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WHAT'S IN A GAME? REGULATION OF VIOLENT VIDEO GAMES AND THE FIRST AMENDMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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WHAT'S IN A GAME? REGULATION OF VIOLENT VIDEO GAMES AND THE FIRST AMENDMENT

WEDNESDAY, MARCH 29, 2006

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS OF THE COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:10 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Sam Brownback, Chairman of the Subcommittee, presiding.

Present: Senators Brownback, Coburn, and Feingold.

OPENING STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Chairman BROWNBACK. The hearing will come to order. Thank you all for joining us here today. I am sorry to be late. We had a long caucus discussion on immigration, one of the key hot topics of the day.

I am delighted that the witnesses are here and the people present, my colleague, Senator Feingold, who is also interested in this issue, and his colleague, Senator Kohl, has been one of the leaders on this topic for many years. I follow his lead on it.

We are here today to discuss the recent developments in State efforts to restrict the sale of violent video games to minors. We have a video that we are going to show briefly here about some of the recent games out, some of the cop-killer games that I want people to get a good view of what we are talking about.

Since 2001, four States and two cities have passed laws restricting minors' access to violent video games. The video game industry successfully challenged each of these laws in Federal court. Four district courts and the Seventh and Eighth Circuit Courts have granted injunctions barring enforcement of these laws. Despite this, 15 other States have introduced similar legislation. I believe we have a chart that shows the States that are proceeding down this line.

The courts' decisions in these cases were primarily based on the failure of the States to show a compelling State interest necessary to justify the regulations. That is what we want to talk about today. Several judges noted past studies which link media violence to aggressive behavior in children. They were not convinced, however, that such evidence justified restrictions on minors' access to violent video games.

Because video games are a relatively new medium, studies exploring their effects are still developing. Today we have several witnesses who will discuss recent studies which bolster the call for increased restrictions.

The First Amendment guarantees the right to free speech. What too many in the media industry fail to realize is that this right is not without limits, particularly when it comes to minors. The Supreme Court in *Sable Communications* v. *FCC* held that, "The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."

In 2002, the Sixth Circuit held that, "The protections of the First Amendment have always adapted to the audience intended for the speech. Specifically, we have recognized certain speech, while fully protected when directed to adults, may be restricted when directed toward minors." State laws restricting minors' access to violent games do not impair adult access. Adults can continue to buy these games for themselves and can provide them to children. The laws are only aimed at preventing children from entering stores and purchasing the games themselves. However, requiring adults to purchase these games will cause parents to think twice, we hope, about buying them for their children.

Thanks to new technology, the violence in today's video games is becoming more graphic, realistic, and barbaric. Today's video games allow players to decapitate and electrocute their opponents, beat their victims to death with golf clubs, pin women against walls with pitchforks, and have sex with prostitutes before beating them to death.

In *Ginsburg* v. *New York*, the Supreme Court upheld a State law prohibiting the sale of obscene material to minors. The Court found that two compelling State interests were at work:

First, "The legislation could properly conclude that parents and others—teachers, for example—who have the primary responsibility for children's well-being, are entitled to the support of laws designed to aid discharge of that responsibility."

Second, the State "has an independent interest in the well-being of its youth."

These are important interests that may justify regulation on the sale of violent video games as well. The State laws passed to date target only those games which include extreme violence and gore or target police officers. It is with regard to these games that the need for parental involvement is so important.

A number of courts have held that States cannot show a compelling State interest because scientific studies showing a link between the games and real-life violence are lacking. However, many psychologists agree that violent games are associated with violence in children. The American Psychological Association issued a resolution in November calling for a reduction in violence in video games and interactive media. The APA resolution was a result of research by its Media Psychology Division, which showed that violent video games increase aggressive thoughts and behavior among youth.

Recently, a new group has voiced concern over violent video games, and that is police officers. A new video game—"25 to Life" is the title of the game, shown in a clip that we will show—was released in January of this year. In "25 to Life," players choose the role of either a police officer or gang member. If the player chooses to be a gang member, the goal is to avoid arrest. Players use guns, pipe bombs, tasers, Molotov cocktails, and broken bottles to torture and kill. This is not the first cop-killing game to gain national attention.

One of our witnesses today, Steve Strickland, will share the story of his brother, who, along with two other police officers, was shot and killed by Alabama teen Devin Moore, an avid player of "Grand Theft Auto." That game rewards players for avoiding law enforcement in a quest to steal cars and perpetrate crime. After his arrest, Moore stated, "Life is like a video game. Everybody's got to die sometime."

The National Law Enforcement Officers Memorial Fund has also voiced concern about a game that glorifies and rewards the murder of police officers. They have a petition—I have got it here to show you—signed by 265,000 voicing the concern of officers and their families across the country. A number of representatives of that organization are here today, and I appreciate your attendance.

At this point, with the indulgence of my colleague, I work to show a short clip of some of these video games that are new on the market, and particularly the cop-killing ones. I would advise those in the audience that these are graphic, they are violent. If you do not want to watch them, please do not. And I would not blame you a bit. I viewed them myself, and really, they turn your stomach. But I want to give you an idea. The videos you are about to see show clips of three games that are rated M for mature audience.

Would you please put those videos on? It is about a 4- or 5-minute clip showing several games.

[Video shown.]

Chairman BROWNBACK. Thank you for showing that. My apologies if it offends people. I think it is important, though, that we show those.

I hope that this hearing will allow us to discuss the current state of the law with regard to restrictions on the sale of these types of video games to children. I will introduce our witnesses in just a moment after I go to my colleague for an opening statement.

Senator Feingold?

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. Thank you for holding this hearing.

The issue of violence in the media, and violent video games in particular, has raised a lot of concerns for parents and lawmakers, and I hope this hearing will be a constructive forum for inquiry and debate in both the scientific and legal issues related to the regulation of violent video games.

Now, contrary to popular rumor, I am not a big video game guy, so this is really an opportunity for me to learn about something I

am not terribly familiar with. Politicians do not usually admit they do not know about something, but I really do not.

We have all heard about some of the extremely violent video games on the market today, and we have seen a powerful example of that today. And let me just say, Mr. Chairman, it enrages me that such a thing exists, that anyone would want to spend even 1 minute creating such a monstrous thing. I say that as an individual.

It is natural for parents to worry about whether playing those games could have detrimental effects on our young people, so I am interested to hear from the experts today about the work they have done in this area. While I realize that this hearing is not intended to address any particular Federal legislation, there are pending proposals in Congress on this topic.

As in so many areas, Congress must be careful to consider the constitutional questions related to any attempt to address violence in video games. Obviously, we are taking this up as a part of the Judiciary Committee. We must precisely identify the problems that we are attempting to solve, and we have to evaluate the First Amendment implications of any proposed solutions.

Federal courts, everyone should be aware, have consistently struck down on First Amendment grounds local and State efforts to regulate violent video games. It would be an enormous waste of time and resources to pass a clearly unconstitutional law, and at the end of the day, passing such a statute does not help anyone. Nonetheless, I am very interested in learning about this problem, and I welcome the witnesses, and I look forward to the testimony.

Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you, Senator Feingold.

I want to recognize again Senator Kohl's leadership on this effort for some time, your colleague from Wisconsin.

We will go to the witnesses. I do not know, Senator Coburn, if you have an opening statement. No opening statement?

Senator COBURN. No.

Chairman BROWNBACK. Let me introduce our first panel. We have two panels today.

First, Reverend Steve Strickland, whose brother, Arnold Strickland, was a 25-year veteran of the police force in Fayette County, Alabama. He was shot and killed, along with two other offices, in 2004 by Alabama teen Devin Moore, an avid video game player.

Second is Dr. Elizabeth Carll. She is Chair of the Interactive Media Committee, which is part of the Media Psychology Division of the American Psychological Association. She was actively involved in the APA resolution drafted last year calling for a reduction in violence in video games. Thank you very much for joining us, Dr. Carll.

The third witness is Dr. Dmitri Williams, an Assistant Professor of Speech Communication, University of Illinois at Urbana-Champaign. Dr. Williams recently led a study on the effects of violent games and aggression.

Dr. David Bickham is a research scientist at the Center on Media and Child Health at Harvard Medical School. Dr. Bickham has spent years studying the effects of all forms of media violence on children and published numerous articles on the subject.

I thank the panel for joining us here today. I am looking forward to your testimony.

As I mentioned at the outset, my intent here is to try to get and to build a factual basis of why there is a legitimate State interest in legislating on violence in video games and their targeting and marketing toward children. Any suggestions you have to us of Federal legislation would be good as well, but I am primarily trying to establish a factual record as to why there is a legitimate State interest in these, contrary really to how the Federal courts have ruled to date.

Reverend Strickland, I know this must be difficult for you to be here, but I am delighted that you are willing to join us. The microphone is yours. We will set the clock at 6 minutes. That is a guide for you. All of your written testimony will be submitted into the record, and I would personally prefer most if you would summarize so we can ask as many questions as possible.

Reverend Strickland?

STATEMENT OF REVEREND STEVE STRICKLAND, FAYETTE COUNTY, ALABAMA

Rev. STRICKLAND. Mr. Chairman and other distinguished members of this Committee, my name is Reverend Steve Strickland. I am one of three brothers of Arnold Strickland, who was a Fayette, Alabama, police officer, who was murdered by a teenager on June 7, 2003. I was asked to come and testify by Senator Brownback's office on how my brother's murder has affected me and our family, and the two other families who also lost their loved ones, and our entire community. Thank you for giving me this opportunity today.

