unified act that is together theirs.’ Essentially, Dworkin feels that democratic society is the by-product of the equal participation of its members. He feels that by safeguarding the moral membership of all members of the society and allowing all citizens to participate equally within society that the true nature of democratic society can be realised (Dworkin 1996). For Dworkin, preserving the ‘political community’ in this way is the most important role for any state, eclipsing any other commitments they may have. He argues that when the state or any other body censors the expression of a member of the political community, then they exclude them from the community and remove their right to participate equally (Dworkin 1996: 128). By doing so, the state has violated its commitment to preserving the political community and has failed in its most important task. Dworkin’s defence of free speech is strong because it argues that the right to free expression is not just an important democratic principle but in fact, the defining feature of a democratic society. It is also strong because it positions the preservation of free speech as one of the fundamental roles of a democratic state.
However, Catherine MacKinnon argues that the conception of political community and moral membership is complicated when we consider a case where one citizen’s ability to participate equally is hindered by the expression of another citizen (Dworkin 1996: 205; McKinnon 2006: 142). She gives the example of pornography, which she argues is not only offensive to women, but also acts to undermine the standing of females in society and their ability to equally participate within society (Dworkin 1996: 205; McKinnon 2006: 142). She argues that the way that women are portrayed in pornographic films causes women to be taken less seriously and therefore reduces the effectiveness of their expression compared to men. This example and MacKinnon’s argument in general causes a confusion in the interpretation of Dworkin’s argument: should we honour the right to equal participation of the pornographer or should we restrict his right to speech in order to restore the rights of female citizens?

This objection is a strong one but even so, the most important thing that Dworkin’s argument shows is that we can conceptualise the debate about free speech in terms of the political community. In this chapter we have also seen other ways in which to think about free speech: ‘the clear and present danger’ doctrine of Justice Holmes; the moral consequentialist arguments of Mill; Schauer’s ‘artificial’ consequentialist argument; as well as Scanlon’s theories of autonomy and interests. It is possible that some light could be shone upon the debates over video game censorship by applying these theories. However, before that, the next chapter will discuss the extent to which video games should be thought of as political expression.

**Video Games: a Legitimate Form of Political Expression?**

The previous chapter focused on various theories that attempt to justify the protection of our right to free speech. However, little was said about what sorts of acts or modes of speech should be included in the definition of ‘political expression’ or more accurately, which forms of expression should be protected under legislation pertaining to freedom of speech. It also did not address questions about the content or message of a particular form of expression and if they could come to bear on whether it should be protected from restriction. These debates are very important to the video game industry in its fight against restriction and censorship because there is a tendency for the political establishment to question the
legitimacy of video games as a serious form of political or artistic expression. While other mediums that have emerged since the days of John Stuart Mill such as film and popular music have weathered the same sort of legal controversy as video games, these mediums have managed to establish themselves successfully as legitimate forms of political and artistic expression while video games are still considered by the wide majority to be merely a form of juvenile entertainment.

An example of this underestimation can be seen in Australia, where there is currently no 18+ or Adult rating for video games (Parker 2011). The oldest age rating in Australia is 15+ and as a result, a lot of adult games that are released in other countries under an Adult classification are not able to attain a rating in Australia, meaning that they are unable to be published or sold and are effectively banned (Parker 2011). Games developers will often tone down their adult games so that they can receive a 15+ rating while in other cases, games with content that could be considered inappropriate for a 15+ classification are released with that rating because no Adult rating exists (Parker 2011). What this example seems to suggest is that the political establishment in Australia does not seem to think of video games as a serious adult medium and by having 15+ as the oldest age classification, seems to deny that video games could provide anything of worth to a responsible adult.

