

# Beyond Content: The Emergence of Video Games and their Diverse Effects on Legal Normativity As Seen Through the Lens of Jean Baudrillard

Stephen Orr†

## Abstract

Current legal discourse about video games focuses primarily on freedom of speech issues relating to the content of games. Using the work of Jean Baudrillard (and to a small extent Marshall McLuhan) this article reconsiders how we should conceptualize the regulation of video games. Baudrillard's theories are particularly interesting to explore as his pessimistic reflections about technology challenge us to contemplate how profoundly the form of new communicative technologies, such as video games, shape human interaction.

Appealing to both theorists' belief that "the medium is the message", this article argues that we should be wary of focusing legal energy exclusively on content restrictions, since the content of particular games will not shape the world as profoundly as gaming machines themselves. This article also explores Baudrillard's troubling claims that communicative technology will lead to a conflation of reality and "hyperreality", and a reduction in human agency. This article is written as a response to the dearth of discussion regarding the broader effects of video games beyond content.

## 1 Introduction

Home video game systems are one of the most popular forms of entertainment in North America. Throughout the 1980s and 1990s, gaming was, for the most part, ignored by formal legal systems. Pac-Man and Pong elicited little excitement in the legal community, and games with controversial adult-centred content, such as *Leisure Suit Larry*,<sup>1</sup> remained resolutely on the periphery of an industry focused on satisfying the desires of children. However, as the industry has matured economically, so too has its content — gaming is no longer the exclusive domain of children. Video games are now created for, and marketed to, adults as well as children.<sup>2</sup>

As the industry has expanded in size and economic importance, it has also become a vital and powerful artifact of culture.<sup>3</sup> With improved technology and new markets to satisfy, video games offer more "realistic"<sup>4</sup> experiences than ever before, and in many cases push the boundaries of taste and decency. Larry's benign sexual romps in the early 1990s have been replaced with the aggressive sexual assault of prostitutes in the hyper-popular *Grand Theft Auto* ("GTA") series. Diverse interest groups now resolutely condemn the content and supposed effects of many of today's most popular games.<sup>5</sup>

Agents of formal legal discourse — law professors, lawyers, the courts, legislatures — are beginning to respond to the public's qualms about the often violent, sexual, socially deviant and potentially inappropriate content of video games. Questions about the role of law in regulating gaming have come to the fore over the past several years, and there are active attempts at resolving them in both the academy and the popular press.<sup>6</sup> Since the regulation of video games is a polarizing issue affecting children, it is not surprising that passionate arguments and short-sighted solutions have marginalized alternative methods of understanding the extensive social consequences of gaming. How then, with invective and diatribe fueling the debate, should we understand the role of law in the realm of video games?

Discussions about video game regulation have for the most part centred on balancing freedom of speech against restrictions on the content of games.<sup>7</sup> This myopic emphasis has contributed to legal academics restricting their analysis to weighing the benefits and harms of content restrictions. Legal discourse must develop greater sophistication when analyzing gaming and consider the broader effects of videogames on social and legal normativity.

This article draws on the cultural theories of Jean Baudrillard (and to a lesser extent Marshall McLuhan) to examine the success of existing legal responses to gaming. These theorists believe that the effects of a new

---

†© Stephen Orr. B.A. McGill University, M.A. University of Toronto, B.C.L. & LL.B. McGill University. I am indebted to the anonymous reviewers who provided useful substantive comments about this article. I would also like to thank Tina Do Kyun Lee for her support and encouragement.

medium of communication are more widespread and intense than we might initially realize.<sup>8</sup> They help us understand that new technological media drive sociological responses, including those of the law. McLuhan's pithy phrase "the medium is the message" aggregates how profoundly and radically new methods of communication alter existing social relationships.<sup>9</sup> Both argue that television (and by extension video games) has a more profound effect on society than its basic function of presenting content to viewers. Baudrillard believes that communicative technology is realigning our perception of reality, and shaping human relations, interactions, dreams, and values. He articulates how the pervasiveness of new technology has consequently led to a "hollowing out" of human agency in ways previously unimaginable.<sup>10</sup> There is significant cause for concern if human agency, which many believe is central to the aspirations of the law, is degraded and made ineffectual by this new medium.<sup>11</sup>

Baudrillard's approach to understanding new technologies suggests that the legal community has focused too much on the controversial content of particular games, such as *Halo* or *GTA*. By loudly and passionately advocating for regulation of the content of certain games, legal decision makers indicate that they do not fully appreciate how profoundly new media shape human perception and interaction. According to Baudrillard, the content of video games will not change the world to the degree that the machine, as a technology, will restructure human relationships and reorder orthodox modernist assumptions about the role of technology. Without being prescriptive, this article fleshes out a framework of how we should think about regulating video games beyond emotional pleas of balancing freedom of speech and content restrictions.

I will first analyze the evolution of Baudrillard's theories about communicative technology. I will then apply Baudrillard's (and to a lesser extent McLuhan's) theories to determine whether current legal approaches are satisfactorily addressing the complex social consequences of gaming.

## 2 Through the Lens of Baudrillard

In the 1960s, Marshall McLuhan articulated some of the first profound statements about how television would affect society.<sup>12</sup> In the 1970s and 1980s, his thoughts were expanded in one direction by Jean Baudrillard, one of the most controversial contemporary cultural theorists. I will begin with Baudrillard's earlier works and trace how he developed his theories through four of his major works.

### *The System of Objects*

Baudrillard began writing from a neo-Marxist perspective. In *The System of Objects*,<sup>13</sup> he creates an outline of a theme he developed for years to come: con-

sumer objects structure behaviour through a linguistic sign function. Through reification, objects take hold over subjects and exert special powers over them. Going beyond a traditional Marxist perspective, he argues that objects do not stand alone. Rather, they work in concert to create a system of signs that dominates the subject. The subject, therefore, never consumes an object in isolation. Instead, through each act of consumption she interacts with the entirety of a universal code of recognition — she consumes the *idea of a relation* between objects. The subject is therefore classified according to the signs she buys as well as those she does not. Consumption becomes a "systematic act of the manipulation of signs".<sup>14</sup> So, although Baudrillard relies on both Lacanian psychoanalysis and Saussurean structuralism,<sup>15</sup> his frame of reference in his early works remains classically Marxist.

According to Baudrillard, there is no hope of a Marxist revolution. Contemporary advertising — frenzied, hectic, ever growing — has taken over "the moral responsibility for all of society and replace[d] a puritan morality with a hedonistic morality of pure satisfaction, like a new state of nature at the heart of hypercivilization".<sup>16</sup> He argues that in a hypercivilization, freedom and liberty are confined and restrained by both technological development and the system of commodification. Indeed, technology is central in denying any possibility of a bourgeois revolution:

Everything is in motion, everything is changing, everything is being transformed and yet nothing changes. Such a society, thrown into technological progress, accomplishes all possible revolutions but these are revolutions upon itself. Its growing productivity does not lead to any structural change.<sup>17</sup>

Early in his career he undercut Marx's aspirations by exploring the notion of technology as a mollifying influence on society, and on individual agency in particular, but still worked within the language and framework of Marxist discourse. Later in his career, he moved further away from Marxist assumptions, language and arguments.

### *Consumer Society*

Baudrillard extends his thinking about consumption as both an ideology and a system of communication in *Consumer Society*.<sup>18</sup> He distances himself from traditional Marxism and further develops his own theory about signs. In a contemporary hypercivilization, he argues, deriving pleasure is no longer the goal of consumption. Rather, it is merely a rationalization for consumption. The real goal of consumption, he argues, is to prop up the system of objects:

Production and Consumption are one and the same grand logical process in the expanded reproduction of the productive forces and of their control. This imperative, which belongs to the system, enters in an inverted form into mentality, ethics, and everyday ideology, and that is its ultimate cunning: in the form of the liberation of needs, of individual fulfillment, of pleasure, and of affluence.<sup>19</sup>

Baudrillard characterizes individuals as no longer primarily human beings, but essentializes them as consumers who serve to reproduce the system: “As we ‘consume’ the code, in effect, we ‘reproduce’ the system.”<sup>20</sup> Individuals therefore do not consume mere objects, but the entire system of objects — the signifying system itself. Human agency is cast aside, but individuals retain a limited form of agency to imbue the system of objects with meaning. Technological progress extracts human agency from individuals and replaces it with consumer choice. The individual (as consumer) therefore plays an active but circumscribed role in the process of signification.

### ***Critique of the Political Economy of the Sign***

In his later works, Baudrillard continues to explore the application of his theory to human agency. He concludes that human agency is irrelevant in contemporary consumer society because the human as consumer has conquered the notion of human as citizen, or indeed, even the human as a composition of identity characteristics:

The logic of exchange is primordial. In a way, the individual is nonexistent . . . a certain language . . . is prior to the individual. This language is a social form in relation to which there can properly speaking be no individuals, since it is an exchange structure.<sup>21</sup>

I will explore the consequences of the negation of human agency as related to gaming in section 3.3, but will first explore how Baudrillard believes we lose our agency as humans.