The best way to start is to start on that Saturday morning, a morning that changed all of our families' lives. Arnold and I had plans of going fishing that day. I was looking forward to spending that time with him. We did not get to spend and share as much time together as we would have liked because of my work as a minister. There was always something going on to keep us apart but not on that day. I was already on the water at daylight and waiting for him to get off work and come join me. It was going to be a fun day for the both of us. It always was when we got together. It was about 6:30 when that beautiful Saturday morning turned into one of the darkest days of my life.

My nephew Shane, one of Arnold's three sons, called and asked if I had seen Dad, and I said no, that I was waiting on his phone call to tell him how to get where I was. He was supposed to get off at 5 a.m. and should be here any minute. Shane said something had happened in Fayette and when he found out he would call me back. It was not 15 minutes when my phone rang again, and he said with tears in his voice, "You need to come home quick."

I knew at that moment I would never see my brother alive again. Our fishing days together were over. I sat there and wept bitterly because I loved my brother deeply. As I got to the house, there were family members already there along with police officers. It was total shock and confusion as to what had happened and what was going on. Being a minister, I deal with death on a regular basis, but I had not experienced such trauma as I did that day. In the hours ahead, we learned that Arnold along with two other

men—one being James Crump, a fellow officer, and the other, Ace Mealer, who was the dispatcher that night—were also murdered. A young teenage boy named Devin Moore was responsible for the brutal execution of the three men that morning.

As days passed and then weeks, months, and now years, our family is still trying to put our lives back together. No Saturday will ever be the same for me. No holidays will we ever enjoy as much as when Arnold was there. But what hurts the most is to see his grandchildren and knowing how much he loved them. They will never get to see him again. They will only hear stories and see pictures of their granddad. And how do you explain to a child that just last week granddad was there and now he is gone? And then the parents get to try to explain, when asked, How did he die and why did he die?

The total impact on our families behind these senseless killings will never be over. This is the reason I accepted your invitation to come and speak today, so that maybe other families will not have to answer those hard questions or go through what our families are still going through to this day, trying to still sort it all out. That brings me to the point of why I am here.

Video games: What are they and how are they being used? The statement I made earlier about Arnold and the other two being executed was a very true statement. You see, they were not just shot. All three received a bullet to the head after they were on the floor. You have to ask the question: What would bring a young teenage boy like Devin to this point?

Devin made a statement in a local newspaper 1 day that made no sense to me whatsoever, until it got in the hands of one of our attorneys, Jack Thompson, who knows all about what that statement meant: "Life is like a video game, everyone has to die sometime." As a minister, I deal with a lot of different issues and try to stay up and become educated on them, but Jack opened up a whole other world to me that I did not even know existed. This is the violent video game world—a world that, as far as I am concerned, is straight from the pits of Hell.

As I gather more information on the games and the people who call themselves "gamers," I could see how someone like Devin, who at 1 minute did not put up any resistance when arrested for stealing a car or when being booked, to the next minute, getting my brother's gun from him in the police station, shooting him, and then killing two other men in a matter of less than 2 minutes. A game such as "Grand Theft Auto: Vice City" could and did teach him how to do this. As I watched this game being played on CBS' "60 Minutes," I could not believe my eyes of how close in comparison this game was to the actual slaughter of my brother, along with James and Ace.

I had to ask myself the question: Why would someone put such games on the market and into the hands of teenagers? In "Grand Theft Auto: Vice City," the people we put our faith and trust in to protect us from harm—the police officers—are the ones being targeted as the bad guys. Devin Moore practiced on this game hour after hour to kill our loved ones. It made him a more effective killer.

In this game, if you kill the police and other innocent people, you win points. You get extra points for shots to their heads. When a society gets to the point to where law enforcement are the bad guys and the thugs and the murderers are the good guys, our society will take a turn for the worse. Some have taken that turn. I do not believe most of us are ready for that. We have an opportunity to do something about this problem. Why don't we? I am a man of facts. I try to live my life by them. Jack Thompson and others have facts and experts to back up what these games are: they are cop-killing simulators, and they will bring more deaths in the future. Our loved ones in Fayette are not the only ones to die at the hands of teens who trained on this game to kill.

Let me remind you if I may: It could be one of your family members next. I ask that we put all the true facts on the table about how dangerous all of these murder simulation video games are.

The primary motivation for what these video game companies do in making and marketing violent video games to kids is this: money. Why would these companies want to change things? One day, we will all stand before the Almighty God and give an account for what we have done and what we have accomplished, both good and bad on this Earth.

I ask all of you Senators that we take a good, hard look at the impact of these games and what they have on our teenagers and hold everyone accountable for their part. These games in the wrong hands played long enough are detrimental to our families, to our friends, and to our entire society.

I thank you for allowing me to share our grief, as well as our hope for a safer America. Thank you.

[The prepared statement of Rev. Strickland appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Reverend Strickland. That was very powerful, and we are sorry about your brother and the other members, but I do appreciate very much your willingness to come here and to testify about it. I look forward to having some questions for you.

Dr. Carll, thank you very much for being here today.

STATEMENT OF ELIZABETH K. CARLL, CHAIR, INTERACTIVE MEDIA COMMITTEE, MEDIA PSYCHOLOGY DIVISION, AMERICAN PSYCHOLOGICAL ASSOCIATION, LONG ISLAND, NEW YORK

Ms. CARLL. Thank you, Mr. Chairman and distinguished members of the Committee, for initiating this important hearing on violence in video games. I am Dr. Elizabeth Carll, the Chair of the Interactive Media Committee of the Media Psychology Division of the American Psychological Association.

Chairman BROWNBACK. Pull it up a little bit. You are kind of hard to hear.

Ms. CARLL. The effects of media violence on children has been a career-long interest with the adoption of the APA Resolution on Violence in Video Games and Interactive Media being one of the initiatives when I served as president of the Media Division of APA. I am also a psychologist in private practice in Long Island, New York, and I have worked with children, teens, and families for

more than 25 years. The APA is pleased to participate in today's hearing and thanks Senator Brownback for his important work on issues surrounding media and children.

The Interactive Media Committee was formed to facilitate the implementation of the recommendations of the Resolution on Violence in Video Games and Interactive Media, which was adopted by APA in 2005, which I will be discussing. APA's Media Psychology Division spearheaded the adoption of the APA resolution with the recognition that there is often a disconnect between research, legislation, and implementation of useful recommendations at the community level.

It may be of interest for the Committee to be aware that, as a result of the APA resolution, a formal dialog with the Electronic Software Ratings Board has begun to discuss ways in which the current ratings system may be improved.

It is also important to emphasize that the electronic media plays an important role in the emotional development, social behavior, and intellectual functioning of children and youth. There are many video games that are very helpful for children to facilitate medical treatment, increase learning, and promote pro-social behavior. However, there are also video games that include aggression, violence, and sexualized violence that may have a negative impact on children. It is this group of video games that I will be discussing today.

Many of the issues that I will be discussing today were of concern when I first testified at the 1999 New York State Legislature's hearings on the effects of violence in interactive media on children and discussed the unique characteristics of video games. However, what has changed since that time has been the rapid growth in the body of research that continues to point to the detrimental effects of violence in video games and interactive media on children, as well as the increasing public concern regarding this issue.

So what are the unique characteristics of video games and interactive media versus TV and film?

More than four decades of research have revealed that TV violence has a strong influence on the aggressive behavior of children and youth. Exposure to violent media increases feelings of hostility, thoughts about aggression, suspicions about the motives of others, and demonstrates violence as a method to deal with conflict.

However, video games and interactive media have certain qualities that are distinct from passive media, such as TV and film. For example, video games require active participation enabling rehearsal and practice of violent acts; include frequent repetition of acts of violence as part of winning the game; reward game players for simulated acts of violence, often the winner of the game is the one who kills and destroys the most; and enables the identification of the participant with a violent character while playing video games. All of these qualities enhance learn.

Therefore, this practice, repetition, identification with a violent character, and being rewarded for numerous acts of violence may intensify learning of violence. With the development of more sophisticated interactive media, the implications for violent content are of further concern. This is due to the intensification of more realistic experiences, which may be even more conducive to increas-

ing aggressive behavior as compared to passively watching violence on TV and in films.

What are the effects of exposure of children to violence in video games?

A comprehensive analysis of violence in interactive video game research suggests exposure increases aggressive behavior, aggressive thoughts, angry feelings, physiological arousal, and decreases helpful behavior.

Studies further suggest that sexualized violence in the media has been linked to increases in violence toward women, the acceptance of rape myth, and anti-women attitudes.

Research also suggests that the most popular video games contain aggressive and violent themes and content. Girls and boys, men and women, and minorities are depicted in exaggerated stereotypical ways. Sexual aggression against women, including assault, rape, and murder, is depicted as humorous and glamorous and is rewarded.

What are some of the concerns regarding the current rating system for video games?

Efforts to improve the rating system for video games and interactive media would be a first step in providing additional helpful information as to the content of video games. Currently, the labels are very general, and more content specificity is needed for parents to make informed decisions about the video games their children play. For example, are there only a few depictions of violence, or is it a main theme? What types of violence are depicted—sports violence, war violence, or random thrill kill violence? Is violence linked with negative social consequences or rewarded? The scientific community should be involved in the development of a more accurate rating system to better inform parents and consumers.

Recommendations from the APA Resolution on Violence in Video Games and Interactive Media:

Advocate for the funding to support research on the effects of violence in video games and media on children, adolescents, and young adults. APA supports the Children and Media Research Advancement Act to amend the Public Health Service Act to authorize funding to establish a program on children and the media within the Centers for Disease Control and Prevention to study the role and impact of electronic media in the development of children.

Recommendation: Teach media literacy to children so they will also have the ability to critically evaluate interactive media. This needs to involve educating parents, teachers, and caregivers.