It is true that gaming has moved more and more into mainstream culture, which was a process that seemed to truly begin with the marketing of the first Playstation console, which targeted a more mature audience and was credited with moving the games console ‘out of the little boy's bedroom into the family front room’ (Twist 2004). The Nintendo Wii has continued this process by appealing to non-gamers and casual gamers through the incentives of ease and accessibility (Casey 2006). However, the political establishment continue to deal with video games as potentially dangerous toys and not examples of artistic expression. The importance of this chapter is to counter those who feel that games are meaningless and without expressive value, especially in comparison to other more accepted entertainment mediums like film and music. If it can be shown that video games belong to the same category of expression as these mediums, then this provides an argument for fairer and more equal treatment for the video game industry, which is something that has already been noted as a main theme within the current arguments of the industry in its battle against state-imposed regulation.
Defining what we mean by a ‘legitimate act of expression’ is no easy task. As Scanlon (2003: 8) notes, the term ‘acts of expression’ is incredibly broad, as a very wide range of activities have at one time or another been included in definitions of expression; he presents examples to illustrate just how broadly the term has been used: ‘displays of symbols, failures to display them, demonstrations, many musical performances, and some bombings, assassinations, and self-immolations.’ Of course, some of these acts may seem instinctively more justifiable than others, while some could seem too extreme and too criminal to be included; but where should we draw the line? As was already mentioned in the previous chapter, Mill expressed a fairly limited view of the acts of expression which should be given blanket protection from censorship and restriction. He felt that only clear political or moral speech was worthy of protection or at the very least, only expression which came to bear fairly obviously on political discussions should be included in a definition of free speech (McKinnon 2006: 124). He also argued that any sort of political expression would consist of an attempt to communicate a truth to its audience and he only ever really considered public speaking and the written word to be legitimate forms of protected expression (Riley 1998: 70). Clearly, the vast majority of video games do not fall under this categorisation, although arguably neither would many films or pieces of music, and on top of this, not many games explicitly deal with political issues in any direct way. However, Mill was writing about freedom of speech in the 1800s, before sources of entertainment ever really came to be a medium through which artists attempted to express some form of truth (Riley 1998: 70). Riley (1998) even suggests that Mill would revise his views if he was to see the extent to which artistic expression has evolved and come to be accepted within the modern world. In fact, Jeremy Waldron attempts to extend the definition of protected expression described by Mill in this very way when he argues that in the modern world, expression takes many forms and can legitimately deal with subjects that will offend people (McKinnon 2006: 124). He argues, as Mill does, that we must be left alone to deal with this offence or with the content of any expression so that we can adequately address the ideas we have been presented with.

So we have reason to believe that video games, along with a wide range of other types of expression are subject to protection from restriction. But what types of content and message does an act of protected expression contain? How can we differentiate between someone
walking to work and someone marching in protest? It could be argued, in accordance with Mills view, that the definitive feature of justifiably free expression is that it communicates some sort of truth, opinion or idea to an audience. However, just because you can extrapolate some value from a deliberate action does not make that action an expression in the sense that it is understood in this piece of work. For instance, even if watching a small child chase leaves caught in an updraft leads you to experience an epiphany about the nature of life then that does not necessarily mean that the child is purposely expressing this idea. Alternatively, if a modern artist was to organise an event where people were encouraged to chase leaves, it could easily be argued that he was trying to convey some sort of metaphor about life to the participants. Some could argue that intention is not important, that we should allow expression to continue whether it is intentional or not because the truth gained from it is of equal value; whether it is the purposeful artist or the oblivious child, the epiphany is the same. This view is similar to Mill, who felt that knowledge must be left alone to flourish. However, it is a dangerous way to define expression because it allows people to justify their actions as free expression retrospectively, meaning that criminals could claim that their crimes constituted some form of expression after the fact to avoid punishment. Therefore, to operate on the basis of that argument is dangerous and it is far too broad a definition; and while the requirement for an intentional political, social or moral meaning as a characteristic of legitimate expression is also a broad definition, it seems adequate justification to at least qualify a specific expression as worthy for consideration in a discussion about what does and does not constitute protected speech because it at least draws a line between expression and action.