Economic power, and the associated liberal discourse of the market, is so important in shaping contemporary cultural norms that he claims liberal ideology “appears as a sort of cultural surf frothing on the beach-head of the economy.”<sup>22</sup> The mass media perform a central role in the proliferation of liberal values. Whether through television or gaming, messages are spread through the form of the media, not merely its substance.

Like McLuhan, Baudrillard implores us to study the form, and not simply content, of media. McLuhan was the first to explore how the medium is the message, and Baudrillard agrees with this notion. Examining the content of particular television programs or video games is almost irrelevant for Baudrillard, since media are inherently ideological: “ideology does not exist in some place apart, as the discourse of the dominant class, *before* it is channeled through the media . . . media ideology functions at the level of *form*.”<sup>23</sup> Media, through constant communication, paradoxically creates noncommunication between humans themselves. People become so preoccupied with receiving information from electronic devices that they have no time, interest, or perhaps even the skills to interact meaningfully with other humans. Baudrillard argues that this paradox is “the real abstraction of the media . . . the system of social control and power is rooted in it.”<sup>24</sup>

Media itself, whether television or radio or gaming, is a social control. Baudrillard articulates this idea in frighteningly provocative terms,

It is useless to fantasize about state projection of police control through TV . . . TV, by virtue of its mere presence, is a social control itself. There is no need to imagine it as a state periscope spying on everyone’s private life – the situation as it stands is more efficient than that: it is the *certainty that people are no longer speaking to each other*, that they are definitely isolated in the face of a speech without response.<sup>25</sup>

Any medium that does not seek to “smash the code”, like graffiti, for example, is thereby bound to act as a social control.<sup>26</sup> Based on Baudrillard’s logic, video games certainly cannot be characterized as subversive, and instead work in concert with other dominant media forms to place shackles on human agency.

He rejects the possibility that technology can facilitate responsible or emancipatory media communication. The implications of his analysis are that creating alternative media, or using existing media in alternative ways or forms, is ineffective, or worse, because the very essence of communicative technology denies any possibility of social reform or transformation. He resigns himself to the *status quo*, rejecting any possibility or purpose for reform, and seems to offer little hope beyond either surrendering oneself to the control of media or breaking away from post-industrial methods of communication by pursuing a bucolic lifestyle.

### ***Symbolic Exchange and Death***

By the late 1970s, Baudrillard moved away from political theory and firmly into “radical semiurgy”, where he explored the dominance of the sign.<sup>27</sup> He criticizes that “Marx, in his materialist analysis of production, had virtually circumscribed productive forces as a privileged domain from which language, signs and communication in general found themselves excluded”.<sup>28</sup> According to one academic, Baudrillard believes that Marxist theory could not adequately address the importance of language, signs and communication.<sup>29</sup> For Baudrillard, understanding codes and simulations is not only important, but necessary and vital to comprehend contemporary society:

Today, the entire system is fluctuating in indeterminacy, all of reality is absorbed by the hyperreality of the code and of simulation. It is now a principle of simulation, and not of reality, that regulates social life. The finalities have disappeared; we are now engendered by models. There is no longer such a thing as ideology; there are only simulacra.<sup>30</sup>

No longer does God, nature, or political ideology dominate humans — instead, “[s]igns alone constitute the purest and most illegible form of domination . . . It is completely absorbed, without a trace of blood, in the signs that surround us . . . A symbolic violence is everywhere inscribed in signs, including in the signs of the revolution”.<sup>31</sup> The simulacra (the signs) have no referents. Rather, the system is premised on the bald notion of

rejuvenation and renewal through repetition. Like McLuhan, Baudrillard does not believe production is the most powerful organizing principle in society; instead, he holds that media creates meaning through its form alone.<sup>32</sup> This is indeed a significant departure from his early days when he commingled Marxism and semiurgy.

A consequence of the elevation of signs, codes, and simulacra is Baudrillard's creation of the "hyperreal".<sup>33</sup> In his later writings he refines his conception of the hyperreal, fleshing it out with nuance (and, perhaps, confusion). He argues that because of the centrality and power of media, contemporary society no longer distinguishes between reality and fiction; instead, we live in an age of hyperreality. He suggests that:

From medium to medium, the real is volatilized, becoming an allegory of death. But it is also, in a sense, reinforced through its own destruction. It becomes *reality for its own sake*, the fetishism of the lost object: no longer the object of representation, but the ecstasy of denial and of its own ritual extermination: the hyperreal... manages to efface even this contradiction between the real and the imaginary. Unreality no longer resides in the dream or fantasy, or in the beyond, but in the *real's hallucinatory resemblance to itself*.<sup>34</sup>

Although television was the object of much of Baudrillard's attention, his theories evoke powerful consequences when applied to video games as well. Television sends off programs, messages, and codes to no one in particular. It acts as a mere video of another world, "indifferent to its own messages (you can easily imagine it still functioning after humanity has disappeared)".<sup>35</sup> Since the individual is awash in communication — in hyperreality — she loses her ability to speak and interact with others, her voice removed. As reality is replaced by hyperreality, the ability of people to act and function with others vanishes and human agency is lost. With technological progress and new media, such as video games, further congesting communication pathways, the hyperreal becomes ever more entrenched.

## The three themes

How can Baudrillard's ideas help us understand the effects of video games on the Canadian polity, and by extension, to the law? No one has yet investigated the legal ramifications of video games through this theoretical lens. Baudrillard's theories help us move beyond first order debates about free speech and the content of games and investigate the potential legal consequences of the medium *qua* medium. The remainder of this article is organized around three themes drawn from Baudrillard's work: (1) the medium is the message, (2) reality is rapidly becoming hyperreality, and (3) this is reducing human agency.

As we enter further into an age dominated by post-industrial communications technology, Baudrillard's ideas about the potential consequences of media ascendancy become even more important to understand. While debates about the content of video games are important, we must also address more general criticisms

about communicative technology. Although there is no single canonized critic of communicative technology, I present Baudrillard's theories as one possible examination (albeit a strong one) of whether legal responses to gaming have been satisfactory.

## 3 Application

In this section I apply three of Baudrillard's arguments to the regulation of video games: (1) the medium is the message, (2) reality is becoming hyperreality, and (3) that communicative technology is reducing, or perhaps even negating, human agency. Although these three arguments are interrelated and Baudrillard weaves them together in his writings, it is useful to artificially parse them for the purposes of this article.

### 3.1 The Medium Is the Message

The discussion in section 3.1 centres on content since current legal responses to gaming tackle this issue. I will address McLuhan's notion that the medium is the message, which Baudrillard adopts, to criticize the excessive attention that legal efforts have made to restrict content.

#### Content controversies

There have been numerous public debates about the content of video games. One of the more controversial recent video games was *JFK: Reloaded* ("*JFK*"), where players are brazenly invited to re-enact the assassination of former American president John F. Kennedy; players, acting as snipers, receive points based on the accuracy of their shots. Although the game was sold only online, some bricks-and-mortar retailers did not think they would sell the video game had they been approached.<sup>36</sup> Despite many of the most popular games being very violent, the content of this game stood out as particularly offensive to retailers. *GTA: San Andreas* attracted similar scorn, since it features offensive language, sexual content, drug use, and violence including the killing of prostitutes.<sup>37</sup> However, unlike *JFK*, *GTA* was not a niche product with limited distribution; it was a mass-marketed game that sold 3.6 million copies in its first two months of release. Even with *GTA's* controversial content, or perhaps because of it, it was a remarkable success. These games, as well as others, inspired diverse governance initiatives to restrict the content of video games for being too violent and sexual, which I will explore below.

Before examining these modes of governance, let us first investigate whether gaming has effects beyond merely presenting content. While it would be foolish for legal analysis to ignore the importance of content, it is equally unforgivable to disregard the power of the medium itself. Yet, this is what is occurring. This article seeks to balance these contested frames of reference by focusing on the power of the medium. Irrespective of

one's lens of analysis, gaming is creating significant real life consequences.<sup>38</sup>

Some industries have faced indirect pressure from gaming. For example, observers lament the recent downfall of the quality of basketball played in the National Basketball Association. It used to be one of the most exciting professional sports leagues in North America. It had a fun, fast game that was only outpaced by its rapidly increasing fan base. Michael Jordan, not so long ago, was celebrated as its invincible idol. It is now dry, dull, and predictable. Players in North America have forsaken developing all-around skills for learning how to dunk the ball more dramatically to emulate the virtual characters in video games. According to one writer,

It is all part of a video-game aesthetic being transplanted into our real games: the athlete as action hero, an essentially antisocial lone wolf set apart from teammates, dedicated to his own personal glory and not bound by much of anything, even the laws of gravity ... [Video-game companies turn] real-life athletes into digitized figures, further blurring the distinction between flesh-and-blood athletes and the superhumans we have come to expect in the sports arena.<sup>39</sup>

We see here an instantiation of Baudrillard's vision of a hyperreality, where athletes and fans perceive the players through a fantastical lens created by gaming. In section 3.2, I will revisit this issue in more depth.