Encourage the entertainment industry to link violent behaviors with negative social consequences. Showing violence without realistic consequences teachers children that violence is an effective means of resolving conflict; whereas, seeing pain and suffering as a consequence can inhibit aggressive behavior.

Develop and disseminate a content-based rating system that more accurately reflects the content of video games and interactive media and encourages the distribution and use of the rating system by the industry, parents, caregivers, and educational organizations.

The complete text of the APA Resolution on Violence in Video Games and Interactive Media is available online.

I would like to thank the Committee for their interest in this important issue and Senator Brownback for his continued leadership in this area.

[The prepared statement of Ms. Carll appears as a submission for the record.]

Senator BROWNBACK. Thank you, Dr. Carll, and APA is going to be critical in its findings if Federal court should rule the other way, that there isn't a legitimate State interest. Your organization is going to be one of the critical ones to say there is a legitimate State interest, and I appreciate the resolution. I hope you can keep moving forward with it.

Dr. Williams?

STATEMENT OF DMITRI WILLIAMS, ASSISTANT PROFESSOR OF SPEECH COMMUNICATION, UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, URBANA, ILLINOIS

Mr. WILLIAMS. Thank you, Mr. Chairman, Senator Feingold, for the opportunity to testify here today.

I am here today in my capacity as a media researcher and social psychologist to talk about the science of media effects. Like my colleagues here, I have read the research, and like them, I strongly support media literacy for both adolescents and parents. Like them, I have come to the conclusion that televised violence likely does lead to increases in aggression among some adolescents, most often the ones in at-risk categories. I have no issue with that body of research.

The question is whether the same thing holds true with the work on video games, violent and otherwise. My message to you here today is that we do not know yet. People use words like "links" and "relationships," which imply cause and effect, but that is not well established yet. Based on what has been published so far, I do not share my colleagues' certainty at all, and I would like to explain specifically why.

The first reason is that we have been studying fish out of water. Gaming is a highly social activity, and we know from media research dating back to at least the 1930's that social context can change media effects drastically. Some games have vibrant social communities, and some have none. A massively multi-player game like "World of Warcraft" is as unlike a game like "Doom" as "Sesame Street" is from "The Sopranos." The games are often apples and oranges, and many researchers do not know one from another. Plainly put, games are not television.

I talk to gamers every day. They say things like, "GLA for the win" and "Minus 50 DKP" and other arcane slogans. Unless you enter their very social world, you will not understand what meanings they are making.

Bringing isolated people into a lab does not gain us much because that is not how people play, especially in the Internet era. When you include the social side, you quickly find large effects, both good and bad. I have found and published both good and bad.

The second point is that we do not know if we can trust a lot of the existing research because of how short it is. If I told you that we had a study that showed games causing aggression and that that study lasted 30 minutes, you would have a hard time then

concluding that games would cause aggression over an hour or a week or a year. For that you would need a study that lasted an hour, a week, or a year. I am not sure that you realize that all you have been given are these short studies. They usually last between 10 and 30 minutes, and yet we are all talking about years and life spans.

The other big problem is that with a study that short, you might be measuring excitement, not violence. That would be arousal, not aggression. You could effectively get the same effects by having them throw a Frisbee.

In fact, when the studies go longer, it is possible that the effects might fade away. We do not have a lot of these long studies, so the jury is really still out, but we do have two studies of one violent game in particular—"Mortal Kombat." In the first study, the players played for 10 minutes, and there were large effects. In the second study, the players continued playing for 75 minutes, and the effects were nearly gone. That means there is a very good chance they fade away or were not there in the first place. It is possible that arousal was replaced with boredom or fatigue in those studies.

Last year, I published the longest study to date investigating game violence. I had players play a game over a month and not in a laboratory. The average play time in my sample was 56 hours, which is the longest research exposure for a game ever. And after 56 hours, I found nothing. I was surprised—no increases in violence, aggressive cognitions, anything.

Let me be clear. I am not suggesting that this study proves that games do not cause violence. A different game, a different sample, different measures might have found something different. I also cannot say what 2 months would do. I am not willing to make that leap the way that others are willing to do.

But when you look at the length of these studies and you consider results like mine, you have to become at least a little skeptical of the strong claims that are made, the strong causal claims.

I know that one of the reasons to hold this hearing is to find out why the State laws keep getting defeated. Let me explain why the laws are losing on the science. It is because the legislators are only talking and listening to people who agree with them, when, in fact, there is significant disagreement within academia.

I have read the legislative bibliography for the current California case, and I have seen materials from the State which claim that they have read all the applicable research. But they did not. There are studies that are missing. There are entire methods which do not appear on their list. The 75-minute study is there. My 1-month study is not there. There are entire research associations that were not consulted, two which specialize in media, which I belong to, and one which specializes in game research. Not consulted. And the entire body of anthropological work is completely ignore.

Those decisions represent politics, not science. And if you read the courts' opinions, you can see that the judges' can tell.

I know that the CAMRA Act is also making its way through Congress, so here is a place where I think we have some common ground. We really do need more and better research, and certainly better media literacy. I support CAMRA, but let me offer some suggestions of how it can get rid of objections like mine.

First, do not ask the Centers for Disease Control to administer studies of media. Media is not a controlled substance. If you want media researchers to respect it, consider the National Science Foundation.

Second, amend the Act to include the social context of media use. I have read the Act's language and it is missing. More studies of college sophomores playing alone are not going to help anymore. We need studies of all ages and of how they actually play, which means studies of gamers playing with their friends, playing with family, playing with strangers, online at home, in Internet cafes, at school, and at work. The networked world of play is the future, and it is also the future, subsequently, of research.

And, last, emphasize long-term studies, controlled, if possible. Ten- and 30-minute studies are not sufficient for science to conclude long-term effects, and they should not be enough for policymakers either.

Senators, thank you again for the opportunity to speak today.

[The prepared statement of Mr. Williams appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Dr. Williams, and I look forward to some discussion and the question time period. Thank you.

Dr. Bickham?

STATEMENT OF DAVID S. BICKHAM, RESEARCH SCIENTIST, CENTER ON MEDIA AND CHILD HEALTH, CHILDREN'S HOSPITAL BOSTON, BOSTON, MASSACHUSETTS

Mr. BICKHAM. Thank you very much. Thank you for the opportunity to testify today. My name is David Bickham, and I am a research scientist at the Center on Media and Child Health located at Children's Hospital Boston and affiliated with Harvard Medical School and Harvard School of Public Health. The center is an interdisciplinary group of pediatricians, psychologists, social scientists, and child development experts with the mission to research and respond to the effects of media on the physical, mental, and social health of children. My own research has been published in top health and psychology journals. I am here today to review the scientific evidence on video games and the concern that these games contribute to children's violent thoughts and behaviors.

While most the research on video game violence is relatively new, we must consider it within the broader field of television, film, and visual violence, and I disagree a little with Dr. Williams on this point. I see television—we understand television teaches kids by them viewing the violence, seeing it rewarded, and then incorporating that into their own behavior. Video games go one step further and actually allow them to imitate it and do it onscreen themselves. So I see that television provides a very good basis for understanding the effects of video game violence because it is also a visual medium.

There are five decades of research that show a link between violent media and aggression the Tribunal is based on a sound theoretical and empirical understanding of learning aggression and social cognition. A core ongoing project at the Center on Media and Child Health is the consolidation of all existing research on media effects into one publicly available data base. After 3 years of this

work, the data base includes over 1,200 research reports investigating the effects of media violence.

Now, if you take any of these studies alone, we must realize that no study is perfect. Even the best study design can be criticized for limitation of its methods. All methods have weaknesses. Taken together, however, each study provides a piece of a single puzzle that all interlock to reveal one picture. In this case, the picture is clear: Using violent media increases children's aggressive thoughts, attitudes, and behaviors.

Beyond violent television and film, there are reasons to believe that violent video games have stronger effects. We know that all media teach, and they especially teach young children. And they teach whether it is by the design of the media or just simply by default. Video games are exceptional teaching tools. They incorporate many techniques that promote learning in their users. They are interactive. They are involving. They require almost complete attention. And they reward success with points and new challenges. Scientists have exposed children to violent video games in laboratories and found that they become more aggressive than children who played non-violent games. Using survey studies, scientists have found that, even after controlling for complex environmental and individual characteristics that are also linked with aggression, playing violent video games is related to children's aggression additionally.

Overall, we should not be surprised by the scientific evidence illustrating that when children play games that reward and encourage violent behavior onscreen, they become more violent.

In rare situations, violence from media is directly imitated. But the most pervasive effects are more subtle and come from repeated viewings and playings. Violent video games present a world where violence is justified, it is rewarded, and it is often the only way to win the game. Exposure to this world primes children for hostile thoughts and behaviors immediately after playing a game. They begin to think and act aggressively and solve problems with violence.

Regardless of exactly how this process happens, the real question is about risk. Playing violent video games is one of a number of factors in a child's life that increases that child's risk of behaving aggressively.

Before suggesting some strategies for mitigating the effects of violent video games, I would like to clarify two common misconceptions about research on media violence.

First, scientific research does not claim that media violence is the sole cause of human aggression. Nor does it claim that media violence is the original or most important cause. Violent media is, however, a substantial, pervasive, and controllable contributor to children's violent behaviors. The aspect of controllable is very important because other factors that contribute to aggression, such as heredity, family environment, racism, culture, all of these things are difficult, if not impossible, to change.

Second, this research does not show that there is something inherently dangerous about video games. Many non-violent puzzle-based and educational games have been shown to increase children's mental abilities and teach academic lessons. Children will

learn what we teach them. If we provide positive, healthy messages the resulting behaviors will be positive and healthy as well.