So how can we relate these insights to specific video games? It is difficult to identify what political or social expression can be identified in early games like *Space Invaders* (1978). The graphics are of low quality and are fairly abstract; the goal is a simple one: to destroy all the advancing enemies before they reach you; it seems improbable that the intentions of the game developers were anything other than to produce an entertaining and challenging game. The writer Steven Poole (2000) has tried to attribute more depth and meaning to the game through his interpretation of the game mechanics. For instance, he argues that when *Space Invaders* offers the player an extra life for reaching a specific score, the game is actually implicitly conveying the idea that survival is the most important virtue and suggests that killing to
achieve this goal is justified (Poole 2000: 102). However, while Poole’s analysis is interesting, it is doubtful that it was ever the intention of the developers to express these ideas through the game mechanics. What Poole is really doing is trying to identify the unintentional meanings that can be extrapolated from the nature of a game. It seems fair to say that, as a result of its simplicity, at its very beginning the video games industry was focused largely on the production of fun and challenging games and very rarely on the communication of moral or political messages. However, just as films and music evolved, becoming more complicated and more meaningful, so too have video games. The modern video games industry is forecast to rise to a worldwide value of 70 billion dollars by 2015 (Takahashi 2010). Modern video games feature in-depth storylines and high definition graphics; the industry is spread over a multitude of platforms; and the scope of games development varies from the smallest independent flash games to incredibly extensive, console-based, big budget studio productions. Surely in this modern setting, there are examples of games behaving as forms of political, social or moral expression?

In a game such as September 12\(^{th}\) (2003) – an online flash game where you fire indiscriminately from above onto a Middle Eastern town, with every shot transforming groups of grieving inhabitants into terrorists – there is a very clear and deliberate message, the execution and delivery of that message is very obvious and it seems unlikely that anyone would deny its status as an example of political expression. However, the game is small in scope and not widely known in the way that console or PC games are. It is hosted online so that it is free from much of the scrutiny of the legislative bodies who have focused most of their attention on console titles and on the ESRB, which controls the regulation of the industry. It also represents a very small subset of what could be called ‘political’ games, where the primary focus is on the delivery of a message through the medium of a game. Contrastingly, the extent to which political, social or moral messages are the primary focus in other, more mainstream games, is questionable; major releases very rarely have such an obvious message as September 12\(^{th}\).

Despite this, there are still a wide range of games in which we can definitely identify the expression of ideas and meaning. For instance the Playstation 2 game Ico (2001) is widely acclaimed for its aesthetic design and immersive game play and is a good example of a case
where a video game could legitimately claim to be a piece of ‘art’. The game follows the young boy Ico, who has been imprisoned in a large fortress, as he attempts to escort his vulnerable female companion Yorda and himself to freedom. The game play consists of fairly standard elements of the platform genre but with the added element of Yorda who must be protected from harm and lead through the various game stages. Ico’s developers have noted that with Ico they explicitly attempted to create an immersive game play experience which would communicate what they term a ‘boy meets world’ theme, as well as hoping to imbue the players with a sense of heroism (1UP 2000). The game was also intended to differentiate itself from the majority of other games, which overwhelmingly focus on combative elements; Ico instead focuses on game play mechanics which emphasise elements of protection and conflict avoidance (1UP 2000). The extent to which the messages and concepts expressed through Ico are political, moral or social in nature is debatable; the game play does seem to communicate ideas about pacifism and the resolution of conflict through non-violent means, however the developers do not seem to suggest that this was an intentional message (1UP 2000). From what the developers say about their aims, the game play seems more like a response to the trend within the industry towards violent and combative forms of game; and while not strictly political, this message does speak of what could be thought of as the politics of the games industry, it does act as a critique or an opposing viewpoint within a specific community or social group, namely the community of games developers. The explicit attempt to communicate ideas of heroism and the thematic elements of the game also seems like a direct intention to express an idea or an opinion to the player. So, given the fact that Ico is noted for its aesthetic beauty, combined with its unique and communicative game play, there is definitely an argument to suggest that it deserves protection for the same reasons that more traditional forms of art justify their protection as free expression.

However, while it does seem to show that a video game can be an effective format for the expression of an opinion or idea, Ico is not a particularly offensive or controversial game; it is not the sort of game that would be objected to by the political establishment. What the industry needs to do to assert the value of video games as a medium is to show that even allegedly offensive or obscene games can offer some form of expressive value. Grand Theft Auto is possibly the most controversial series of games in the history of the industry and
Grand Theft Auto: San Andreas (2004) is perhaps the most controversial game to ever be released. A significant amount of academic work has been done that seeks to understand the nature of the game, some in support of it and some starkly opposed (Nate Garrelts, 2006). The game content consists of large amounts of indiscriminate criminal violence and sexual references. There was even a sexually explicit mini-game that was found hidden within the game’s code during what was termed ‘the hot coffee mod controversy’ (Crecente 2005).