This brief discussion demonstrates the profound impact of gaming. More than merely being a device for users to digest content, gaming is altering people's approaches to life. The story that academics should be documenting, according to Baudrillard, is the ascendancy of gaming and its effect on human relationships, not merely gauging the acceptability of content of particular games. Nonetheless, formal legal responses to video games have focused on their content. By concentrating attention solely on content, the rich tapestry of social, economic and cultural consequences of gaming is lost. With this limitation of current formal legal responses in mind, let us explore recent responses.

### Current legal and regulatory responses

Although we have seen that video games have significant impact on how people live and interact, almost all the legal focus on gaming revolves around content restriction. Content critics believe that the most important harm reduction strategy for gaming is to limit access to particular content. This has inspired both self-regulation by the gaming industry, and legislative oversight. Civil lawsuits have also been brought against gaming corporations for their alleged contribution to incidents where young people violently attack each other, such as the Columbine massacre.<sup>40</sup> I will briefly describe how these three methods of governance have approached the regulation of gaming.

#### *Ratings board*

A consequence of content controversies is that the industry has consistently advocated for self-regulation of

gaming content.<sup>41</sup> The Entertainment Software Rating Board (ESRB) describes itself as "a self-regulatory body for the interactive entertainment software industry established in 1994 by the Entertainment Software Association".<sup>42</sup> There is no independent Canadian ratings board, so Canadians rely on ESRB's efforts. The ESRB independently applies and enforces ratings, advertising guidelines, and online privacy principles adopted by the computer and video game industry. The ESRB is modeled on the Motion Picture Association of America (MPAA), which has rated the content of movies since 1968. According to the ESRB, the "rating system helps parents and other consumers choose the games that are right for their families. ESRB ratings have two parts: rating symbols that suggest what age group the game is best for, and content descriptors that indicate elements in a game that may have triggered a particular rating and/or be of interest or concern".<sup>43</sup> The effectiveness of the ESRB's work remains unclear.

Although the ratings system does exist, it has substantial problems. The ESRB was established by the industry in response to widespread concern from the public and lawmakers. While movie theatres are known to take the ratings of the MPAA seriously and risk censure if they violate the ratings, the ESRB ratings have not had the same effect. The ESRB's ratings have been called "inconsistent and insufficient".<sup>44</sup> Most importantly, they are overlooked by adult shoppers, the group they are intended to influence, yet remain dependent on consumers' (especially parents) understanding of the role and meaning of the system. Based on the number of legislative proposals to criminally sanction retailers who sell or rent inappropriate games to children, it seems as though many parents either do not understand the ratings, are not aware of them, do not find them sufficient, or do not care. In some cases, stores themselves have ignored the legitimacy and importance of the ratings; there have been reports of ratings being covered with the price sticker, or of displays that explain the rating system being removed to make room for additional merchandise.<sup>45</sup> Because of the current ineffectiveness of the ratings and the continued belief in their importance, some American jurisdictions have initiated legislation to enforce the ratings with criminal sanctions.

#### *Legislation*

In the United States, there have been federal and state initiatives to pass legislation respecting the content of video games. Canada has not yet followed suit with similar legislative schemes. These initiatives to regulate "violent video games follows, in part, from the belief that such games were a causal factor in various high school shootings that have occurred in recent years".<sup>46</sup> In early 2003, Democratic Representative Joe Baca introduced the *Protect Children from Video Game Sex and Violence Act of 2003*<sup>47</sup> to the U.S. Congress, which, as Baca trumpeted in an official press release, "would make it a

federal crime for retailers to sell ultra violent and sexually explicit video games to minors because the games can be harmful to children".<sup>48</sup>

Based on the preamble, the proposed Act seeks to fine "[w]hoever sells at retail or rents, or attempts to sell at retail or rent, to a minor any video game that depicts nudity, sexual conduct, or other content harmful to minors".<sup>49</sup> In 2003, the bill was first referred to the Judicial Committee, but has not yet passed into law. Two years after its introduction, the bill remains in committee. More recently, Senator Hillary Rodham Clinton sponsored *A Bill to Limit the Exposure of Children to Violent Video Games*.<sup>50</sup> Despite indications that legislators are not excessively concerned with passing the bills, Representative Baca and his fellow federal politicians are not alone in seeking to legislate restrictions on video game content.

Many American states have proposed regulatory initiatives to complement the federal proposal. In 2003, state representatives introduced similar legislation in, *inter alia*, Pennsylvania,<sup>51</sup> Delaware,<sup>52</sup> Michigan,<sup>53</sup> Minnesota,<sup>54</sup> New Jersey,<sup>55</sup> and New York.<sup>56</sup> More recently, in July 2005, Governor Rod Blagojevich of Illinois signed into law a bill to "prohibit the sale, rental [and distribution] of excessively violent or sexually explicit video games to minors".<sup>57</sup> It is not necessary in this article to delve into the particular restrictions and criminal penalties imposed by each bill. However, I should note that much of the legislation is similar in substance and scope. Legislatures have clearly felt it their responsibility to act, or to at least provide the illusion of action, by criminalizing merchants who sell inappropriate video games to minors.

The proposed statutes appear to have one thing in common: the idea that law can be, and should be, used as an instrument of social reform. This instrumentation suggests there will be a clear relationship between the legislative purpose and the desired cultural and social impact.<sup>58</sup> However, solving broad social problems through legislation is made difficult because of unintended consequences, or because legislators do not fully understand the problem in the first place. These are both legitimate concerns, but especially the latter. While there have been many proposed bills to impose restrictions on the content of video games in the United States, there has been markedly little discussion about restrictions on guns, assault weapons, or of remedying wildly disparate levels of income, education and well-being. Seen in this context, the proposed legislation seems to be little more than a reactionary response to controversial content that does not address foundational problems.

### *Civil lawsuits*

Civil litigation is another method to regulate the content of video games, particularly in the United States. However, in the last several years the judicial tide has risen against finding video game manufacturers liable

"for selling products that supposedly cause or contribute to real-life violence".<sup>59</sup> This issue has not yet been litigated in Canada, but since these cases have not succeeded in the United States they would likely fail in Canadian courtrooms. In response to the failure of lawsuits, advocates of state-based restrictions have shifted the locus of governance away from the courts and towards the legislature, as seen above. With so much focus on content in sites of legal normativity, let us examine what Jean Baudrillard would say about the importance of the medium's content.

### **Baudrillardian analysis – the medium is the message**

Most legal scholarship regarding video games has centred on freedom of speech. It remains tantalizing for some to claim that there is causation between the content of games and violent incidents in society. This argument has significant currency and has displaced alternative threads of discourse, especially in the United States, where there have been highly publicized deaths from school shootings. This attention has been mirrored by governance initiatives through the courts, legislatures, and informal industry standards with respect to the content of video games. Although concerns about content are perhaps legitimate, they miss the larger point that the medium itself shapes individual and group behaviour, which can have serious social, cultural, and legal consequences.

New communicative technologies, whether radio, television, video games, or the Internet generate powerful social consequences. Television, a new medium when both McLuhan and Baudrillard were writing, initially had uncertain effects. However, it seemed clear to both that beyond content, the medium itself created powerful consequences. Based on their claim about the centrality of media in effecting social change, it does not make sense for the law to regulate only the content of games. However, this is precisely where legal discourse is currently focused.

Not only must we examine the medium, we must also recognize that the environment in which one experiences a medium also influences its effects. The physical and social environment of gamers has a significant impact on these questions. We should not forget to examine how the interaction takes place, in what kinds of spaces it occurs, and what social relations it encourages (and dissuades). When we think about films we consider the whole cinematic experience: sitting next to strangers, the projection, and the smell of buttered popcorn affects our experience. For video games, we must also consider the entire impact of the surrounding environment, and how the individual relates with the medium.

With the video game industry growing each year, more and more young people spend significant amounts of their time gaming instead of pursuing other pastimes.

While playing games they engage in an individualistic, atomistic enterprise, alone in their homes, and literally connected to the machine. When gamers interact with each other, they are separated and distant, mediated by the technology. Face-to-face interactions are excluded, while mediated interactions are privileged. The gaming system sends a powerful message of favouring interaction between the individual and the machine, or at least having the machine mediate relationships between gamers. The most commanding relationship is between the machine and the individual. It is not the content of games that creates this message, but the system itself. The content is merely accessory to the medium. Yet, this aspect of the gaming phenomenon has not received adequate attention from scholars, legislators, and those in other sites of legal normativity.

Current regulatory efforts that focus on restricting the access of children to games with inappropriate content do not sufficiently address Baudrillard's concerns. Although it may be problematic for children to play games designed for mature audiences, it is potentially more dangerous that children are playing excessive amounts of video games in the first place. The interaction between gamer and machine remains similar regardless of the content of games: the gamer sits (typically alone) in front of the television, enters a fantasy world created by the game, and blocks out the world around them. Gamers sacrifice food, drink and other distractions for the sake of the game. It seems that this solitary interaction with the medium for hours each day has greater potential to influence how gamers understand and relate with the world, social interaction, and human agency than the content of the games. Baudrillard's and McLuhan's thoughts about how the medium is the message reveal the poverty of existing legal discourse and governance initiatives regarding video games.