Further research in this area can inform us in the most effective intervention strategies. We need to know more about what factors increase and decrease a child's risk for the effects of violent video games. Through this research, we can develop prevention measures for all children and specifically target higher-risk children for intervention. We need to extend the research that ties violent video games with real-life violence. There is some anecdotal evidence that many school shooters have been heavy users of violent video games. Could violent video game play have been a trigger that switched a troubled child from thoughts of revenge to actual behavior? We do not know. And given the nature of the crime, we will probably never be able to study this directly. But we can examine the relationship between violent video games and precursors of school shootings, including the most common, much more common behaviors of bullying and weapon carrying. A long-term study, preferably one that is nationally representative, is essential to understand these and other effects of violent video games.

Media literacy programs where children learn critical thinking skills can help immunize them against the effects of violent media. At the Center on Media and Child Health, we are currently evaluating the effectiveness of a school-based media literacy program. Our preliminary evidence shows that children start to change their understanding of media violence after a single class session. Additional research is necessary so that we can create the most effective programs possible.

To date, the evidence about video games may not be perfect. In social science, you rarely actually ever prove anything. But I think we are at a point when we need to act on what we know.

Given the evidence that we have, are we actually willing to risk the possible and dramatic long-term effects that playing these games could have on our children's health? As caretakers of the next generation, we have a responsibility to provide children with a safe environment in which to grow, develop and learn. Research has shown the media children use have real effects on their lives. In the Information Age, media must be understood as a powerful, nearly universal environmental health influence. We ensure the safety of what we feed children's bodies. We owe it to their future and the future of our society to ensure the safety of what we feed their minds.

Thank you.

[The prepared statement of Mr. Bickham appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Dr. Bickham.

I am going to go to Senator Coburn first for questions. We will run the clock at 6 minutes, if that is OK with my colleagues, and then I will go to Senator Feingold. Senator Coburn has another meeting he has to attend.

Senator COBURN. Thank you, Mr. Chairman, and thank you, Senator Feingold, for the deference to ask questions first.

Is there any doubt in any of your minds that you can positively influence behavior in a positive way with video games? In other

words, if you want to achieve a certain goal, you can design a video game to increase the propensity to establish that behavior?

Mr. BICKHAM. I will take that. I think there is some doubt because there is not a lot of research on it. There is a lot of research on educational television that shows when it is well designed, it can have long-term effects, including positive—kids who watch more "Sesame Street" when they are about 4 have higher grades in high school. So there is some evidence base there. And because of the potential that video games have for how good teachers they are, I think that a well-designed, a well—a game that is well designed but also has a lot of research put into it at the front end as they are developing it could lead to very dramatic positive effects if it is designed that way.

I would go a little further and say that you would have to take violence completely out of those games because those effects are so well documented that I think it would have those as well, so we would have to be very careful to take that out of any of those types of games.

Senator COBURN. Dr. Carll? Dr. Williams?

Ms. CARLL. I would certainly agree that there are many games that are not violent and destructive and there are video games that are being developed for children who have various illnesses to help them deal with those. So there are a lot of positive things developing, and learning theory is a neutral theory. You can learn negative behaviors and you can learn positive behaviors.

Senator COBURN. But your general inclination is that that is probably so, that you can learn a positive behavior from a well-designed video game.

Ms. CARLL. Yes, if it has positive content.

Senator COBURN. Yes.

Mr. WILLIAMS. This is a place where our colleagues in the field of education have actually done probably more extensive research than many of us in social psych and the effects side have, especially some work for some people up in Wisconsin, actually. At UW, the Education Department there has a group of researchers who have actually been looking at long-term learning effects, and here is a place where they have us at a disadvantage because rather than doing 10-minute or 20-minute or 30-minute studies, they can look at things like test scores over the course of a semester, and they could taken games, some with violence, some without, games like "Civilization" where you are building up societies and attacking and defending from others, following the course of history, and you can see dramatic improvement in learning.

It is an area where we do not have the same level of evidence to make the same kind of conclusions.

Senator COBURN. Dr. Williams, in your 56-hour study, how long was your followup period on that, post-follow-up? have you had a continuing post-follow-up on that study?

Mr. WILLIAMS. No. For reasons of compliance with my local IRB, this was a 1 month-off study, also for resources. I did a pre-test. They played the game. There was a post-test immediately after, and that is it. Also because of anonymity, I cannot contact them. They are gone.

Senator COBURN. So you are basing your testimony on a study you had and you have no followup?

Mr. WILLIAMS. As I said, I am only comfortable talking about what happened over the course of the month. I do not want to make conclusions longer—

Senator COBURN. Which means if we have no followup, we know nothing about the results of that exposure—

Mr. WILLIAMS. We know nothing about—

Senator COBURN [continuing]. Because it is not immediate—

Mr. WILLIAMS [continuing]. It after a month, that is right.

Senator COBURN. That is right, OK.

Mr. WILLIAMS. That is the longest to date.

Senator COBURN. Let me ask you a question. At any time in the course of your studies have you received any funding, directly or indirectly, from either a video game company, a manufacturer, or somebody that is a principal in that through an indirect or direct source?

Mr. WILLIAMS. For research?

Senator COBURN. Yes.

Mr. WILLIAMS. When I was completing my dissertation work, I had to get copies of the game that I used as a stimulus somehow, and I did not have the resources to do it. But for legal reasons, the publisher of the game did not want to be associated with it, so they gave me copies as a donation, wiped their hands clean. They did not want to be in possession in case I did find something negative. It turns out that I did not. But for that reason I actually have no relationship with the game industry.

Senator COBURN. OK. Thank you.

I am amazed that we do not sit back and look at common sense on this. I mean, we know what television does. You know, it is pretty firm, the conclusions both the psychologists, the pediatricians, the social psychologists have come to in terms of the influence of violence through television. And it seems to me strange that we would not start with the concept that probably there is an impact and now let us go prove it to see if there is since we know through other video forms that there is an impact.

Mr. Chairman, I would just relate, I have taken care of kids in my practice for 25 years, and I can tell you, I have seen the effects, both negatively and positively, of video games. And my partners see the effects. We actually had a shooting in Fort Gibson, Oklahoma, at one time, and much of that was related—not just to video games, but also to the environment that a child was in.

So I would hope that we and the Congress would start with the precept of what we do know about video presentation of violence and children and work from that, and I would agree that we should certainly be in the position to fund some long-term studies.

In the meantime, we ought to do whatever we can to limit the violent exposure of these games to children, because there is nothing positive. There may not be anything negative, but there is certainly nothing positive from these games.

And with that, I yield back my time.

Chairman BROWNBACK. Thank you very much.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Mr. Chairman, I have received a number of additional statements and testimony for this hearing, and I would ask that they be placed in the record.

Chairman BROWNBACK. Without objection.

Senator FEINGOLD. Thank you, Mr. Chairman.

Reverend Strickland, thank you for being here today. I am sure it was not an easy thing for you to do this, and I want you to know that I appreciate your willingness to share your experience with us.

This question is for the three researchers on the panel. I understand from the testimony that quite a bit of research has been done regarding the effects of television violence on the behavior of children, but far less has been done, as has been indicated, specifically on the effects on violent video games. Obviously, Dr. Williams had already alluded to this.

But each of you, I would like you to comment on do you think we need more research in this area. Dr. Carll?

Ms. CARLL. Oh, absolutely. That is why we support the CAMRA Act. We certainly need more research on longer-term and we need more research in many of the things that I think Dr. Williams also had said, as well as Dr. Bickham, particularly in Dr. Williams' because his is a multi-player format, which is very different than some of the video games that have been evaluated before, which involves cooperation and various other aspects. So certainly the importance of research is there.

Senator FEINGOLD. Dr. Williams, I think I know what you are going to say, but go ahead.

Mr. WILLIAMS. I agree with myself, yes.

[Laughter.]

Senator FEINGOLD. Very eloquently stated.

Mr. WILLIAMS. Thank you.

To elaborate briefly, there are some initial pieces of research coming out that you find that there are differences when people are playing by themselves, with other people, against other people, with teammates, and I think that is the direction we ought to be heading, because those are the ways that games are actually played. It could very well be that that shows that things are worse, not better, but these are the mediating factors that we would like to understand better. Me particularly, I would focus on the social. This is a huge phenomenon, especially playing online. Millions of people playing together creating online communities, and we know almost nothing about it.

Senator FEINGOLD. Dr. Bickham?

Mr. BICKHAM. Yes, surprisingly, I also agree there needs to be more research. I think, however, there is enough research now, I think, as I said, that we can act. You know, it is at a point where in social science we do not prove things. We always work with limited information. We always work with incomplete knowledge. We could fund this forever. We could do this research forever. These games change every day. We have to make a decision at some point: Do we know enough now, are we willing to step out and say, yes, we want to protect children from something, even if we are not completely 100 percent sure? Even if it is only something that accounts for 15 or 20 percent of all the crime, are we willing to go

out on the research that we have and make some interventions to protect kids from them?

Senator FEINGOLD. I think that is a fair point. It is hard to know at what point you have done enough, and you cannot make it impossible for you to go forward and do anything about a problem. But I want to go back to Professor Williams with regard to this. Say a little bit more how a researcher goes about evaluating whether a particular form of media, such as video games, might cause people to engage in aggressive behavior. It strikes me as a very difficult hypothesis to test. And Dr. Bickham just talked about knowing that in 15, 20 percent of the cases this is the case—I did not hear you say that in your testimony. It did not seem like you necessarily thought this was true, any proof that it is true in any case. So how do you separate these things out in terms of methodology?

