

STORAGE NAME: h3341.grr

DATE: April 20, 1998

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
GOVERNMENTAL RULES AND REGULATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3341

RELATING TO: Public Exhibition of Violent Video Games

SPONSOR(S): Representative Silver

COMPANION BILL(S): SB 696 by Senator Grant (identical)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CIVIL JUSTICE & CLAIMS (W/D)
 - (2) FAMILY LAW & CHILDREN (W/D)
 - (3) GOVERNMENTAL RULES AND REGULATIONS
 - (4) CRIMINAL JUSTICE APPROPRIATIONS
 - (5)
-

I. SUMMARY:

This bill creates the "Children's Protection from Violence Act," which places restrictions on the exhibition of video games which contain graphic violence. The bill prohibits "any person" from exhibiting a video game containing graphic violence if the game "is visible from any public street or public place." It also prohibits businesses, which exhibit video games containing graphic violence, from allowing entry to persons under 18 years of age. The bill describes procedures for verifying the age of those seeking entry.

This bill prescribes penalties for violating restrictions on the display of video games. It imposes a fine not to exceed \$5,000 for the first offense, \$10,000 for a subsequent offense, and \$50,000 total. Fines would be deposited in the Public Medical Assistance Trust Fund.

Finally, this bill allows the owner of a business, in which video games are displayed, to seek a declaratory judgment from the courts as to whether a video game contains graphic violence.

This bill could have a negative fiscal impact on video arcades, other businesses which exhibit video games, property owners who lease space to video arcades, and video game manufacturers. It could produce new revenues for the Public Medical Assistance Trust Fund.

Representative Silver proposes a strike-everything amendment to the bill. It is discussed within this document. See page 11, Section VI, Amendments or Committee Substitute Changes.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Currently, the content of video games is not directly regulated under the statutes. Chapter 847, F.S., prohibits obscenity and, to some extent, regulates the content of video games. Section 847.013, F.S., prohibits the exposure of minors to "harmful motion pictures, exhibitions, shows, presentations, or representations." However, this provision does not specifically restrict violent content.

1. **Content of Video Games** - Recently, video game violence has come under increased scrutiny. Video games are interactive, unlike television, requiring participation from players who control their on-screen emissaries. Recent advances in technology have led to increased realism. In games such as Castle Wolfenstein, Doom and Doom II, players move through a realistic three-dimensional world, and must kill a variety of enemies with weapons such as chain saws and shotguns. See Mathew Hamilton, Note, Graphic Violence in Computer and Video Games: Is Legislation the Answer, 100 DICK. L. REV. 186, 187 (1995).
2. **Link between Depicted Violence and Actual Violence** - Several professional groups, such as the American Academy of Pediatrics and the American Psychological Association have concluded that heavy exposure to television violence correlates with elevated aggression in young people. Since 1955, numerous studies and reports have suggested a link between depicted violence and aggressive behavior. Laura B. Schneider, Warning: Television Violence May Be Harmful to Children; but the First Amendment May Foil Congressional Attempts to Legislate Against It, 49 U. MIAMI L. REV. 477 (1994). However, other groups, such as the American Civil Liberties Union and media representatives discount any link between viewed violence and aggression and cite research in support of their positions. Youth violence, they suggest, has many causes including poor parenting, inadequate discipline, violence within the home, psychiatric and emotional problems, genetic predisposition, and other factors.
3. **First Amendment** - The First Amendment of the federal constitution extends its protection to all forms of communication, written, verbal, and nonverbal. The expressive content of video games is covered by the Free Speech Clause of the First Amendment. Video games, as a form of entertainment and expression, appear to enjoy much the same level of protection that has been granted to literature and motion pictures. Cf. Schad v. Borough of Mt. Epyhram, 452 U.S. 61, 65 (1981).
 - a. **Symbolic Content** - The First Amendment protects non-verbal expression from unreasonable government interference. Tinker v. Des Moines School District, 393 U.S. 503 (1969). However, the First Amendment does not offer the same level of protection to symbolic conduct, as it does to pure speech. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); United States v. O'Brien, 391 U.S. 367 (1968). Limitations on symbolic conduct will be upheld if: (1) they further an important or substantial government interest unrelated to the content of the expression, and (2) any incidental impact on First Amendment freedom is no greater than that which is essential to further the government's interest. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). In Texas v. Johnson, 491 U.S. 397 (1989), the Supreme Court invalidated a state statute

which made it a crime to mutilate a state or national flag. The Court determined that the government's prosecution of a person who disobeyed the statute was based upon the content of the expression. See also United States v. Eichman, 496 U.S. 310 (1990).