It is not particularly surprising that legal governance approached regulation of gaming through content restriction. After all, those who are proposing or initiating reforms are, for the most part, older and have not been affected by the medium of gaming. They are interpreting new social phenomena through existing legal norms that they understand, although this discourse is likely not sufficient to address the complexities created by gaming. It will be interesting to follow the evolution of gaming regulation. Will regulation in the future look anything like what is currently desired? Or, will those in sites of legal normativity in the future, having been gamers themselves throughout their lives, be more attuned to broader issues beyond content, and advocate for strikingly different models of governance?

One criticism of Baudrillard is that he is an "arm chair" theorist whose work bore little relationship to the "real world". He did not do empirical research, and in his later years became less rigorous, and more self-referential. For many, his work thus sits on a level of theory *qua* theory, not as theory explored through empirical anal-

ysis. I attempt to remedy this deficiency by exploring the state of gaming at length, and of using Baudrillard's theory as a lens through that to understand the consequences of video gaming.

Baudrillard is also considered a rather strict formalist and technological determinist when it comes to media theory. He removes any focus on content and studies purely the formal structure and effects of media. According to Douglas Kellner, "Baudrillard might retort that it is the media themselves that abstract from the concreteness of everyday, social, and political life and provide abstract simulacra of actual events that themselves become more real than 'the real' that they supposedly represent".<sup>60</sup> Regardless, his marginalization of the content of media is a criticism that resonates with many people. Some have advocated for a more nuanced view of the media that does not totally reject the role of content.<sup>61</sup> Nonetheless, this application of Baudrillard's theories provides a balance against the dominant strand of scholarship. It is interesting to note that a focus on form leads to a greater warning of the social, physical, sensory, psychological, and experiential impact of communicative technology and a more pessimistic vision of the reworking of human life and society that might be used to argue for even greater restrictions on the availability of these technologies.

## 3.2 Reality Becoming Hyperreality

### The state of gaming

The video game industry has become big business — so big that gaming can no longer be marginalized or ignored as a mere child's pursuit. Each year the industry moves closer to matching the amount of income that Hollywood earns from its big-budget movies. The numbers are staggering. In autumn 2004, Microsoft released *Halo 2*, the second volume of its flagship game, for its X-Box video game console. The game was so popular that 1.5 million people preordered the \$50 game.<sup>62</sup> Over the first 24 hours it surpassed by far the sales of any Hollywood film over the same period, and by the end of the first weekend amassed sales of \$125 million.<sup>63</sup> In its first two months of release in autumn 2004, *GTA: San Andreas* sold over 3.6 million copies.<sup>64</sup> In 2003, video game sales topped \$20 billion worldwide.<sup>65</sup> Approximately half of all American parents bought video games as a Christmas present for their children in 2004.<sup>66</sup> Many youth and young adults now spend more money on gaming than on attending movies.<sup>67</sup> There is no denying the gaming industry's ascendancy as an economic force that challenges Hollywood for dominance in the creation of culture through mass-entertainment.<sup>68</sup>

It was not always this way. Scarcely a few years ago, the video game "business was not one ... any media company would touch".<sup>69</sup> Now movie studios are interested in buying video game corporations because of the wide profit margin on successful games, and because

they hope to capture the fecundity of designers who have creatively built brands and radically redefined the gaming aesthetic. In autumn 2004, the industry appeared so strong that Electronic Arts, which produces over 60 per cent of the sports video game market, signed a 15-year \$750 million agreement for exclusive use of the ESPN brand.<sup>70</sup> Large video game and media corporations are committing to significant long-term investments, suggesting that the industry is not close to reaching its zenith.

Gaming is no longer only a source of entertainment — for some serious gamers it is their livelihood. A small but increasing number of professional gamers earn a living from competitive video game play. Many gaming tournaments exist, such as the World Cyber Games, attended by 40,000 people in 2004, with similar numbers watching on the Internet, and a first place prize of \$20,000.<sup>71</sup> One particularly successful gamer has earned more than \$300,000 from “tournaments, product endorsements and a line of accessories” he markets.<sup>72</sup> Like professional sporting leagues, the entrepreneurs behind these tournaments solicit substantial sponsorships from large, interested corporations like Intel, Nokia, and Samsung. Certain groups of gamers have created development systems to bring along ingénues and train them to be world-class players who will be the stars of the future. Edward Castranova has recently studied how multiplayer games that have millions of participants playing together, such as *Everquest*, have created real markets for virtual objects within the game.<sup>73</sup> That is, gamers buy and sell with real currency resources that are located within a virtual universe. This certainly signals that gaming is reaching new heights of popularity, both among dedicated players and those who follow their travails. There is no doubt about the significant economic impact of video games on industrialized economies.<sup>74</sup> What then, about the social and cultural impact?

More than merely a forum for presenting questionable content, video games are reshaping the way gamers live and understand life. These thoughts are articulated succinctly when parents wonder, “Why can [kids] look at a screen and see a world where they belong while I look at the same screen and get a migraine?”<sup>75</sup> Although this intergenerational abyss may have also been an issue with the advent of television, the technological and aesthetic complexity of video games ensures a division between those who embrace it and those who are excluded. A recent monograph frames this divide as a generation gap: video games “are a central, defining part of growing up for millions of people. The first massive wave of mainstream gamers are in their 20s and early 30s now. They think games are just another part of the real world.”<sup>76</sup>

Gaming has reached such a level of technological sophistication that games are now used for instrumental educational tasks.<sup>77</sup> Why learn and interact with others, when a video game system can stand in? Advocates

believe there are numerous ways in which video games can be used in education, from honing relevant skills to disseminating experiences about particular careers. The United States Army uses video games to teach “soldiers realistic strategies for urban military operations”.<sup>78</sup> The Army also uses video games to help desensitize soldiers to violence through simulated battle experiences. Moreover, a recent medical study found that “surgeons who played video games for at least three hours a week were 27 per cent faster and made 37 per cent fewer mistakes than surgeons who did not play video games”.<sup>79</sup> The doctor who led the study is now working with a gaming company to create a video game for doctors to practise more specific surgical skills.

Educators have also attempted to harness the educational value of video games for children. This scheme was pursued in the context of making education more “pleasure-oriented, child-centred, and less hierarchical” than orthodox classroom approaches,<sup>80</sup> and indicates significant blurring between the traditional watertight compartments of “entertainment” and “education”.<sup>81</sup> In a recent academic article about video games, cultural production, and entertainment, Mizuko Ito suspects claims that these games have legitimate educational value, and argues that much of the content of “edutainment” games are merely part of a “junk culture” where developers rely more on “gross bodily noises, explosions, hyperbole, and increasingly, established licensed characters” than on substance and educational value.<sup>82</sup> Others are more optimistic of the value and benefits of teaching children with video games.<sup>83</sup>

With new technological advances, the gaming experience has begun to change. Traditionally, gaming involved sitting alone, perhaps with friends, in front of a television. The player would type commands into the computer or ministrate a keypad with two buttons and a direction pad to manipulate the game. The gaming worlds were typically two-dimensional fantasylands with comic-looking characters and bright sounds effects. This classic gaming experience has been left behind and the gaming experience is now more rich and complex. Today’s controllers have two or more directional controls and a dozen buttons, all of which gamers must manipulate in concert. The universe of individual games has expanded to three dimensions, and can be vast worlds that take patience and expertise to navigate. It is also increasingly common for people to outfit their cars with video game consoles to entertain passengers or pacify children.<sup>84</sup> The realm of the gaming experience is no longer limited to an individual playing alone in his living room, although this is obviously still common. Regardless of the location of players, they are more fully locked into gameplay than in the past.

Several of the most popular video game systems allow interactive online play — each gamer in the comfort of his own home. Some of these games have millions of dedicated participants.<sup>85</sup> Although they are physically



separated from one another, gamers work towards goals and share virtual worlds together. There are headsets, microphones, and speakerphones available for players to communicate with one another about strategy, or to berate opponents.<sup>86</sup> The gamer is locked into the experience more than ever before.

Another model of game is individualistic and celebrates the gamer as “lone wolf”, as exemplified in first-person shooter games.<sup>87</sup> This type of gamer is separated from others and “dedicated to his own personal glory and not bound by much of anything”, such as moral codes or social imperatives.<sup>88</sup> Many of the most popular games are based on this model. The rugged individualism that games encourage does not facilitate community building or meaningful interpersonal relationships. Instead, it nurtures players to be self-reliant, autonomous, competitive, and strongly individualistic.

### Baudrillardian analysis – reality becoming hyper-reality

Whichever the model, the gaming experience is individualized. Gamers are brought into the world of gaming to an even greater degree than with television. As Baudrillard would say, there is no original gaming experience that anyone ever shares. Rather, every gaming experience is a simulation of the real. With millions of gamers playing, there are millions of simulations occurring every day, creating simulacra. This is indeed the contradiction with Baudrillard’s theory: as people communicate with one another through technology, signs and simulations mediate relationships and we are left only with simulacra — the dominance of the sign. Once people enter into the realm of video games they cannot help but be enveloped by simulacra, even after they stop playing.