Mr. WILLIAMS. I certainly agree with Dr. Bickham that you need multiple methods to really understand something. It would be nice to also have some sociological and ethnographic work done to actually talk to players, as revolutionary a concept as that may sound, actually go and see what meanings they are making out of it. You get a very different story than you do with a study.

To track someone over the long term is, as you say, a pretty difficult thing. It is something that is resource-intensive, and in the communication area we are often having a hard time getting funding for it to do these long-term studies. And I think we are all on the panel in agreement that it would be a useful contribution to the literature and to our understanding.

My contention is that 30 minutes, that does not tell us much about truly long-term things, and here is a point of significant difference with the television literature, where there are truly longitudinal research studies, and I started my testimony by saying that I have no quibble with them. I am sold. But that is where you have people and you can follow them over 25 years. I do not think we need to do 25 years of research, but I think that going past 30 minutes into days, weeks, months gets a little more at the reasonableness factor to see when these things might stick, because some of the research that I talked about suggested that it might not be sticking, it might fade off. It might work just like television does. It might be worse. But until you show it, that is very different than saying that you know about it.

Senator FEINGOLD. How do you deal with the problem that the same person may be watching other kinds of media that are disturbing? And how do you separate that out?

Mr. WILLIAMS. It is a very difficult research problem. It adds a significant amount of noise. The one thing you can try to do is establish a control group of people who are not engaging in your kind of media, but they are going to be engaging in some other kind of media. So what you have to do is find some kind of game that is significantly different than the media universe they might consume on their own, or you take some measure after, post hoc to find out what they did and contrast it with it.

It is a thorny issue, and it is one of the reasons why the television research, the long-term one, did not have a control group.

The 1 month I had is tough enough to do, and without more resources it becomes even harder.

Senator FEINGOLD. Dr. Carll, I want to followup on something that you touched on in your testimony. Video games along with other forms of media can obviously deliver many messages to children that you and I might not think are the best messages to send. Has work been done to evaluate the effects on children of other aspects of video games besides violence that you mentioned in your testimony, that is, let's say, based on gender or racial stereotypes or glorifying sexual aggression against women?

Ms. CARLL. Yes, there have been many studies in that area. In fact, the list that was attached to the testimony we submitted includes that. But, yes, there are stereotypes, and many of the video games, unfortunately, look toward those stereotypes and depict those, and anyone playing that would have exaggerated aspects in playing that as far as how people are depicted, whether it is women, children, boys, men, minorities in particular. So, yes, other aspects besides violence have been researched.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you, Senator Feingold.

I want to ask first submission to the record of a statement by Dr. Leland Yee, Speaker Pro Tem of the California State Assembly; also a statement in by Dr. John Murray, Professor, Department of Psychology, Kent State University; a resolution by the Florida Police Chiefs Association; and from the Pennsylvania Fraternal Order of Police—the police ones particularly regarding the video gam "25 to Life" that we showed. Those will be submitted into the record.

Reverend Strickland, thank you again for being here, and I appreciate your poignant testimony about the impact and the impact on your family in particular. Have you in your work as a minister worked with families where the child—or with children that have been involved in video games, violent video games? Do you have more experience in this area?

Rev. STRICKLAND. No, sir, I do not. Like I said, it is a whole new world to me. I deal mainly with alcohol and drugs more than the videos, but the videos are becoming very evident within our communities. I mean, when all this came about in 2003, I had many mothers that would come up to me after it hit the media about the video games and tell me that they did not realize that their children—or what their children was playing. Many parents, you know, you stick a video in, you go buy a video game and let the kids play, and you go do what you want to do. And, unfortunately, they did not censor these games before they started letting them play, and they would come up and tell me and say, "When I watched the games of what they were, I actually took them out and throwed them in the garbage can. I did not realize that they were this violent."

So it is a whole new area for me. It is one that I am learning and trying to get educated on, on how to handle it, because I feel that it will affect our younger generation.

Chairman BROWNBACK. Did you see any quotes from Devin Moore's parents about his playing of these violent video games? Or do you know anything about that situation?

Rev. STRICKLAND. Nothing other than we have facts that he did play them. Devin came from a very difficult background. He has had a mom and a dad that was not together, or whatever. His upbringing was not the best in the world. But his mom did say that she was with him when he purchased the video games themselves at an age that he wasn't supposed to be able to purchase them.

Chairman BROWNBACK. But Devin purchased the games himself?

Rev. STRICKLAND. Right.

Chairman BROWNBACK. Even though it was not age-appropriate for him to purchase it?

Rev. STRICKLAND. Right.

Chairman BROWNBACK. I want to go to the researchers on this point. I have been around this topic awhile. Since being in the Senate, I have been around this topic, and they just keep getting more graphic, more violent, more horrific. I mean, I long for the time in 1997, I think, when I started these hearings, because the technology was not as good. I am imagining the day soon where you stand in the video room as the first-person killer and you are surrounded by sound and by screens and shooting in a very realistic setting. As a matter of fact, I am sure somebody technologically could do it today. It is whether they can make any money out of it probably is the question. And you all know we use these video settings to train our military with. I have been in simulators at Fort Riley in Kansas where we use a video simulator to train, and we retrain and retrain and retrain. And so that when the person gets in the situation, they do not have to think. They act. And we can also overcome the natural tendency in people to not want to shoot somebody else. It is actually more natural within us not to shoot somebody else, but in military settings, in particular, OK, we are trying to force people to overcome that. And so part of it is this, OK, we are going to put you in a simulator and simulate and simulate and simulate so that when you get in that situation you are not thinking, you are just shooting. And I cannot help but to think that that flows right into this situation here when we purposely do it in that setting and when it gets so much more graphic, so much more violent and realistic.

Let me ask you, the researchers in particular, what if we require the video game manufacturers before they released an M-rated game that they had to do some sort of behavioral study like what you have done and we try to build the prototype of what it is, that we require that prior to the game being released. Would that be useful information to help build up the body of knowledge that you all say is lacking? Dr. Carll?

Ms. CARLL. I would request that certainly various kinds of research would be helpful, but it should not be conducted by the entertainment industry but a neutral organization who does not have a vested interest in it.

Chairman BROWNBACK. Amen to that. I agree with you on that. But what about having that information by a neutral group?

Ms. CARLL. That may be helpful. I think what would be even more helpful, because that is something so far down the road, would be information in a rating system that would be helpful for parents to be more specific as to the content—

Chairman BROWNBACK. That is what you mentioned in your testimony.

Ms. CARLL. Right. And that could be more easily done than what you are describing. It would be very helpful for parents to know if violence is rewarded and does it have negative social consequences or is the purpose of the game thrill kill to see how many people you can kill for the sake of killing them. That is a different kind of game than, for instance, the one that was used by Dr. Williams, which was not antisocial in that sense.

So different kinds of games have different outcomes, and I certainly agree that there is a diversity of games and we need to look at research in that area. But those kinds of games which have those negative qualities are likely very different from some of those with more positive ones, and, yes, so having more research in that area would be helpful as well. But having information for parents to know what kind of games their kids are playing is even more important.

Chairman BROWNBACK. I agree with that.

Dr. Williams, what do you think about that, requiring a study for M-rated games released?

Mr. WILLIAMS. Well, here we cross into the First Amendment territory as much as the research territory, and the impulse to in some way restrict or measure something before it is released to the general public falls way outside of my purview. And as a citizen, honestly it creeps me out a little bit. As a researcher, sure, I would love to have access to those kinds of materials. I can also tell you that we take a really, really long time with things, so I don't know how feasible that would be. Would it be nice to have some kind of better description or content knowing what is out there to give parents more information? I don't think anybody objects to that. You know, you will hear from the ESRB rep in the second panel, and you can figure out whether or not you think they do a good job or not.

I have to say in passing that I spent all last week at the game developer conference in San Jose talking with game developers, and it might surprise you to know that they have a very contentious relationship with ESRB and find them very adversarial. So ESRB obviously feels besieged from both sides.

Chairman BROWNBACK. OK. I want to thank the panel very much. If you have additional statements to put in, please feel free to do so.

We have a second panel I want to call up. The first witness on the second panel is Pat Vance, President, Entertainment Software Rating Board. The ESRB provides the ratings for video games.

We have Representative Jeff Johnson, Assistant Majority Leader, Minnesota House of Representatives. Representative Johnson drafted a video game bill which is currently pending before the Minnesota Legislature.

Paul Smith is a partner at Jenner and Block in Washington, D.C. He has represented the video game industry in a number of its suits challenging State restrictions on the sale of violent games to minors.

And Professor Kevin Saunders, a law professor at Michigan State University, teaches a course on constitutional law and the First

Amendment. He has been involved in drafting a number of the State laws.

Thank you all very much for being here. Ms. Vance, I want to open up with you. Welcome. We will run the time block at about 6 minutes.

STATEMENT OF PATRICIA E. VANCE, PRESIDENT, ENTERTAINMENT SOFTWARE RATING BOARD, NEW YORK, NEW YORK

Ms. VANCE. Thank you, Chairman Brownback, Ranking Member Feingold, and the entire Subcommittee for the invitation to appear today. I would like to take this opportunity to provide greater insight into how ESRB ratings currently empower parents to make informed decisions about the games their children play. I request that my statements, both oral and written, along with the instructive appendices, be made a part of the hearing record.

Chairman BROWNBACK. Without objection.

Ms. VANCE. Thank you.

Virtually every computer and video game sold in the U.S. today carries an ESRB rating, and nearly all major retailers choose to only stock games that have been rated by our organization. This voluntary commitment from the video game industry and the retail community ensures that consumers have accurate and reliable information to help them decide which games are appropriate for themselves, their children, and other family members. Today, the vast majority of parents use and trust ESRB ratings in helping them make those decisions.