Despite the mature themes, the game also comes across as fairly light-hearted; there is a lot of humour within the game, which can be found in the dialogue, the scenery within the game and most famously on the in-game radio. The aesthetics of the game also seem surprisingly cheerful, cartoony and colourful for a game with such adult themes; and the cast of the game consists mainly of hilariously exaggerated American stereotypes. Many have come to the defence of the game by insisting that it should be understood as a scathing social satire that critiques American society and the perceptions Americans hold about their own culture (Leonard 2006: 59; Porter 2010). Rockstar, the developers of the Grand Theft Auto games have even explicitly stated that this was their direct intention when making the games in the series (Leonard 2006: 59). Considering that the adult content of GTA: SA is communicated to the player so light-heartedly and with such an emphasis on humour, to claim that the game is in fact a socially critical satire seems like a fairly persuasive argument. However, some object to the suggestion that GTA: SA is a social satire; Leonard (2006: 60) argues that defending GTA:SA on the grounds that it is actually a political satire distorts the way the social groups portrayed in the game are perceived by the player; and those who have legislated or campaigned against the games may be aware of its satirical nature but it is unlikely that this would dissuade them if they are of the opinion that the content in GTA:SA is harmful to society and they prescribe to the ‘clear and present danger’ way of thinking. However, within the context of this argument, these objections do not hold much weight because they do not disagree that there is an attempt at satire within the game. What is important here is not whether the content is particularly harmful but that the game is acknowledged as having a clear and expressive message, which would surely entitle it to protection as artistic expression.

Of course, Grand Theft Auto: San Andreas is not the only game that has been the subject of controversy, there is a long history of games that have prompted public discussions based on
supposedly offensive content. Another incredibly controversial game that was also developed by Rockstar, is *Manhunt* (2003), a game which actively encourages players to kill enemies in the most gruesome ways possible. The game is especially controversial because it was implicated as influencing the murder of 14 year old Stefan Pakeerah by 17 year old Warren LeBlanc, although any connection between the game and the murder was ultimately dismissed by the investigating officers (BBC News 2004).

*Manhunt* is actually distinct from San Andreas in the sense that it is incredibly difficult to see any attempt to communicate any sort of meaning through the game; it seems as if the game was designed simply to allow players to indulge themselves in violent escapism. In fact, a former employee of Rockstar described how the game caused internal friction within the company on account of its content, stating:

> ‘*Manhunt*, though, just made us all feel icky. It was all about the violence, and it was realistic violence. We all knew there was no way we could explain away that game. There was no way to rationalize it. We were crossing a line.’ (Cundy 2007)

Clearly this example lends support to the view that Manhunt was about violence and nothing else. So, if we cannot identify any value beyond violent indulgence within the game, does that mean *Manhunt* represents a point past the furthest limit to which violent games can be given the status of free expression? In his book ‘The Ethics of Computer Games’, Miguel Sicart describes an interpretation of games like Manhunt that could suggest otherwise. He describes two types of ethical games which he terms ‘opened’ and ‘closed’ ethical games; according to Sicart, ‘open’ games are games that offer the player the element of choice, so that they can decide to act within the game world based on their ethical reasoning; ‘closed’ games, he states, are games that do not provide the player with the opportunity to choose (Sicart 2009: 212-221). ‘Closed’ ethical games enforce an ethical viewpoint upon the player through linear storylines and unavoidable game play choices (Sicart 2009: 15). By doing so the player is unable to realise their personal ethics within the game world and is instead forced to question their own ethics in the real world (Sicart 2009: 15). As the player is forced to behave against his ethics in the game world, he is forced to reconcile his morality with those actions, either strengthening or challenging his pre-existing views (Sicart 2009: 15). For Sicart, this is
the ethical strength of games like *Manhunt*, however, it is unclear from what has already been discussed whether there was ever any conscious attempt by the developers to provide this experience for the player. Nevertheless, by understanding Sicart’s interpretation of ethical games, we can see how a game with content similar to *Manhunt* could be a deliberate attempt to convey an experience of moral significance to the player. This seems to suggest that even in the case of a game as ‘obscenely’ violent as *Manhunt*, there is some sort of expressive value that could possibly be communicated through this content. This could support a view that even obscenely violent content is not necessarily value-less and therefore not automatically unprotected by the principles of free-expression.