Although people who play *GTA* may briefly internalize some of the antisocial norms (perhaps driving their car quickly or erratically after playing the game), the fact that they interact alone with the medium for hours on end may be more problematic. It can lead to, as Baudrillard discusses, a conjoining of realities — a hyper-reality where, for example, they begin to understand life through simple moral imperatives that the medium demands (e.g. good or evil, individual competition or cooperation). Not only is this potentially more problematic and endemic than a child experiencing age-inappropriate content, it is happening on a macro scale.

Games like *GTA* allow users to wander about a virtual field in a non-linear fashion, to realize their dreams and hopes, to explore, be tense, excited or awkward. It allows gamers to create a new virtual life for themselves. However, their actions in the game world represent a very simplistic understanding of life. It is experienced through a two-dimensional screen and is powered by a digital machine where the world often has simple binary codes of morality: you are either a good guy or a bad guy, either with us or against us. Baudrillard

would argue that simulacra wash over gamers as they explore these virtual worlds, forever reorienting, to a certain degree, their relationship with the non-gaming world.

The relationship between gaming and interpreting the world through the lens of hyperreality occurs because of a feedback mechanism that Baudrillard describes. The longer a user of a communicative medium is exposed to the medium, the more adept the user becomes at manipulating information from the medium. With more experience, gamers are capable of digesting greater amounts of information, allowing them to play longer and more intensely.<sup>89</sup> This is why kids “look at a screen and see a world where they belong”, while parents do the same and get a migraine;<sup>90</sup> gamers are simply more adept and experienced at engaging with the speed, values, and narrative structure of video games.<sup>91</sup> If there is indeed an intergenerational gap between gamers and those on the periphery, do those of an older generation have sufficient skills interpreting the medium to create credible legal reforms with respect to gaming? Or, are their approaches bound to be unsatisfactory since their frame of reference is so removed from what gamers experience?

Baudrillard’s hyperreality collapses the supposed barrier between fiction and reality. This has obvious application for video games. Gamers enter virtual worlds for hours on end, physically isolated in the comfort of their own homes. As they become more adept at balancing the output from the medium, they are better able to interact with it for longer periods of time and integrate themselves into the framework of the medium. It is naïve to believe that they will not transfer any of their experiences from the gaming world to the *real* world. As gaming becomes more popular and widespread, reality will continue to be sculpted by additional codes and simulations. Distinction between reality and its representation will collapse and there will only be simulacrum. The model upon which the simulation is based will cease to exist and we will be left only with the simulation.

Part of the allure of Baudrillard is that he offers us a critical vision of the role and importance of media through the language of simulacra.<sup>92</sup> It is more common for critical legal scholars to resort to neo-Marxism, and the discourse with which critical scholars are most familiar: capital, hegemony, and power. There are strong and persuasive critiques against Baudrillard’s claims of the “end of the individual”. However, his rejection of Marxist political economy remains provocative, when accompanied with how “we live in the hyperreality of simulations in which images, spectacles, and the play of signs replace the logic of production and class conflict as key constituents of contemporary societies”.<sup>93</sup> Baudrillard’s theory can provide a tantalizing vantage point from which to analyze video gaming. His radical critique

is particularly important for legal discourse, since legal scholars rarely address Baudrillard's theory.

### 3.3 Reduction of Human Agency

#### The state of gaming

Video games are no longer a narrow diversion, limited exclusively to computer aficionados. Gaming has burst beyond the once restricted groups of "computer geeks" and become central to popular culture. Some in the industry argue that video gaming "is the new rock 'n' roll", and *Halo 2* the new Woodstock.<sup>94</sup> Even some musical artists who are featured on the soundtracks of particularly well-known games do not even ask for royalties, since association with a dominant cultural artifact is sufficient compensation.<sup>95</sup> Games are also a source of inspiration for popular movies, such as *Lara Croft*, and of independent films as well.<sup>96</sup> More than ever, video games are shaping the culture of industrialized countries.

Bruno Bonnell, the CEO of French video game maker Atari, situates gaming within a larger scope than do many in the industry. Video games, for him, are intimately connected to human entertainment as it has evolved over thousands of years. He argues that it is only natural for gaming to play an active and central role in popular culture. After all, video games are merely the latest incarnation of the most traditional forms of entertainment. Back in the time of cavemen, he says,

they had two ways of entertainment. One was the chief of the tribe telling about the hunting of the day – how big the tiger's teeth were, how brave this guy was when he went to hit the mammoth with the stick . . . And that was to impress the crowd. The fun, the thrills, were coming from this impression that you got from outside. Then they moved into painting on the cave walls, then writing stories, then the stories started moving, like cinema, and the cinema went to television. Still the same system. The media of impression.<sup>97</sup>

He continues, though:

The second way of entertainment they had was to take two sticks, beat them together and dance around the fire . . . Here the thrill was not about being impressed but about expressing yourself. That moves into the invention of musical instruments, getting different emotions from different styles of music, growing the music experience into opera or whatever. And that really leads into the video game. Playing with a joystick is basically the same move as playing a piano; the thrill is not what you get from outside, but what you express from inside. Whether it's a piano or a chessboard or a joypad, that's your technology, and you express yourself through it.<sup>98</sup>

Where some see video games as a purely passive form of recreation, like television or movies, Bonnell believes games are an active expression of self and shape human experience and aspiration in a profound and personal fashion. He situates gaming as actively shaping cultural norms and treats the games as important cultural artifacts.

Since games play a central role in the lives of young people, we must ask what they learn from the experience. Beck and Wade argue that, among other lessons, players learn to be self-empowered and celebrate that

they "are the star. Unlike, say, Little League, where most kids will never be the star".<sup>99</sup> Other common ideas, centred in a discourse of liberal individualism include: "You're the boss. The world is very responsive to you. There's always an answer. You might be frustrated for a while, you might even never find it, but you know it's there. Trial and error is almost always the best plan. It's all about the competition."<sup>100</sup> Gaming therefore seems to reinforce a political and legal ideology that is already at the heart of American and, arguably, to an increasing extent, Canadian society.<sup>101</sup> We can anticipate this strand of liberal individualism continuing to influence the Canadian polity in the future, driven at least partially by the popularity of gaming.

In addition to the role of individualism and communitarianism in the gaming industry, other identity characteristics, such as gender, have not yet been sufficiently explored.<sup>102</sup> Important questions include how women are depicted in games, how women relate to gaming, the work of women in the industry, and what types of games and systems appeal to women. Although these are important issues that deserve full attention elsewhere, I will provide a cursory examination. I then contrast how critical legal scholars typically frame questions of identity with how Baudrillard rejects the importance of traditional markers of identity, and focuses instead on how all individuals lose their human agency and sense of individual identity through communicative technologies.

A dissection of the role of gender in video games would be seen by many critical legal scholars as an important contribution. Baudrillard, on the other hand, eschews the importance of race,<sup>103</sup> gender, class and other identity characteristics. He argues that these issues lose importance as communicative technologies attack a more fundamental aspect of human identity — human agency. Before addressing his claims, let us first briefly unpack the relationship between gender and gaming.

The vast majority of professional gamers, as well as the fans who follow their pursuits, are men. NPD Group, a market research firm based in New York, recently concluded that more than 80 per cent of video-game players are male.<sup>104</sup> The gender disparity is also recognized in statistics that suggest that only 10 per cent of those employed in the gaming industry are women, and that most of them work in customer service, marketing, and quality assurance, not as game designers, producers, or programmers.<sup>105</sup> Video games consequentially do not, for the most part, reflect the experience and interests of women. Women generally do not relate to video games to the same degree as men, since neither the content nor the form of video games relate to their experience.<sup>106</sup> Women in positions of power within the gaming industry are often struck with how the "testosterone-fueled attitude among upper management" percolates throughout these corporations and into their products, which consequently do not pique the interest of many women. Since the female demographic remains untapped, gaming corporations have recently found it increasingly important to cater to this unserved market.

Instead of more radically exploring the role of video games and gaming systems themselves, game developers have simply approached this issue as a question of how best to tailor a product to the needs of a demographic.<sup>107</sup>

Although there have been some prominent roles for women as protagonists in video games, gender roles remain traditional, verging on comical. Lara Croft, for example, is the female protagonist of *Tomb Raider*, a popular game that inspired a film franchise.<sup>108</sup> She is sexualized and voluptuous, wearing tight clothing to accent the impossible shape of her body, yet able to battle her opponents with considerable strength and dexterity. In November 2004, Thomas Ostermeier directed a pop version of Henrik Ibsen's *A Doll's House* picking up on the meta-themes from the video game and film. Instead of dressing Nora in traditional clothing for the third act's denouement, he dresses her up as Lara Croft to demonstrate that "female pop stars in vehicles like *Tomb Raider*... wield fictional power that women don't truly have".<sup>109</sup> His statement underscores that when women are represented in video games they are characterized as a male fantasy. Using one medium to critique the tropes and stock characters from other media, the director notes that

Men think it's sexy to see strong women. But in reality many of them don't believe in equality. Nora is initially fulfilling her husband's male fantasy when she dresses up like Lara Croft. When she really does use a weapon and does what Lara Croft does in the video games, it's no longer funny for the men.<sup>110</sup>

Some video game designers seem gradually to remediate the disparity between genders. *The Sims*, for example, is an interactive video game with hundreds of thousands of participants, a majority of whom are women. This game is grounded not in the logic of conflict, but in carrying out routine tasks and relationships in a simulated world. Again, the preoccupation with designers is to sculpt the content to appeal to diverse audiences. They do not seem interested in larger questions about whether there are structural imperatives that demand that video games exclude particular audiences while privileging others, or if games elevate some types of interaction and behaviour to the detriment of others.