The two-part ESRB rating system now consists of six age-based rating categories appearing on the front and back of each game package and 32 different content descriptors that appear on the back prominently displayed next to the rating category which indicate elements in a game that may have triggered a rating or may be of concern to parents. ESRB ratings are based on the consensus of adult raters who have no ties to the game industry and work on a part-time basis. One of ESRB's key responsibilities is to ensure that these raters review all pertinent game content, including the most extreme, no matter how hard it might be to find when playing the game.

Many of today's games can take over 50 hours to play all the way through, so it is critical that companies fully disclose to the ESRB in detail exactly what is in the game across a broad range of categories, including but not limited to violence, sex, language, use of a controlled substance, and gambling. If a company does not fully disclose all the game's content to the ESRB, recent enhancements to our enforcement system allow for the imposition of fines up to $1 million. The power to impose substantial penalties which may include the suspension of rating services and corrective actions that can result in a full product recall serve as a tremendous disincentive for any company entertaining the notion of withholding pertinent content from the ESRB.

As the FTC has previously noted, the ESRB enforcement system is unique in its scope and severity among entertainment rating systems. While games that are rated for mature audiences tend to get a disproportionately high amount of media attention, the reality is that, by far, the largest number of titles rated by the ESRB year

in and year out receive a rating of "E" for "Everyone," and only about 12 percent of games receive an M rating for players 17 and older. Furthermore, last year, not one mature-rated game made it onto the top ten seller list. These facts belie the common misperception that all games are created and intended for children. The fact is that the average age of a gamer today is 30. So it is not surprising that video games, just like movies and TV shows, are created for all ages. The ratings help parent discern which games are right for their children and which ones are not, and increasingly, parents have come to rely on them.

A recent study by Peter Hart Research found that 83 percent of parents with children who play games are aware of the ESRB ratings and 74 percent use them regularly when buying games. While that is pretty good, we continue to put significant resources into aggressive educational initiatives to remind and encourage parents to use the ratings every time they buy a game.

Moreover, for the ratings to be reliable, they must meet parents' expectations, and to that end, the ESRB commissioned separate research annually to test the level of agreement with our rating assignments among parents in ten different markets across the U.S. In the study, parents view excerpts from a large number of randomly selected games across all ESRB rating categories, and the results show that parents agree with ESRB ratings 82 percent of the time or find them too strict another 5 percent of the time. Given the broad diversity of values, tastes, and opinions in our country, this is a very high level of agreement, and it is a testament to the effectiveness of the system we use to assign ratings.

Some would argue that the ratings do not work because they do not place restrictions on what kids can buy. To address that point, it is worth mentioning that the FTC has reported that adults are involved in the purchase of a video game 83 percent of the time. Similar studies conducted by the industry have found that a parent or adult is involved 92 percent of the time. Simply put, parents are the gatekeepers, as well they should be, when it comes to which games come into the home.

I would like to close today by saying simply that nobody takes these issues more seriously than we do. ESRB values immensely the trust that millions of parents have placed in our ratings, and we fiercely intend to preserve that trust. The vast majority of parents can and do make sensible choices about the games their children play, and our ratings consistently play a critical role in making those choices.

Thank you, and I look forward to answering any questions that you may have.

[The prepared statement of Ms. Vance appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Ms. Vance.

Representative Johnson?

STATEMENT OF HON. JEFF JOHNSON, ASSISTANT MAJORITY LEADER, MINNESOTA HOUSE OF REPRESENTATIVES

Representative JOHNSON. Thank you, Mr. Chairman and Senator Feingold. My name is Jeff Johnson. I am a third-term Republican member of the Minnesota House of Representatives. I am Assistant

Majority Leader and Chairman of the House Civil Law Committee. But more importantly, I am the father of two little boys who would play video games 12 hours a day if we did not limit them to about 3 hours a week. And I should add that I am not opposed to video games. In fact, I enjoy those 3 hours on the weekends with one of my sons playing football or soccer or some other video game, unless one of is naughty and we have it taken away from us. But I do not believe that video games are inherently bad.

I do believe that some are, though, and I am the House author of a bill in Minnesota that takes a rather modest step towards restricting access by our kids to extremely violent or sexually explicit video games. And this is a bipartisan effort. Senator Sandy Pappas is a Democrat from St. Paul. She has already passed this bill off the Senate floor, and I am hopeful to do the same in the House within the next few weeks.

The bill is really very simple. It is very narrowly tailored. Frankly, it is probably more narrowly tailored than I would like, but because of the constitutional issues, this is what we thought we ought to do. And what it says is that children under 17 cannot rent or buy video games that are rated either M or AO by the ESRB. If they attempt to do so, they are subject to a $25 civil penalty or civil fine. Our bill also requires that each retailer of these games in Minnesota has to post a clearly visible sign regarding the restriction. That is the entire bill.

My intent with this legislation is not to make criminals out of kids or to raise money $25 at a time for the State of Minnesota, and, frankly, I do not expect that would happen even if we are able to pass this bill and make it law. What I am hopeful for is that by passing the new law we may get the attention of at least a few of the painfully oblivious parents in our State who are really paying absolutely no attention to some of the garbage that their little kids are playing in their own homes on their video game machines.

As I mentioned, I have two little boys at home, and our oldest is in second grade. He is 7. And I am amazed at how many of his little friends—and this was last year, actually, when he was in first grade. I am amazed at how many of them regularly play M-rated video games. Now, I do not blame that on the ESA or the companies that make these things. I blame that on their parents, and what I want to try to do is at least get their attention because I would like to believe that if some of these parents knew what was in these games, if we could just get their attention, they might put a stop to it.

I have been working on other ways to get the attention of parents in Minnesota with Dr. David Walsh and the Minneapolis-based National Institute on Media and the Family, which is probably the most well-respected organization in the country addressing the impact of the media on children and families. But I also believe that we have to do something legislatively, and you have already mentioned it, Mr. Chairman, and a couple of the testifiers did, and we saw it on the screen. We are not talking about the equivalent of an R-rated slasher movie here. Many of these games are absolutely, to use your term, horrific, and I have actually rented some of them so I could see before I wrote my bill. They allow kids to learn firsthand how to kill people and how to torture people and

how to mutilate people and how to rape people in graphic detail and in vivid reality. And the key difference from the movie is they do not watch other people doing it. They get to do it themselves. And in many of these games, the more violent and gruesome you are, the more points you score.

I cannot leave today without being certain that everyone comprehends the nature of the violence in these games. We saw some examples on the screen. Those are not even the worst examples that I have seen, Mr. Chairman, and I want to share with you just very brief descriptions of four popular video games that I know are available at large retailers and video rental stores in Minnesota, because I have seen them.

The most popular game in America last year was "Grand Theft Auto," which you had on the video that we saw. The player is a young man who is trying to gain the respect of street gangsters and other criminals, and, of course, you are that person. And the more creative and brutal you are in killing innocent people, and in some cases cops, the more respect you gain and the more points you score.

One example in this game of a creative kill would be to beat someone to death with a bat until he drowns in his own blood, and then when the ambulance comes, you can actually kill the ambulance driver and use the ambulance to kill some more people on the street.

Another piece of this game is one that you mentioned, Mr. Chairman. You can score points by having sex with a prostitute, and then if you beat her to death afterwards and get your money back, you may score some more points.

"Clock Tower 3" is another game that is readily available. It is a survival horror game about a young girl who is being chased by murderers who want to kill her and her family. In one scene, a little girl with pigtails is caught by her attacker who repeatedly smashes her head against a wall with a sledgehammer. Later you see her ghost covered in blood playing a piano while her father is impaled onto a fence. And another scene shows a killer gouging out a man's eyeballs and then lowering the man's elderly mother into a vat of acid as she begs for mercy.

"Manhunt" is another fairly popular game, and I know that is available at my large video rental store because whenever I go with my son and he wants to look at the latest "Madden NFL Game," there is "Manhunt" right next to it. And in this game, the player is a mass murderer who sometimes wears a clown mask to disguise himself. You score points by, of course, killing people in creative and gruesome ways. For example, you can use a piano wire to grab a man from behind and saw at his neck, pushing your foot up against his back until his head falls off. You can suffocate someone with a clear plastic bag. You can twist large shards of glass into someone's eyeballs or you can use a sickle to split someone's stomach or stab a crowbar into the back of someone's head and pry it apart.

And my last example is "Postal 2," and I think we saw an example of "Postal 1" on the video earlier. This is a serial killer game where, of course, you score points by killing innocent people. There are a lot of ways of doing it, but one piece that I found interesting

was that you can actually possibly score extra points by urinating into a victim's mouth before you kill him or her. And you can even open fire on a Gay Pride march, a minority community celebration, and a parade of police officers.

Mr. Chairman, comparing this in any way to playing Frisbee is just beyond my belief, because it is not.

I do not enjoy reading these descriptions. They literally make me sick to my stomach, especially knowing that little kids all over the State of Minnesota are playing them. But people need to know how horrific these games really are, and I think by describing them you can better understand why some of us feel that we absolutely have to do something about it.

To the bill, and I will keep it very brief. We have crafted a very narrow-language bill in our State because we are concerned about the cases out there that exist with respect to content-based restrictions. But despite the dire warnings from the ESA when I first brought this bill up last year, I believe that our bill could survive a constitutional challenge, and here is why. Three brief reasons.

The only case on point with any precedential value in Minnesota is the Eighth Circuit case of *IDSA* v. *St. Louis County*. The rest of them are without our jurisdiction, and that case came down over 3 years ago, and I believe was argued nearly 4 years ago. There is a big difference between our bill and the bill in that case.