- b. **Commercial Speech** - If the content of video games is considered commercial speech it may be subject to greater regulation by the government. According to the Supreme Court of the United States, in United States v. Edge Broadcasting, 113 S.Ct. 2696 (1993), only that segment of speech which proposes a transaction may be considered commercial in nature. Because video games are viewed as entertainment, they probably would not qualify as commercial speech. Moreover, even if video games were found to be pure commercial speech, government limitations would still have to overcome significant hurdles to meet First Amendment requirements.
- c. **Suspect Types of Regulations** - Certain categories of regulations violate the First Amendment because they contain amorphous standards.
 - (1) **Overbroad Regulations** - Under the First Amendment, regulations which burden substantially more speech, than would be required to further a compelling state interest, are invalid. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Thornhill v. Alabama, 310 U.S. 88 (1940). Overbroad regulations may produce a chilling effect on free speech. Arnett v. Kennedy, 416 U.S. 134 (1974). They also may lend themselves to selective enforcement. Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).
 - (2) **Void for Vagueness Doctrine** - If a law fails to give persons fair notice as to what is prohibited, it violates the Due Process Clause (see below) as well as the First Amendment. The law must clearly delineate prohibited conduct so that persons of ordinary intelligence are not forced to guess about the statute's meaning or application. Connally v. General Construction Co., 269 U.S. 385 (1926). Deficiencies in meaning are strictly interpreted against the government.
- e. **Content-Based Regulations** - The courts rarely uphold regulations which seek to forbid or limit communication of specific ideas and viewpoints. To justify a "content-based" regulation of speech, the government must show that the regulation is: (1) necessary to serve a compelling state interest, and (2) narrowly drawn to further that interest. Depending upon how the issue is framed, a regulation aimed specifically at the content of video games could be viewed by the courts as content based.
 - (1) **Obscenity** - The government can prohibit obscene speech and expression. Obscenity has been defined as that expression which: (a) taken as a whole, by the average person applying contemporary community standards, appeals to the prurient interest, (b) portrays sex in a patently offensive way, and (c) taken as a whole, lacks serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15 (1973). More rigorous regulations may be applied to protect minors. New York v. Ferber, 458 U.S. 747 (1982). The government may not, however, ban the private possession of obscene material by adults. Stanley v. Georgia, 394 U.S. 557 (1969).

Under present common-law standards, most video games would not be considered "obscene" because the meaning of obscenity is limited to the erotic. As a result, video games which portray violence or cruelty cannot be restricted unless they also portray sexual conduct in a manner which triggers the obscenity test enunciated in Miller. Some commentators have advanced the idea that violence should be considered a form of obscenity under the First Amendment. See generally KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION* (1996). This concept has not been embraced by the courts.

- (2) **Clear and Present Danger** - The government may prohibit speech which creates a clear and present danger of imminent lawless action. Two criteria must be met. First, the speech must be directed toward producing or inciting imminent lawless action. Second, the speech must be likely to produce such action. Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969). Due to the immanency requirement, and due to unproven links between portrayals of violence and actual violence, it is unlikely that government attempts to restrict access to violent video games would meet the "clear and present danger" standard outlined here.
- f. **Prior Restraint** - Any system of restraints, which prevents access to protected expression, comes with a strong presumption that it is unconstitutional. Prior restraints are disfavored because they could result in a chilling affect on free expression.
4. **Due Process** - The Due Process Clause of the Fourteenth Amendment restricts states from engaging in arbitrary action which deprives citizens of life, liberty, or property. Property may include items such as personal property and intellectual property. Deprivation of liberty occurs when a person loses significant freedom of action or when a person is denied a constitutional or statutory right. See e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Substantive due process is a doctrine that "require[s] legislation to be fair and reasonable in content as well as application." BLACKS LAW DICTIONARY, 1429 (7th ed. 1990). Substantive due process guarantees that laws will be reasonable, not arbitrary or irrational. In the past, courts applied substantive due process to strike down various economic and social regulations. More recently, courts have shown great deference to legislative findings. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). Courts will presume that regulations affecting, business, lifestyle, and other socio-economic fields are valid, unless these regulations are wholly unrelated to the objective sought. Regulations which affect fundamental rights, however, are more carefully examined. If a law infringes upon a fundamental right, such as the First Amendment, courts will apply a strict scrutiny analysis. A law which infringes upon a fundamental right will only be upheld if it is necessary to promote a compelling interest. Furthermore, courts require a close fit between the government's objective and the means used to advance that objective. It is uncertain whether restrictions on viewing violent video games would meet these criteria.
5. **Taking Private Property** - Restrictions on viewing video games may be challenged as constituting a taking under the Fifth Amendment of the federal constitution. The Taking Clause of the Fifth Amendment prohibits taking private property for public use without just compensation. The "public use," requirement is liberally construed.