### **Baudrillardian analysis – reduction of human agency**

With these issues seemingly percolating, why then does Baudrillard's analysis circumscribe identity characteristics such as gender? The simple answer is that he focuses on a more fundamental characteristic of identity: human agency. According to Baudrillard, the final consequence of powerful new communicative media, such as video game systems, is the reduction of human agency. He had several different instantiations of this idea through his career. His early writings were based on both Marxism and semiotics. Human agency was cast aside, while individuals, understood as consumers and not citizens, were given agency to imbue the system of objects with meaning. He later moved towards a theory based on what he called "radical semiurgy". As communicative technology more fully dominates the individual, individ-

uals lose their ability to express themselves. The medium places shackles on individuals and prevents them from exercising their human agency. Individuals thereby become increasingly subjugated by communicative technology.

Individuals located in Baudrillard's hyperreality are constantly awash in communicative technology and lose their interest and ability to express themselves, speak, communicate, and interact meaningfully with others. Their voices are silenced, they lose their ability to act and function with others, and their human agency vanishes. Video gaming will continue to accentuate this process, especially since gamers devote so many hours and so much concentration to the medium. Enthusiastic gamers enter virtual worlds in trancelike states, flooded in communication. To understand the representations that the system puts on the screen, gamers must focus and block out their participation with the real world. When this occurs over significant periods of time to significant numbers of people, it is understandable that Baudrillard would advance this hypothesis.

If Baudrillard is correct, and there is evidence to suggest he may be, this process will have potentially profound consequences for society. The legal consequences of his claim are stark. If law is designed to help facilitate human agency and the realization of human dreams, how is it supposed to respond to a machine that disenfranchises people? Instead of people creating a dialogue together of how to best achieve their aspirations through legal frameworks and instruments, video games will further separate them into atomistic boxes, with each person increasingly independent and isolated. Should the state care that its citizens are losing their human agency? What consequences does this have on democracy and the legal system? How will the law respond to coordinate the behaviour of members of society if everyone is separate and no one has agency? Scholars and governments could commission significant empirical research to determine whether Baudrillard's claims are true in the context of gaming.

I am uneasy with Baudrillard's claim that the proliferation of technological communications leads to a negation of human agency. McLuhan, in contrast, is more optimistic than Baudrillard about the consequences of communicative technologies. He believes that media affect the world both positively and negatively, but always in a natural way.<sup>111</sup> Regardless of whether one subscribes to all the consequences that Baudrillard envisions, we must be aware that there are issues affecting video games beyond content. The most important conclusion of this article is that we must respect that video games have the potential to shape society in very profound ways, regardless of content.

It is interesting to note that Baudrillard nostalgically longs for a world where face-to-face communications are the norm. He thus reifies and privileges what he considers personal types of communication, while focusing on the negative effects of technological communication. Baudrillard thus preferred direct communication

between two humans over mediated communication, forgetting that all communication is necessarily mediated — through language, signs and codes. This may suggest that his claim about how communicative media destroy human agency is overstated.

A final, yet important, criticism of Baudrillard's theory centres on his intensely pessimistic vision of the consequences of hyperreality on human agency. McLuhan and Baudrillard offer divergent visions about the consequences of new media. In the words of one scholar, McLuhan argues that communications technology will help create a "global community and even a new universal (media) consciousness and experience through the dissemination of a global media system".<sup>112</sup> McLuhan's position would see new technologies as more natural elements in a process of historical transformation.<sup>113</sup> On the other hand, Baudrillard argues that technological media, such as television and video games, isolate individuals and remove their agency, trapping them in "a universe of simulacra where it is impossible to distinguish between the spectacle and the real, and where individuals come to prefer spectacle over 'reality'."<sup>114</sup> Media thus has a chilling effect on human relationships, interactions and aspirations. The subject itself, for Baudrillard, becomes transformed into an object — part of a nexus of information and communication. Where McLuhan believes media could be an extension of self, Baudrillard argues that humans internalize media and thus become mere conduits of technology. Although his grim forecast is not the only possible consequence, it is a forceful vision that we should at least consider.

## 4 Conclusion

Only by treating games as legitimate cultural artifacts can we appreciate how they will continue to powerfully and persuasively mould cultural norms in the

future. Games have become more than simply a source of entertainment for gamers — they "are also a gateway to a complex social network that takes on a life of its own".<sup>115</sup> Some have gone so far as to argue that video games are a sociological phenomenon, an art form, and not simply disposable entertainment.<sup>116</sup>

Legal scholars should reconsider how to conceptualize the regulation of video games. As Baudrillard and McLuhan say, the medium is the message. We should therefore be wary of focusing legal energy exclusively on restricting content. The content of games is not what will most profoundly shape the world and individual interactions. It is the machine itself, the technology, which will create the most profound effects. Since instrumental regulation is what legislatures and courts do best, it is not surprising that the legal energy of these institutions has focused on the instrumentation of law to regulate content. However, it is surprising that the majority of legal scholarship on video games has also centred on free speech and content issues. I hope this article helps remedy the dearth of discussion in the legal community on the broader effects of video games.

Legal scholars should engage with video games on a more profound level than simply reiterating the platitude that "certain content is good for certain people, while other content is bad for certain people". I focused on Baudrillard because his theory is disconcerting and jarring to many people, and often elicits strong reactions. His pessimistic reflections about technology (and its consequences on society) challenge us to consider how profoundly new communicative technologies, such as video games, shape human interaction regardless of content. I will end with a most un-Baudrillardian aspiration: that this article helps initiate a dialogue in the legal community about the ascendancy of video gaming and implications beyond its content.

## Notes:

<sup>1</sup> Larry, the game's protagonist, was let loose in a world with wanton sexual norms. Although the game's content was considered salacious at the time, it would be considered tame compared with what currently exists.

<sup>2</sup> See, e.g., Alice LaPlante & Rich Seidner, *Playing for Profit: How Digital Entertainment is Making Big Business Out of Child's Play* (New York: John Wiley, 1999).

<sup>3</sup> See e.g. J.C. Herz, *Joystick Nation: How Videogames Ate Our Quarters, Won Our Hearts, and Rewired Our Minds* (New York: Little, Brown, 1997).

<sup>4</sup> I will explore the meaning of this word later in this article, particularly in section 3.2.

<sup>5</sup> Some interest groups that have supported legislative restrictions on content include: Traditional Values Coalition; Center for Successful Parenting; The Lion and Lamb Project; Mothers Against Violence in America; American Academy of Child & Adolescent Psychiatry; American Academy of Pediatrics; National Association of School Psychologists.

<sup>6</sup> See e.g. Editorial, "Media-mad children" *The Globe and Mail* (11 March 2005) A14. (More than two thirds of American children between the ages of 8 and 18 have televisions in their bedroom. It is not difficult to imagine how this may affect cognitive development or creativity.) See also State of Play, "State of Play III: Social Revolutions", online: "State of Play III: Social

Revolutions" <<http://www.nyls.edu/pages/2396.asp>> (the annual State of Play conference explores the intersection of gaming and law and is held annually by New York Law School and Yale Law School).

<sup>7</sup> See e.g. Clay Calvert & Robert D. Richards, "The 2003 Legislative Assault on Violent Video Games: Judicial Realities and Regulatory Rhetoric" (2004) 11 *Vill. Sports & Ent. L.J.* 203; Anna Everett, "P.C. Youth Violence: 'What's the Internet or Video Gaming got to do with it?'" (2000) 77 *Den. U. L. Rev.* 689; Patrick M. Garry, "Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games" (2004) 57 *S.M.U. L. Rev.* 139.

<sup>8</sup> See Gary Genosko, *McLuhan and Baudrillard: The Masters of Implosion* (London: Routledge, 1999).

<sup>9</sup> Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: McGraw-Hill, 1964) at 7 ("In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operational and practical fact, the medium is the message. This is merely to say that the personal and social consequences of any medium — that is, as any extension of ourselves — result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology" at 7.) [McLuhan, *Understanding Media*].