**Applying the Theory**

Having established significant reasons to believe that video games are perfectly capable of operating as legitimate forms of expression, this piece can now move on and discuss the ways in which the arguments that were presented in the first chapter can be applied to the modern day debate about video game regulation.

The predominant motivation for those who have attempted to regulate or restrict video games throughout the mediums history has been the issue of violence and the supposed link between violent content and aggressive behaviour in game players. Cases, like the pending Californian law, that have looked to regulate games because of their violent content have always discussed the imminent danger that games present, particularly to minors. Others, like Representative Fred Morgan, have tried to extend the definition of this supposed harm beyond the damage caused by direct interaction with game content and have argued that violent video games are corrupting society as a whole through their influence on the youth of America (Leonard 2006: 51-52). What can be easily identified here is an appeal to the thinking of Justice Wendel Holmes and to the doctrine of ‘clear and present danger’. Clearly, those who have attempted to increase video game regulation on the grounds that it would minimise the threat posed by violent content in games feel that reducing this harm takes precedent over the freedom of the industry to regulate itself or to distribute its games as it sees fit.
As was noted in the first chapter, the ‘clear and present danger’ doctrine seems to implicitly suggest that expression which results in criminal harm should be thought of in some senses as criminal action itself. However, it could be argued that there is little evidence to suggest that makers of violent video games that are implicated in violent crimes have been punished because the state feels that they are criminally responsible for the influence the content in their games has on the player. Additionally, there is no implication either that the makers of these games harbour any intent to incite the sort of criminal behaviour in children which has been linked to violent games. Nonetheless, members of the games industry might respond that while there is no explicit call for the punishment of the industry, by imposing regulations such as those recommended in the Californian law, the political establishment are effectively punishing the industry by reducing their ability to realise the potential profit from their games (Boyd 2010). Essentially, members of the industry feel that they are being held punishable for crimes which they had no intent to cause and which there is no conclusive evidence that they in fact did cause (Boyd 2010). While the rhetoric of the ‘clear and present danger’ doctrine is clearly identifiable in the arguments of the political establishment, the objections to that doctrine can also be identified in the responses from the gaming industry.

The extent to which regulation attempts by the state can really be considered active and intentional punishments of the gaming industry is uncertain; there is no mention of any intent of this kind in the arguments of the state or in the wording of the proposed legislation (Brown et al. 2010; Congressional Research Service 2005). However, the gaming industry also objects to laws such as the one suggested by the state of California because they feel that they are based on inconclusive research or they are of the opinion that further regulation is unnecessary. As was mentioned in the first chapter, Holmes and Brandeis both argue that the term ‘clear and present danger’ only applies when there is a very significant risk of harm to the state and society, or when there is an emergency and civil society cannot operate as it usually does (Meiklejohn 1960: 46). Of course, there is no current emergency that would suggest that democratic principles are not functioning, so that could never be used to legitimate the restriction of video games. However, many in the industry feel that the evidence to support the view that violent video games cause increased aggression in players is inconclusive, or at least that the resultant increase in aggression is insignificant or ineffectual (Boyd 2010; Kennelly 2005). Much of the research that has been done into the link between
Violent content in video games and player aggression has been mired by poor methodology and in many cases it is argued that the implications of the research have been vastly exaggerated (Boyd 2010; Hoffman 2010; Kennelly 2005).

On top of this, it is argued that legislation that further regulates the video games industry would not be preventing any significant danger because there are already fully functioning and effective bodies for the regulation of video games: which in the US, is the ESRB (Boyd 2010; Hoffman 2010). The ESRB is a voluntary, industry-adopted organisation that classifies and rates games based on their content (ESRB, date unknown). Submitting to an ESRB rating is optional; however, there are severe financial disincentives for refusing an ESRB rating because games without a rating are not allowed to be licensed on any of the major consoles and traditionally do very poorly commercially (Boyd 2010; Hoffman 2010). It could be argued that the ESRB already does an effective job of regulating the video games industry, so any further regulation by the state would not act to significantly prevent harm. Of course, there are examples where the effectiveness of the ESRB has been called into question, such as in the case of the ‘hot coffee mod’ controversy, where the ESRB unwittingly allowed Grand Theft Auto: San Andreas to be released with a Mature rating, although the game contained hidden sexual material that would justify an Adults-Only rating (Adams 2006). However, this is a very rare occurrence and it was in fact Rockstar, the developers, who were legally punished for deceiving the ESRB (Adams 2006). Therefore, it seems unfair to question the effectiveness of the ESRB based on this concern.