The St. Louis County ordinance in question first was a great deal broader than our very narrowly tailored bill in Minnesota, and that is a very important distinction because not only the Eighth Circuit but all of the other cases, I believe, where a court has either struck down or placed an injunction on one of these statutes or ordinances say that we need to more narrowly define the statute.

Second, the St. Louis County ordinance that is in this case and all the other laws that have been struck down have been subject to the argument that they are unconstitutionally vague because they restricted video games which fell under a specific statutory definition of "violence" or "excessive violence." So the retailer could not look at the box and say, "Oh, this falls under the law." What we have done is we have said that the restrictions only apply to those games that are rated in a certain way so that you can look at the box and immediately determine. And I realize this isn't ideal because the industry or at least a private entity will have control over which games fall within the category, but it is all we have got. And I would certainly welcome a future discussion on possible Government rating of these video games.

And then finally, and most importantly, the St. Louis County case was argued more than 3 years ago, and the court determined at that time that there was no compelling State interest because they were unable to find a credible link between excessively violent video games and psychological health of children. And if you actually read the case, you will see that almost nothing of value was offered. One psychologist testified in court—

Chairman BROWNBACK. Mr. Johnson, let's wrap it up here if we can.

Representative JOHNSON. Thank you. The difference is that a lot has happened in the last 3 years, and, frankly, I think we have heard in the last hour more evidence than what the Eighth Circuit

was presented. So my belief, and my strong belief, even though I may have a misplaced faith in the court system, is that our case will survive a constitutional challenge.

Thank you.

[The prepared statement of Mr. Johnson appears as a submission for the record.]

Chairman BROWNBACK. Thank you.

Mr. Smith?

STATEMENT OF PAUL M. SMITH, JENNER AND BLOCK LLP, WASHINGTON, D.C.

Mr. SMITH. Thank you, Mr. Chairman and Ranking Member Feingold and members of the Subcommittee. I appreciate the opportunity to come before you today to discuss the constitutionality of State regulation of violent video games, and I ask for consent that my full statement, including the relevant attachments, be made a part of the hearing record.

Senator FEINGOLD. [Presiding.] Without objection.

Mr. SMITH. My perspective is that of an appellate advocate who has litigated First Amendment issues for the better part of three decades. Most recently I have represented the video game industry in litigation regarding the constitutionality of State laws that ban distribution to minors of video games with violent content. In each of those cases, as well as every other case to consider the issue, the courts have struck down legal restrictions on minors' access to violent video games. Those outcomes reflect the fact that there is no general exception to the First Amendment for laws that target minors' access to protected speech. Any attempt at such regulation of distribution of video games based on their violent content, either at the State or Federal level, would under no circumstances that I can contemplate be upheld.

Every court that has looked at this has found that the State regulation in question did not pass constitutional muster because the Government lacks a legitimate and compelling interest which must be based on substantial evidence in the record for restricting violent video game content and access by minors. The kinds of testimony presented here today in favor of legal restrictions on video games have been rejected out of hand by every court that has considered them.

First, as a matter of law, any attempt to justify content-based suppression of speech based on the theory that particular content carries too much risk of causing listeners to engage in bad behavior is categorically ruled out under the First Amendment. Our Constitution mandates that the Government regulate behavior, not speech that is perceived as likely to cause undesirable behavior among listeners or recipients. There is only a single very narrow exception to that rule, the *Brandenburg* incitement standard, and that test requires that the speech have been intended to and e likely to incite imminent lawless action like a mob being whipped up in the street. As the courts have recognized, video games do not remotely meet that standard.

Similarly, courts have rejected the argument that restrictions on violent video games can be justified as a means to prevent psychological harm to minors. That is because the Government does not

have a legitimate let alone compelling interest in regulating speech in order to affect citizens' thoughts, attitudes, and personalities. This is through for minors as well. The Supreme Court has made abundantly clear that the Government cannot suppress speech to minors solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. That is simply not a role that the Government may play in our society.

In any event, factually, the social science claims that minors who are exposed to depictions of violence in video games are more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobe of the brain, or to exhibit violent anti-social or aggressive behavior have found absolutely no judicial acceptance. Courts have considered them wholly unpersuasive and not even approaching substantial evidence, and one factor in that is the precipitous drop in youth violence per capita that has occurred in this country since 1994 when the most violent and graphic games were introduced in the range of a 43-percent reduction.

Now, singling out video games from all other media containing violent images constitutes another fatal flaw in State video game legislation. Because movies, books, magazines, music, art, television, the Internet, to which almost all modern American children are exposed, are left unaffected by these laws, they cannot conceivably advance any purported State interest. In addition, courts require that a regulation of expression be the least speech-restrictive means available to achieve the bill's end. Given the multitude of other options available to the Government, such as parental education and parental controls that are being installed in the video game machines themselves, legislative censoring of violent video games has consistently been held unconstitutional.

Finally, it is worth noting that the proposed Federal legislation restricting access to video games would fare no better than the State regulations that have been struck down. The proposed Federal Family Entertainment Protection Act would impose Federal penalties on the sale or rental of a video game rated M for mature or AO for Adults Only by the ESRB to minors under the age of 17. Like the State laws, the proposed Federal act would impose a content-based restriction on expression that is fully protected by the First Amendment and would without question be struck down by the courts.

For all of these reasons, among others, I urge this Subcommittee not to support unconstitutional legislation that has been consistently struck down in courts around the country. Even beyond their repugnance to the Constitution, it is clearly the view of the courts, and likely most Americans, that families and not the Government should be making the decisions about what type of content children should be exposed to.

Thank you, and I look forward to answering any questions that you may have.

[The prepared statement of Mr. Smith appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Mr. Smith.

Professor Saunders? And we just called for a vote. My colleague went over for that. We will hear your testimony, and then hope-

fully he will be back after my questioning, and we can keep this going without going into a recess. Professor Saunders?

STATEMENT OF KEVIN W. SAUNDERS, PROFESSOR OF LAW, MICHIGAN STATE UNIVERSITY, EAST LANSING, MICHIGAN

Mr. SAUNDERS. Mr. Chairman, I want to thank you and the Committee for the opportunity to share my thoughts on the shielding of children from violent video games. Those thoughts are set out in more detail in my written statement. I am Kevin W. Saunders, Profess of Law at Michigan State University. I have spent the last dozen years studying the constitutional issues surrounding attempts to limit the access of children to depictions of extreme violence, and I have been involved in most of the recent round of attempts to so limit children. I am bothered by the view that while these games are poison, the First Amendment requires that children have access to that poison. While the attempts have thus far been struck down, there are bases on which restrictions may overcome First Amendment limits.

I also would say I agree that the first line of defense does have to be families, but I think families need help, that you cannot ride herd over your child every minute of every day, and by simply requiring that materials not be provided directly to children, it requires that their parents make the one-time decision to provide that material or not to provide that material.

Turning to those bases, the first two potential bases I will mention only briefly have met with at best limited success in the courts, and later courts may take the earlier decisions as authoritative, although the Supreme Court has not ruled on the theories involved. One approach is to argue that sufficiently violent material, when presented to children, may be obscene. I argued for this thesis in my book "Violence as Obscenity," and it was accepted by the Federal district court in the Indianapolis litigation but was rejected by the Seventh Circuit. It is important to note that the Supreme Court has never ruled that violent material cannot be restricted. It has struck down a violence statute as vague, but specifically warned against the more general conclusion that violent material cannot be restricted.

The second theory is that video game play, like the play of pinball machines, is not an activity protected by the First Amendment. This was the theory of the district court in the St. Louis case, but it was rejected by the Eighth Circuit. The important distinction, one not spelled out by either court, is between the creative activity of the programmer and the communication of the product of that activity to the player on the one hand and the player's playing of the game on the other. This sort of distinction was recently recognized by the Fourth Circuit in distinguishing between the band at a community dance and a dancer on the floor.

The theory to which the courts have paid the most attention is based on the claim that, even if violent video game play is protected by the First Amendment, restrictions may stand based on the danger the games pose. Infringing a constitutional right does not mean the limitations are necessarily struck down. Instead, a restriction must meet strict scrutiny. It must be narrowly tailored to a compelling governmental interest. All the courts have accepted

that physical and psychological well-being of youth is a compelling interest, but the courts have not been willing to find the restrictions necessary to that interest.

The courts have questioned the scientific studies and have questioned whether evidence of correlation between violent video game play and real-world violence demonstrates causation. This is particularly interesting given the overwhelming consensus of the health and science community that media violence causes real-world violence.

As an aside, let me say there is a new body of evidence developing that was not presented today, a neuroscience in the violent video game play on the development of brains in adolescents, a study at the Indiana University Medical School that shows a difference in functioning in the prefrontal cortex of children with exposure to violent media. This was raised in the Illinois case. The industry produced a witness who said, well, maybe this judgmental function is being done in some other part of the brain. No evidence that it is being done in any other part of the brain, but it could happen, I suppose. Even if that is true, it still shows a brain dysfunction that is similar to that of children who have disruptive developmental disabilities. So I think that is a developing area that needs to be followed.

I am not a scientist. I do not have the understanding of the issues that others testifying today do have. It seems likely that none of the judges involved have been scientists either, and we would almost be open to recognizing the continuing development of this area of research, both psychology and neuroscience.

From a legal point of view, it is important to note that the courts' decisions on the scientific issues can have no long-term precedential effect. Unlike conclusions of law, the conclusions on science are contingent. A court's conclusion that the science fails to establish the danger perceived by the public and the legislature is only a conclusion that the science at the time was lacking. It does not establish the conclusion that the science at the time of any future legislation or litigation is also lacking. Each time the issue arises, the courts must consider the science anew.