If the property in question is stripped of all economic value the regulation constitutes a taking. Regulations that decrease the value of a property do not necessarily result in a taking if they leave an economically viable use for the property. Yee v. City of Escondido, California, 503 U.S. 519 (1992). Zoning ordinances, for example, do not result in a taking as long as they do not extinguish a fundamental attribute of ownership and advance a legitimate state interest. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); but see Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). If a regulation merely decreases the value of property, courts will determine if a taking has occurred by balancing: (a) the social goals the regulation seeks to promote, (b) the diminution in value to the owner, and (c) the owner's reasonable expectations regarding use of the property. Unlike the United States Constitution, the Florida Constitution expressly protects the rights of property owners. This protection extends to all aspects of property ownership, including the right to devise. Shriners Hospital for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990). To ensure compliance with due-process principles, Florida courts have strictly construed forfeiture statutes in favor of those whose property is at risk. General Motors Acceptance Corp. v. State, 11 So.2d 482 (Fla. 1943).

B. EFFECT OF PROPOSED CHANGES:

1. **Scope of Prohibition** - This bill places restrictions on the exhibition of video games which contain graphic violence. Graphic violence is defined as "the depiction or representation of death or severe injury, including, but not limited to: (1) decapitation, (2) dismemberment, (3) repeated instances of bloodshedding, or (4) grotesque cruelty, in such a way that the depiction or representation shocks the conscience of the community and exceeds the boundaries of what should be tolerated in a civilized society." (see "PRESENT SITUATION" paragraphs 1., c., (1) and (2), relating to overbreadth and vagueness)
 - a. **Impact on Private Persons** - This bill prohibits "any person" from exhibiting a video game containing graphic violence if the game "is visible from any public street or public place." Public streets and public places constitute "public forums" under the First Amendment. Government regulations of expression within public forums are subject to strict scrutiny and must be narrowly tailored to advance government interests. Under this bill, private persons would be subject to the same sanctions as businesses for violating the prohibition against the display of video games.
 - b. **Impact on Business** - This bill prohibits businesses, which exhibit video games containing graphic violence, from allowing entry to persons under 18 years of age. The bill provides procedures for verifying the age of those seeking entry. A defendant has a complete defense if: (1) the prospective video game observer evidenced that he or she was 18 years of age or older, (2) the appearance of the prospective video game observer would have led a prudent person to believe that he or she was 18 years of age or older, or (3) an employee of the business required prospective video game observers to produce a form of identification. Because many customers of video arcades are less than 18 years of age, this bill could significantly affect the operation of these businesses. The impact of this legislation on those businesses which rent video games is uncertain.

2. **Penalties** - This bill prescribes penalties for violating restrictions on the display of video games. The bill characterizes the penalty as a "civil infraction." Under the bill's provisions, fines may be imposed which do not exceed \$5,000 on the first offense, \$10,000 on a subsequent offense, or \$50,000 total. Fines collected as a result of the penalties contained in the bill would be deposited in the Public Medical Assistance Trust Fund.
3. **Declaratory Judgment** - Finally, this bill allows the owner of a business, in which video games are displayed, to seek a declaratory judgment from the courts as to whether a video game contains graphic violence.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

N/A

E. SECTION-BY-SECTION RESEARCH:

Please see section II.B, Effect of Proposed Changes, for discussion of the bill.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

This bill will have a positive fiscal impact on the Public Medical Assistance Trust Fund. However, it is uncertain whether the penalties collected would be offset by enforcement costs.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

This bill will have a negative fiscal impact on video arcades, other businesses which exhibit video games, property owners who lease space to video arcades, and video game manufacturers. Because persons under 18 years of age are the primary customers of video arcades, these businesses could suffer losses.

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

This bill could have a slight negative impact on the state's tourism industry because children may desire to vacation in a state where they have the option of playing a full spectrum of video games.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

These issues were developed by the Committee on Civil Justice and Claims.

Key Issues - This subsection uses a question format to stimulate debate about the bill under discussion.