So there is reason to believe that governmental responses to violent video games seem to follow the reasoning of the ‘clear and present danger’ principle, but the attempts to regulate the video game industry have either fallen foul of classical objections or failed to satisfy the necessary conditions of the principle.

Another objection to the attempt to regulate video games is that many in the industry feel allowing the government to have control over the classification and distribution of video games could be the first step on a slippery slope where gradually more and more games come to be included in the definition of ‘violent content’ when perhaps originally they would not have. This worries the industry because they feel that this will give the state too much power.
over the medium and they do not trust the government to regulate games responsibly (Boyd 2010). This is an incredibly pertinent point of contention in the case of Schwarznegger v EMA, due to the inclusion of an interpretation of 18+ games that considers them ‘obscene’ and therefore not constitutionally protected as free speech (Hoffman 2010). The ESA/EMA have argued that they are fearful that because this definition is so unclear that it will be interpreted far too broadly and some games will be unfairly classified as ‘obscene’ (Hoffman 2010). The fears of the games industry in this matter seem to encapsulate the argument of Schauer who thought that we should allow total freedom of speech because we cannot trust the government to fairly and responsibly control expression (McKinnon 2006: 128). Schauer would agree with those opposed to the bill that while the ESRB and other industry regulatory bodies across the world may not be perfectly effective, that the consequences of allowing the political establishment to regulate video games would be worse than the consequences of leaving the system as it is. This view would be supported by Mill who felt that giving the political establishment power of censorship and regulation over political expression would lead to oppression and hierarchy (McKinnon 2006: 124). Scanlon would also agree, although in addition he noted that as well as government bodies, we should also be critical of the ways in which unelected organisations impact upon political expression (Scanlon 2003: 157-158). This would perhaps suggest that not only should we be critical of the state but also of the regulatory bodies which have a say in the ways in which specific video games can be marketed and distributed. However, this seems like an overextension of Schauer’s principle, at least in the case of video games because the industry on the whole embraces and accepts the ESRB and feels that the organisation represents their interests in marketing their games fairly and to the correct demographics (Adams 2006).

As has already been noted, Scanlon feels that we must understand the issue of free speech in terms of the interests which are promoted or violated when we express ourselves (Scanlon 2003: 154). Perhaps by investigating the way that interests are affected by video games and video game regulation, a greater understanding of the debate can be reached. Firstly, it could be argued that as an audience we have an interest in retaining the freedom to play violent games if we so wish; if a government were to remove this right then they would be removing the agency and autonomy we have in making the decision to play specific types of games, which Scanlon feels is an incredible wrong. Feinburg (1985: 169) would agree with this view...
because he argues that we have a ‘right to privacy’ and the government has no justification for interfering in our private interests. Of course in the majority of cases, especially in America, there have been no attempts to completely prevent legal adults from being able to purchase violent games. However, it could be argued that because regulation legislature is argued to provide financial constraints on the industry and therefore inform the types of games which are released, that the political establishment have indirectly removed the ability of game players to access the content that they desire.

This final point is perhaps better understood as an example of participant interests being violated, in the sense that developers of violent games have an interest in producing violent games and an interest in having those games played by others. It has been reiterated throughout this chapter so far that regulation legislation will impede on the ability of developers to produce the sorts of games they would have done otherwise due to perceived financial constraints resulting from a stricter classification of violent games. So it seems that Scanlon would agree that government regulation of the games industry would violate the interests that games developers have in producing the types of games they wish to.