- <sup>10</sup> See Jean Baudrillard, "Symbolic Exchange and Death" in Mark Poster, ed., *Jean Baudrillard: Selected Writings* (Stanford: Stanford University Press, 1988) 119 [Baudrillard, "Symbolic Exchange"].
- <sup>11</sup> More recently, Paul Virilio picks up on Baudrillard's lamentable vision of human agency. See Paul Virilio, *Open Sky*, trans. by Julie Rose (New York: Verso, 1997).
- <sup>12</sup> See McLuhan, *Understanding Media*, *supra* note 9.
- <sup>13</sup> Jean Baudrillard, "The System of Objects", in Mark Poster, ed., *Jean Baudrillard: Selected Writings* (Stanford: Stanford University Press, 1988) 10 [Baudrillard, "The System of Objects"].
- <sup>14</sup> *Ibid.* at 22.
- <sup>15</sup> Bernardo Attias, "Welcome to the World of Jean Baudrillard", online: "Welcome to the World of Jean Baudrillard" <<http://www.csun.edu/~hfpc002/naud>>.
- <sup>16</sup> Baudrillard, "The System of Objects", *supra* note 13 at 12-13.
- <sup>17</sup> *Ibid.* at 22.
- <sup>18</sup> Jean Baudrillard, "Consumer Society" in Mark Poster, ed., *Jean Baudrillard: Selected Writings* (Stanford: Stanford University Press, 1988) 29 at 46 [Baudrillard, "Consumer Society"].
- <sup>19</sup> *Ibid.* at 50.
- <sup>20</sup> Attias, *supra* note 15.
- <sup>21</sup> Jean Baudrillard, *For A Critique of the Political Economy of the Sign*, trans. by Charles Levin (St. Louis: Telos, 1981) at 75 [Baudrillard, *Political Economy of the Sign*].
- <sup>22</sup> *Ibid.* at 144.
- <sup>23</sup> *Ibid.* at 169.
- <sup>24</sup> *Ibid.* at 170.
- <sup>25</sup> *Ibid.* at 172.
- <sup>26</sup> *Ibid.* at 184.
- <sup>27</sup> Baudrillard, "Symbolic Exchange", *supra* note 10.
- <sup>28</sup> Baudrillard, *Political Economy of the Sign*, *supra* note 21 at 164.
- <sup>29</sup> Douglas Kellner, "Baudrillard: A New McLuhan?", online: "Baudrillard: A New McLuhan?" <<http://www.gseis.ucla.edu/faculty/kellner/Illumina%20Folder/kell26.htm>> [Kellner, "A New McLuhan?"].
- <sup>30</sup> Baudrillard, "Symbolic Exchange", *supra* note 10 at 120.
- <sup>31</sup> *Ibid.* at 130.
- <sup>32</sup> *Ibid.* at 138.
- <sup>33</sup> *Ibid.* at 145.
- <sup>34</sup> *Ibid.*
- <sup>35</sup> Jean Baudrillard, *America*, trans. by Chris Turner (New York: Verso, 1988) at 49-50.
- <sup>36</sup> Laura Rich, "The Teeming Crowd in Video Games" *The New York Times Magazine* (5 December 2004) 7.
- <sup>37</sup> Katie Hafner, "Game Ratings: U Is for Unheeded" *The New York Times* (16 December 2004) G1 [Hafner, "Game Ratings"].
- <sup>38</sup> See e.g. Leon Hunt, "I Know Kung Fu! The Martial Arts in the Age of Digital Reproduction" in Geoff King & Tanya Krzywinska, eds., *ScreenPlay: Cinema/Videogames/Interfaces* (New York: Wallflower, 2002) 194.
- <sup>39</sup> Michael Sokolove, "Clang!" *The New York Times Magazine* (13 February 2005) 42.
- <sup>40</sup> There are studies that suggest that there is a correlation between gaming and an increase in aggressive behaviour. See e.g. Craig A. Anderson & Karen E. Dill, "Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life" (2000) 78 *Jour. of Personality & Soc. Psych.* 772 (study concludes that the "results from both studies are consistent with the General Affective Aggression Model, which predicts that exposure to violent video games will increase aggressive behavior in both the short term (e.g., laboratory aggression) and the long term (e.g., delinquency)" at 772).
- <sup>41</sup> Grassroots initiatives have also come from within the industry, as certain game developers have banded together to oppose violence and sexuality in video games. See e.g. IGDA, "IGDA's Sex SIG", online: "IGDA's Sex SIG" <<http://www.igda.org/sex/>>.
- <sup>42</sup> Entertainment Software Rating Board (ESRB), "About ESRB", online: "About ESRB" <<http://www.esrb.org/about.asp>>.
- <sup>43</sup> *Ibid.* According to ESRB, the following was the breakdown of games ratings in 2004: 54 per cent of all games rated by the ESRB received an E (Everyone) rating; 33 per cent of all games rated by the ESRB received a T (Teen) rating; 12 per cent of all games rated by the ESRB received an M (Mature) rating; <1 per cent of all games rated by the ESRB received an EC (Early Childhood) rating; <1 per cent of all games rated by the ESRB received an AO (Adults Only) rating.
- <sup>44</sup> Hafner, "Game Ratings", *supra* note 37.
- <sup>45</sup> *Ibid.*
- <sup>46</sup> Garry, *supra* note 7 at 139.
- <sup>47</sup> H.R. 669, 108th Cong. (2003) (legislation proposing a prohibition on sale or rental of violent and sexually explicit video games to minors) [*Protect Children Act*].
- <sup>48</sup> Press Release, "Cop Killing, Prostitution, Mass Murder, Sodomy — Is it All Just a Game?" (13 February 2003), online: <<http://www.house.gov/baca/108th/pr030213a.htm>> (the press release announces a reintroduction of the bill, which died in committee under the previous Congress).
- <sup>49</sup> See *Protect Children Act*, *supra* note 47.
- <sup>50</sup> S. 2126, 109th Cong. (2005) (the short title of the bill is the *Family Entertainment Protection Act*).
- <sup>51</sup> S. 349, Gen. Assem., Reg. Sess. 6321(a) (Pa. 2003) (outlining offences for selling interactive violent video games to minors).
- <sup>52</sup> H.R. 221, 142d Gen. Assem., Reg. Sess. (Del. 2003).
- <sup>53</sup> H.R. 4267, 92d Leg., Reg. Sess. (Mich. 2003).
- <sup>54</sup> S. 35, 83d Leg., Reg. Sess. (Minn. 2003).
- <sup>55</sup> S. 2194, 210th Leg., Reg. Sess. (N.J. 2003).
- <sup>56</sup> A. 3999, 2003 Reg. Sess. (N.Y. 2003).
- <sup>57</sup> H.B. 4023, 94th Gen. Assem. (Ill. 2005 & 2006). See also Safe Games Illinois, "Governor Blagojevich signs law making Illinois the only state in the nation to protect children from violent and sexually explicit video games", online: "Governor Blagojevich signs law" <<http://www.safegamesillinois.org>>.
- <sup>58</sup> Naomi Mezey, "Approaches to the Cultural Study of Law: Law as Culture" (2001) 13 *Yale J.L. & Human.* 35 at 37.
- <sup>59</sup> Calvert & Richards, *supra* note 7 at 204. See e.g. *James v. Meow Media, Inc.*, 300 F.3d 683, 684 (6th Cir. 2002), cert. denied, 537 U.S. 1159 (2003) (holding video games do not constitute "products" for purposes of imposing strict liability); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003) (holding county ordinance violated First Amendment right to free speech when applying strict scrutiny analysis); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1268 (D. Colo. 2002) (dismissing negligence and products liability claims against manufacturer of video game *Doom* filed by widow and stepchildren of teacher killed at Columbine High School in April 1999).
- <sup>60</sup> Kellner, "A New McLuhan?", *supra* note 29.
- <sup>61</sup> *Ibid.*
- <sup>62</sup> Robert Levine, "Microsoft Seeks Video Game Winner With Halo 2" *The New York Times* (8 November 2004) C1.
- <sup>63</sup> Michel Marriott, "Hollywood Would Kill for Those Numbers" *The New York Times* (14 November 2004).
- <sup>64</sup> Hafner, "Game Ratings", *supra* note 37.
- <sup>65</sup> Marriott, *supra* note 63.
- <sup>66</sup> Rich, *supra* note 36.
- <sup>67</sup> Matt Richtel, "Game Sales Thrive Thanks To the Big Kids (In Their 20's)" *The New York Times* (27 December 2004) C1.
- <sup>68</sup> Of course, the most important consequence, as far as this article is concerned, is that the economic ascendancy of gaming has been accompanied by the emergence of its cultural import. See Geoff King, "Die Hard/Try Harder: Narrative, Spectacle and Beyond, from Hollywood to Videogame" in Geoff King & Tanya Krzywinska, eds., *ScreenPlay: Cinema/Videogames/Interfaces* (New York: Wallflower, 2002) 50 (an examination of the relationship between Hollywood and gaming).
- <sup>69</sup> Laura Holson, "Blockbuster with a Joystick; Movie Studios Get Serious About Making Video Games" *The New York Times* (7 February 2005) C1.
- <sup>70</sup> Cate Doty, "More Armchair Quarterbacks" *The New York Times* (24 January 2005) C11.
- <sup>71</sup> World Cyber Games, online: <<http://www.worldcybergames.com>>.
- <sup>72</sup> Eric Taub, "Taking Their Game to the Next Level" *The New York Times* (7 October 2004) G1.