1. **Question Presented** - *Whether the Legislature should impose restrictions upon the display of video games containing "graphic violence," to protect society against aggressive behavior that might occur following the viewing of such games.*
2. **Other Policy Considerations:**
 - a. Does the evidence point to a link between depicted violence and actual violence? Could factors, other than having viewed violence on television or through games, account for why violent behavior may be more prevalent in some individuals? If evidence does point to a link between depicted violence and actual violence, how strong or tenuous is this link? Would such a link justify censoring certain video games or other forms of entertainment?
 - b. Does this bill infringe upon First Amendment protections concerning free speech and free expression? Is this bill subject to challenge under the void for vagueness doctrine, in that it fails to adequately define the types of expression it attempts to regulate? Does this bill constitute a prior restraint under the First Amendment? Is this bill subject to challenge under the overbreadth doctrine, in that it denies access to certain protected forms of expression? Is this bill subject to challenge as a content-based restriction on free expression?
 - c. Is this bill defensible, under the First Amendment, in that it constitutes a restriction on commercial speech, expression creating a "clear and present danger," or obscenity?
 - d. Would this bill result in a chilling effect on free expression? How valuable are the types of expression that would be censored under this bill? Should the Legislature be involved in making determinations concerning the value of certain types of expression? If so, under what circumstances?
 - e. Why does this bill attempt to regulate video games but not analogous forms of entertainment such as laser tag, hunting, boxing, or wrestling? Should these types of activities also be regulated? If not, then what logic would justify the imposition of regulations against video games?
 - f. As video games grow more realistic, particularly with the advent of virtual reality, does the danger grow that children could increasingly confuse imagination with reality? Does the interactive nature of video games intensify this danger?
 - g. Could the restrictions contained in this bill constitute a taking of property without just compensation under the federal and state constitutions? Are there other due process implications?

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

A. Summary:

Representative Silver will offer a following strike-everything amendment that alters the approach of the bill but not the intent. The strike-everything amendment provides legislative findings for support the compelling interest of the State in regulating the exhibition of video games that contain graphic violence. It provides an expanded definition of "graphic violence," revises the scope of prohibited acts and reduces the penalties assessed for committing the civil infraction. The bill also provides for an enacting date.

B. Substantial differences between the bill and the strike everything include:

- The inclusion of legislative findings in lieu of a set of whereas clauses to codify the legislative intent of the bill. These findings include:
 - a finding to provide the basis for the state's compelling interest in regulating video games that have content deemed graphically violent as defined in this bill;
 - a finding that states the link between the performance of interactive simulated violence by children and actual violence and aggression by minor is supported by anecdotal and scientific data;
 - a finding that states expressive conduct, if any, contained in the graphically violent element of these games constitutes no essential part of any exposition of ideas, and is of such slight social value that any benefit derived from it is clearly outweighed by the social interest in order and morality; and
 - a finding that states that the regulation is narrowly tailored to further the state's compelling interests to protect minors from society from the harm of these games
- Provides for an expanded definition of the term "graphic violence" to specify that portion of a video game's content that is deemed obscene and therefore fall under the provisions of this act. The definition:
 - includes the language of the *Miller* test, a judicial standard developed to analyze challenges to speech or expression considered obscene (see section II.A.3.e.(1), above, this document); and
 - that the game has been rated unsuitable for viewing by minors by either of two industry rating services using voluntary industry rating standards.
- Revises the scope of prohibited activities and penalties relating to the exhibition of video games that contain graphic violence as defined in the act to include:
 - only the admittance of a minor to an establishment that exhibits those games that contain graphic violent content would constitute a violation of the act;
 - reduces the amount of the fine for the first violation, second or subsequent violation, and total amount of the fine for the first violation;
 - provides that the state attorney may seek an injunction prohibiting the exhibition of these games where that has been a violation of the provisions of the act;

- provides that the owner may seek declaratory judgment in the circuit court to determine whether a video game contains graphic violence;
- provides for a partial defense to the violation of the provisions of the act by describing procedures by which the age of persons seeking entry into the establishment can be verified; and
- a. removes the provision that any fines paid under this act are to be deposited in the Public Medical Assistance Trust Fund (s. 409.918, F.S.) and that those funds are to pay the costs of treating injuries of victims of violent crimes.

C. Recent Case Law

Recent case law suggests that the regulation of video games that contain graphically violent content under regulatory schemes, similar to the one found in HB 3341, that would prevent minors from playing such games are not looked upon favorably by the courts as not sufficiently tailored to promote a compelling state interest. See *Video Software Dealers Assoc. v. Webster*, 968 F.2d 684 (8th Cir. (Mo.) 1992) and *Eclipse Enterprises, Inc. v. Gulotta*, 1997 WL 806997 (2d Cir. (NY) 1997).

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

Prepared by:

Legislative Research Director:

Charles R. Boning

Richard Hixson

AS FURTHER REVISED BY THE COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

Prepared by:

Legislative Research Director:

David M. Greenbaum

David M. Greenbaum