An analysis of bystander interests in the case of video game regulation seems to provide support both for the video games industry and for the state. On the one hand, there does not seem to be any significant harm caused to those who unwittingly expose themselves to offensive content in games. The content in a video game is clearly identified on the packaging and it seems unlikely that anyone could accidentally find themselves playing a game that they did not decide to play. Many argue that the content in games is not displayed clearly enough and one common argument is that parents are often unaware of a games content, which leads them to buy inappropriate games for their children. However, the Byron Review found that this was actually a failing on the part of parents to fulfil their responsibility in controlling the content that is accessed by their children (Byron et al. 2008). So while it is doubtful that games are causing unwarranted offence to uninterested members of society, there is perhaps an argument to suggest that bystander interests are damaged in another way. Fred Morgan and many other critics have suggested that video games, especially those with violent content are corrupting the minds of young people and are forcing them to behave with increasing aggression (Leonard 2006: 51-52). According to these critics, society as a whole is being
damaged by the impact that violent video games have upon the youth of today. Of course, it is already been mentioned that there are various reasons to doubt the link between violent content and violent behaviour; and on top of this, despite the increasing use of video games, rates of juveniles committing violent crimes have been steadily diminishing since the early nineties (Office of Juvenile Justice and Delinquency Prevention, date unknown). Nevertheless, even if their arguments about the corruption that results from violent games are flawed, critics of the video game industry could still use the theory of interests in this manner to strengthen their objections.

The fourth class of interests that are described by Scanlon are the interests we have as citizens, a class of interests that are expanded on by Dworkin in his work on freedom of speech. Scanlon argues that we have an interest in maintaining a truly democratic society and Dworkin argues that a necessary provision for a democratic society is the effective maintenance of the political community and the protection of its member’s moral responsibility. It could be argued that by imposing government regulation upon the video game industry, the state would remove the ability of games developers to participate equally within our democratic society. This is especially relevant considering the fact that video game developers feel that they are being unfairly victimised in comparison to mediums such as film, especially considering that the proposed bills would impose legal restrictions upon games that do not apply to films (Young 2010). By giving films and video games different standards of regulation, the state have essentially removed the ability of video games developers to participate equally within society, especially in comparison to the film industry. In this view, regulation of the games industry would destroy a necessary component of democratic society, violating both our citizen interests and the moral responsibility of the games industry. Members of the industry who have argued the case of unfairness could definitely use the arguments of Dworkin to strengthen their position.

However, there is also a strong objection to Dworkin’s view, although interestingly its application has not been explored by those who have called for greater regulation. Catherine MacKinnon argued that while Dworkin may be right that the most important concern for the state must be the provision of equal participation within society, there are also examples of expression that can violate moral responsibility and remove the ability of groups to participate
equally within society (Dworkin 1996: 205). She feels that pornography should be restricted from distribution because it is inherently sexist and acts to remove the freedom of the female gender to participate equally in society due to diminished respect (McKinnon 2006: 142). It could be suggested that video games violate the moral responsibility of women in a similar way. A report by Children Now (2001) has shown that the female gender has been staggeringly under-represented or misrepresented in video games; they found that very few women characters in video games took a heroic or powerful role and that the majority of female characters fulfilled some sort of classic ‘damsel-in-distress’ function within the game. On top of this, the report also found that female characters in games were generally over-sexualised and objectified. It could be argued that the ways in which games represent the real world can have a dramatic effect on the opinions of game players; and as a result, some might suggest that games cause a similar effect to pornography, in the sense that they diminish the ability of women to participate equally in democratic society by espousing a view of women as weak or purely as objects of sexual desire.

The research by Children Now (2001) also argues that games generally portray non-white characters in a negative light. This is a view that is championed by Leonard, specifically in reference to *Grand Theft Auto: San Andreas*. He argues that the game solidifies and supports stereotypes about black people in America; he feels that the game paints an image of ghetto culture which suggests the ghetto is an area of constant, violent war and must be dealt with stringently by the authorities (Leonard 2006: 60-61). He also feels that the game legitimates an approach by the authorities that calls for violent treatment of what he terms ‘communities of colour’ (Leonard 2006: 60-61). Therefore, it could be suggested that *GTA: SA* has actively diminished the equal standing of black people within the USA in the same manner that MacKinnon argues pornography reduces the equality of women compared to men. It could be suggested that from this view, the state would be justified in censoring *GTA: SA* because it violates the democratic principles of society by removing the moral responsibility of black citizens. Interestingly, this has not been an approach taken by the state; Leonard (2006: 51-54) notes how even the Family Entertainment Protection Act that came about directly as a result of *GTA: SA* focused solely on the violent and sexual content of the game and not the way that race was portrayed. Leonard argues that this response by the censors actually acts to diminish the standing of black people further because it establishes an association between this type of content and black citizens.
It is important to note that the research by Children Now (2001) is methodologically suspect; the study did not actually engage with the actual content of games, it instead based its conclusions on the game content that was displayed most prominently and frequently in gaming magazines. As such, we have reason to believe that its conclusions could be incorrect although it seems reasonable to suggest that most gamers would agree that women and non-white characters are poorly represented in games compared to white male characters.