- <sup>73</sup> Edward Castranova, *Synthetic Worlds: The Business and Culture of Online Games* (Chicago: University of Chicago Press, 2005).
- <sup>74</sup> Mizuko Ito, "Cultural Production in a Digital Age: Mobilizing Fun in the Production and Consumption of Children's Software" (2005) 597 *Annals of Am. Acad. of Pol. & Soc. Sc.* 82 at 83.
- <sup>75</sup> Lisa Belkin, "Life's Work: Learning Early That Success Is a Game" *The New York Times* (19 December 2004) 10-1.
- <sup>76</sup> John C. Beck & Mitchell Wade, *Got Game: How the Gamer Generation Is Reshaping Business Forever* (Boston: Harvard Business School Press, 2004).
- <sup>77</sup> See Yasmin B. Kafai, *Minds in Play: Computer Game Design as a Context for Children's Learning* (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1995) (a study that discusses children as producers of games and not simply consumers).
- <sup>78</sup> Clive Thompson, "The Play's the Thing" *The New York Times Magazine* (28 November 2004) 49. See also Robert H. Scales, "Kosovo, 2020: A Wargame" in Robert H. Scales, *Yellow Smoke: The Future of Land Warfare for America's Military* (Lanham, N.J.: Rowman & Littlefield, 2003) 121; Ed Fitzsimmons, "The Defense Modeling and Simulation Office: How It Started" *Simulation Technology Magazine*, online: <[http://www.sisostds.org/webletter/Preview\\_Article.cfm?article\\_id=245&article\\_Status=Approved](http://www.sisostds.org/webletter/Preview_Article.cfm?article_id=245&article_Status=Approved)>.
- <sup>79</sup> Michel Marriott, "We Have to Operate, but Let's Play First" *The New York Times* (24 February 2005) G4.
- <sup>80</sup> Ito, *supra* note 74 at 83.
- <sup>81</sup> *Ibid.*
- <sup>82</sup> *Ibid.* at 101.
- <sup>83</sup> See Josephine Calao & Feng S. Ding, "The Effects of Playing Educational Video Games on Kindergarten Achievement" (2001) 31 *Child Study Journ.* 95 (the study documents a positive correlation between learning and playing video games).
- <sup>84</sup> Jeffrey Selingo, "Entertaining Miss Daisy" *The New York Times* (22 April 2004) G1.
- <sup>85</sup> Jonathan Dee, "Playing Mogul" *The New York Times Magazine* (21 December 2003) 36. See Thor Alexander, ed., *Massively Multiplayer Game Development* (Hingham, Mass.: Charles River Media, 2003); Robert Marks & Tim Green, *Everquest Companion: The Inside Story* (Berkeley, Cal.: McGraw-Hill, 2003); Castranova, *supra* note 73.
- <sup>86</sup> Charles Herold, "Cutting the (Headset) Cord On the Xbox Controller" *The New York Times* (14 October 2004) G3.
- <sup>87</sup> See Jo Bryce & Jason Rutter, "Spectacle of the Deathmatch: Character and Narrative in First-Person Shooters" in Geoff King & Tanya Krzywinska, eds., *ScreenPlay: Cinema/Videogames/Interfaces* (New York: Wallflower, 2002) 66; Sue Morris, "First-Person Shooters — A Game Apparatus" in Geoff King & Tanya Krzywinska, eds., *ScreenPlay: Cinema/Videogames/Interfaces* (New York: Wallflower, 2002) 81.
- <sup>88</sup> Sokolove, *supra* note 39.
- <sup>89</sup> Torben Grodal, "Video Games and the Pleasure of Control" in Dolf Zillmann & Peter Vorderer, eds., *Media Entertainment: The Psychology of Its Appeal* (Mahwah, N.J.: Lawrence Erlbaum, 2000) 197 (for a study that documents how prolonged play results in frustration and over-arousal in children).
- <sup>90</sup> Belkin, *supra* note 75.
- <sup>91</sup> See Geoff King & Tanya Krzywinska, eds., *Screenplay: Cinema/Videogames/Interfaces* (New York: Wallflower, 2002); Douglas, J. Yellowlees, *The End of Books — Or Books without End: Reading Interactive Narratives* (Ann Arbor: University of Michigan Press, 2000) (regarding hypertext and interactive fiction); Wee Liang Tong & Marcus Cheng Chye Tan, "Vision and Virtuality: The Construction of Narrative Space in Film and Computer Games" in Geoff King & Tanya Krzywinska, eds., *ScreenPlay: Cinema/Videogames/Interfaces* (New York: Wallflower, 2002) 98.
- <sup>92</sup> See Gary Genosko, *Baudrillard and Signs: Signification Ablaze* (New York: Routledge, 1994); Rex Butler, *Jean Baudrillard: The Defence of the Real* (Thousand Oaks, Calif.: Sage, 1999); Mike Gane, *Baudrillard: critical and fatal theory* (New York: Routledge, 1991) (for other works that explore Baudrillard's approach to simulacra and semiurgy).
- <sup>93</sup> Douglas Kellner, "Jean Baudrillard", online: <<http://www.geis.ucla.edu/faculty/kellner/essays/ baudrillard.pdf>>.
- <sup>94</sup> Dan Leroy, "Combat Rock By Way Of R&B" *The New York Times* (28 November 2004) 14CN.
- <sup>95</sup> In other cases, video game composers can earn \$150,000 per game. See "From Beeps to Billboard" *Top Tech News* (19 May 2005), online: <<http://www.toptechnews.com>>. See also David Bessell, "What's That Funny Noise? An Examination of the Role of Music in *Cool Boarders 2*, *Alien Trilogy*, and *Medieval 2*" in Geoff King & Tanya Krzywinska, eds., *ScreenPlay: Cinema/Videogames/Interfaces* (New York: Wallflower, 2002) 136.
- <sup>96</sup> "See You Tube—Broadcast Yourself", online: <<http://www.youtube.com>> (where users post their own short films, many of which are inspired by or created with video games). See also Sacha A. Howells, "Watching a Game, Playing a Movie: When Media Collide" in Geoff King & Tanya Krzywinska, eds., *ScreenPlay: Cinema/Videogames/Interfaces* (New York: Wallflower, 2002) 110.
- <sup>97</sup> Dee, *supra* note 85.
- <sup>98</sup> *Ibid.*
- <sup>99</sup> *Ibid.* See also Beck & Wade, *supra* note 76.
- <sup>100</sup> *Ibid.*
- <sup>101</sup> See e.g. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996).
- <sup>102</sup> There are some notable exceptions to this statement. See e.g. Jo Bryce & Jason Rutter, "Gender Dynamics and the Social and Spatial Organization of Computer Gaming" (2003) 22 *Leisure Studies* 1; Jo Bryce & Jason Rutter, "The Gendering of Computer Gaming: Experience and Space" in S. Fleming & I. Jones, eds., *Leisure Cultures: Investigations in Sport, Media and Technology* (Eastbourne, Eng.: Leisure Studies Association, 2003) 3; Mary Beth Oliver, "The Respondent Gender Gap" in Dolf Zillmann & Peter Vorderer, eds., *Media Entertainment: The Psychology of Its Appeal* (Mahwah, N.J.: Lawrence Erlbaum, 2000) 215 (a study of gender differences in response to different types of media entertainment).
- <sup>103</sup> See Jeffrey Ow, "The Revenge of the Yellowfaced Cyborg Terminator: The Rape of Digital Geishas and the Colonization of Cyber-Coolies in 3D Realms' Shadow Warrior" in Rachel C. Lee & Sau-ling Cynthia Wong, eds., *Asian American.Net: Ethnicity, Nationalism, and Cyberspace* (New York: Routledge, 2003) 249 (a useful work about race and gaming).
- <sup>104</sup> Katie Hafner, "What Do Women Game Designers Want?" *The New York Times* (14 October 2004) G1 [Hafner, "Women"].
- <sup>105</sup> *Ibid.*
- <sup>106</sup> See Tracy L. Dietz, "An Examination of Violence and Gender Role Portrayals in Video Games: Implications for Gender Socialization and Aggressive Behavior" (1998) 38 *Sex Roles* 425 ("video games that are being played by today's youth present an overwhelmingly traditional and negative portrayal of women and that the development of gender identities and expectations among youngsters may be affected by these portrayals" at 425).
- <sup>107</sup> Hafner, "Women", *supra* note 104 (the article discusses a \$200,000 grant in the United States from the National Science Foundation for women to design video games for women).
- <sup>108</sup> See Diane Carr, "Playing with Lara" in Geoff King & Tanya Krzywinska, eds., *ScreenPlay: Cinema/Videogames/Interfaces* (New York: Wallflower, 2002) 171.
- <sup>109</sup> Jonathan Kalb, "Nora the Killer Doll" *The New York Times Magazine* (7 November 2004) 8.
- <sup>110</sup> *Ibid.*
- <sup>111</sup> McLuhan, *Understanding Media*, *supra* note 9 at 7.
- <sup>112</sup> Kellner, "A New McLuhan?", *supra* note 29.
- <sup>113</sup> I should note that McLuhan did not believe the global village would be a communitarian utopia.
- <sup>114</sup> Kellner, "A New McLuhan?", *supra* note 29.
- <sup>115</sup> Amy Harmon, "A Real-Life Debate On Free Expression In a Cyberspace City" *The New York Times* (15 January 2004) A1.
- <sup>116</sup> Dee, *supra* note 85.