Nevertheless, what the application of Dworkin and MacKinnon’s arguments shows us is that perhaps the debate on video game regulation should not only focus on violent content and aggressive behaviour but also on the ways in which video games affect the equality of members of society. Interestingly, this has not been a major feature of legislative attempts up until this point but from what has been presented here, it seems fair to suggest that it could be a fruitful area for legislators to pursue.

**Conclusion**

The aim stated at the beginning of this piece of work was to investigate the existing academic work on theories of free expression and discover any potential applications for them on the video game regulation debate. The first task was to identify and examine the main debates and theories that were present in the existing body of academic work. These included: ‘the clear and present danger’ doctrine of Justice Wendel Holmes; the arguments from fallibility and truth of J.S. Mill; Schauers second best principle; Scanlon’s theories of autonomy and interests; and Dworkins ideas about moral responsibility and political community. By examining these theories, a clear picture of the debate was formed, parts of which could be used to reach a better understanding of video game regulation.

Before the piece could move onto the application of the literature, a need was identified for a greater understanding of the ways in which video games could be argued to represent a legitimate form of political or moral expression. The next section discussed the views of Scanlon and Mill, suggesting a particular definition with which to broadly identify the potential for legitimate expression in a piece of art or entertainment. Several examples were
examined in light of this definition and it was concluded that video games can be capable of meaningful expression.

Finally the piece applied some of the approaches outlined in the first chapter to the debate. Firstly, it looked at how the rhetoric of the political establishment has seemed to follow the doctrine of ‘clear and present danger’. From here, it moved onto consider how the arguments of the video game industry often seem to parallel the sentiments of Schauer’s second best argument. Next, it tried to reach a deeper understanding of the debate by applying Scanlon’s theory of interests. Finally, it looked at how Dworkin’s ideas about moral responsibility could possibly be used to add a new element to the debate.

This dissertation has shown that contrary to the opinions of many, there is definite reason to suggest that video games are a legitimate medium for political or moral expression. This conclusion contributes to the efforts of the video games industry to dispel the opinion that games are a value-less form of entertainment and gives serious support to the view that video games should be considered equal to other comparable mediums such as film or music.

On top of that, this dissertation has also shown how talking about video game regulation in terms of free expression can add an extra element to the discussion. Firstly, it was shown that by approaching the debate with an understanding of the ‘clear and present danger’ principle, support can be lent to the arguments of the industry which have tended to parallel the objections to this doctrine that were identified in the first chapter. Secondly, it was found that the game industry echoed Schauer in its scepticism of allowing the government complete control over the regulation of video games. By making direct appeals to the ideas of Schauer, the games industry could perhaps find stronger justification for its distrust. Thirdly, we saw how Scanlons theory of interests could present a unique understanding of the debate. Finally, an application of Dworkin and MacKinnon led to a suggestion that the current focus of the debate has been too narrow and should be expanded to include considerations about how video games affect the equality of specific groups in society.

Of course, this piece has not been all encompassing in its analysis. Instead, it has represented a thorough identification of various areas through which more in-depth and focused analysis could continue to provide insights into the debate. For instance, by looking further into the extent to which video games affect the equality of members of society and the legal
repercussions that could be implicit in that understanding, a whole new element of support could be added to the movement for added regulation. At the same time, a more detailed mapping of the debate through Scanlons theory of interests could lead to a new way in which to conceptualise the debate.

However, it seems justified to suggest that the aims and intentions that were set out at the beginning of this piece have been realised. There seems to be much that can be added to the video games regulation debate through an understanding of theoretical approaches to freedom of speech.

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