Last, returning to the issues I addressed in a recent book, "Saving Our Children from the First Amendment," that argues for lesser First Amendment protection for expression to children, I think it important to consider the costs of two possible errors here. If violent video games do cause an increase in real-world violence and courts refuse to allow limitations, the cost is psychologically damaged children and, in the extreme, deaths. For the other possible error, allowing restrictions when media violence does not, in fact, have the effects suggested, the costs would seem to be to the values behind the First Amendment. But the most important values served by protecting free expression are those tied to self-government. To be self-governing, we must have access to information, but children do not vote. True, as Judge Posner argued, they need to be competent voters when they turn 18, and that is why I have counseled legislators to set limits at 17. That allows a year to play as many violent video games as it takes to become a competent voter. The other major value thought by some to underlie the Ex-

pression Clauses is autonomy, but we do not really believe in autonomy for children, or we would allow them to smoke and drink.

I hope legislatures will continue in their efforts to protect children from this serious danger. Absent a Supreme Court decision on the issues, at least some lower courts may consider the constitutional theories suggested. Even with a negative Supreme Court opinion on all the issues, a failure to find adequate science at one point does not bar legislation and litigation at a later point. Despite past losses, as the science continues to develop, the effort can continue, and the danger theory is never permanently dismissed.

Once again, thank you for this opportunity.

[The prepared statement of Mr. Saunders appears as a submission for the record.]

Chairman BROWNBACK. Thank you, Professor Saunders, for the testimony and you work in this area. I have a few questions I want to try to ask, and I will ask I be advised when the vote is down to 2–1/2 minutes. If my colleague has not come back, what we will do is probably adjourn at that point in time if he is not being with 2–1/2 minutes left on the vote. I might ask if his staff could find out if he is definitely coming back.

Representative Johnson, what would be the most useful or helpful thing we could do at the Federal level, for you at the State level in dealing with this issue? What information, what could we do to be the most helpful?

Representative JOHNSON. Mr. Chairman, I think two things come to mind. No. 1, anything you can do to provide more evidence than we already have—and I am under the impression that there may be enough there in front of a certain court to show a link and a compelling State interest. But anything that the Government could help establish in that area by funding something would be very helpful. And then as I mentioned, I think at least there should be a discussion of a rating system different than what we have, and I don't think the rating system we have is necessarily wrong, but I think it does pose some separate potential constitutional problems.

Chairman BROWNBACK. More information in the rating system?

Representative JOHNSON. No. A rating system that is done by a separate entity.

Chairman BROWNBACK. Outside group.

Representative JOHNSON. Yes.

Chairman BROWNBACK. We have been looking at that for some period of time, and this is one, you know, where you have got the manufacturers that set up the entity to rate it, it does not lend much confidence to me about the independence of that.

Professor Saunders, what should we do at the Federal level to be most helpful for these State and local efforts?

Mr. SAUNDERS. Clearly, anything that can be done to help further research on both the psychological and the neurological issues I think would be important. There is, of course, always the possibility of a Federal statute as well, and Congressional findings of fact may help to show up alongside the testimony that has been offered by psychologists.

Chairman BROWNBACK. Anything on ratings, any studies on target marketing? We have seen a number of people in the entertain-

ment industry target, market age-inappropriate material where they would take an M-rated item and market it to a 10-year-old?

Mr. SAUNDERS. The problem, of course, in that area is that it is not illegal to provide the material to children. If you are advertising illegal material to an audience—cigarettes to children, for example—then there is a legitimate basis to go about that. Not that I do not think it would be legitimate, but under the court's view of the First Amendment, children would have a right to this material.

So you are going to have to get around the problems that have been raised in the legal decisions so far in order to do what you are suggesting.

In terms of whether or not the ratings are adequate, I am not an expert in terms of the ratings, and I have been content so far to try to at least enforce the ratings. The games that the industry itself says are inappropriate to children, simply try to get stores not to sell those games to children. And the industry, despite saying these games are inappropriate for children, comes in and fights us in litigation and says we have a right to sell these games to children and children have a right to buy them.

Chairman BROWNBACK. Ms. Vance, I want to ask you, you represent the industry, have done so very effectively. A lot of these games turn your stomach, too, don't they, when you see these clips?

Ms. VANCE. I certainly would not bring some of those games home for my children.

Chairman BROWNBACK. And yet they are part of your industry group. They are manufactured by people that are part of your industry or association?

Ms. VANCE. Well, anybody can submit a game to the ESRB to be rated.

Chairman BROWNBACK. But I am having a little difficulty understanding. If you look at these and you are just saying, you know, killing a cop and then putting him on fire with gasoline and kicking him in the groin, that does not seem to be really encouraging scenery to put forward. Why wouldn't the organization itself just drum out people, saying, you know, look, we have got certain standards, we think this is important that people be able to have access to it? Why doesn't the industry itself police some of those items and saying this is just degrading to our industry?

Ms. VANCE. Well, our job is not to censor. Our job is to make sure that the product is accurately labeled, and all the games that were shown were—

Chairman BROWNBACK. I am not asking you to censor. I am asking you to look after your own industry.

Ms. VANCE. I represent consumers. That is my mission. I want to make sure that consumers are informed and the information is on all the packages and in all the advertising is informative. And the games that you are specifically referring to are all rated for 17 or 18 and older.

Chairman BROWNBACK. So there is nothing that would not be inappropriate for your industry to put out for sale?

Ms. VANCE. Again, our job is not to censor. Our job is to enforce the system that we have, which means that—

Chairman BROWNBACK. But I just want to understand that there is nothing that would come across the industry that you guys would say we just are not going to let you guys be a part of this industry, we are not going to allow you to be a part of this association. You are just saying, look, we do not censor anybody, so everything is legal and everything is OK.

Ms. VANCE. If it is a game, we will rate it. We can rate it in the most restricted categories, and we can apply a number of content descriptors that would be very informative to consumers before they purchase. But our job is not to censor.

Chairman BROWNBACK. Nothing inappropriate.

I noted, too, you were saying that most game aren't M-rated, yet in 2004, the top two video games sold were, No. 1, "Grand Theft Auto San Andreas," No. 2, "Halo." Both are M-rated, involving extreme violence and sexually explicit scenes.

Ms. VANCE. In 2004, there were three games in the top ten. In 2005, there were no M games in the top ten.

Chairman BROWNBACK. You were not fully representing things. You may have said "last year" but the year before—

Ms. VANCE. I did say "last year." I did say "last year."

Chairman BROWNBACK. But the year before that, I would hope you would fully represent the industry that is saying, now, wait a minute, we had a pretty good M-rated year in 2004.

Ms. VANCE. The games themselves in terms—

Chairman BROWNBACK. Is that true?

Ms. VANCE. I am sorry. The question was?

Chairman BROWNBACK. In 2004, your top two games were M-rated.

Ms. VANCE. They were, sir. They represented about 15 percent of the sales overall in the industry.

Chairman BROWNBACK. The top two rated in sales.

Ms. VANCE. They were.

Chairman BROWNBACK. So congratulations for selling a lot of violent games in—

Ms. VANCE. I did not sell them, sir. I just rated them, and they were both rated for 17 and older.

Chairman BROWNBACK. I am going to have to slip on out. We will go into recess until Senator Feingold can come back. I have got to get over and vote, and when he comes back, then he will reconvene for some more questions.

Thank you very much. We are in recess.

[Recess 3:50 to 3:56 p.m.]

Senator FEINGOLD. [Presiding.] I will call the Subcommittee hearing back to order, and I understand it is my opportunity to ask some questions of the panel, which I appreciate.

The factual questions that the first panel examined seem to have played a significant role in the court's evaluation of State and local regulations of video games. I understand the goals of these well-intentioned State and local legislators has been to protect children from possible ill effects of playing these games.

For the lawyers and the legislator on the panel, to what extend do each of your legal arguments about the constitutionality of these laws depend on whether violent video games can be proven to cause violent behavior in children? And, more generally, why do

you think courts have consistently struck down laws attempting to regulate violent video games? Let's start with Representative Johnson.

Representative JOHNSON. Thank you, Senator. I have paid most attention, to be honest, to the one case in my own jurisdiction, which is that Eighth Circuit case, and that court clearly struck down—one of the reasons it struck down the ordinance in that case was that there was scant, if any, evidence presented of a link between violent video games and behavior, negative behavior with kids.

My understanding, without being a scientist myself but just from sitting here even today, is that the science has advanced in the last 3 to 4 years, and so my belief is that there is more evidence to present, certainly a lot more evidence that was presented to that particular court. And without having thought through all the different arguments we could make, I think that is an important piece of my argument with respect to the constitutionality of our particular statute, that we are going to have to show that there is a compelling State interest. It is going to be hard to get past the protection that is there without showing that. So I believe that it is going to be necessary, but I also believe that we can do it.

Senator FEINGOLD. But in terms of all the different courts that have struck this down, obviously you are aware that there is a concern about content-based regulation.

Representative JOHNSON. Of course.

Senator FEINGOLD. Could you comment on that you acknowledge that—to what extent you acknowledge the danger of such things?

Representative JOHNSON. Oh, absolutely. I entirely agree, and that is why we have tried to craft such a narrow bill, because part of the argument in the other cases was that there was not enough evidence to show a compelling State interest, but there are also arguments in those cases that either the statute was unconstitutionally vague or was too broad, and we have tried to address all three of those issues, or at least the latter two that we can address, in our bill. So I think it is a unique bill in that way, and that is why I am hopeful at the very least that we could pass muster with the court.

Senator FEINGOLD. Thank you, Representative.

Mr. Smith.

Mr. SMITH. Yes, Senator, I think it is not simply a factual issue. As I said in my statement, there is a very, very high legal standard, which is the strict scrutiny standard, which is never—I cannot think of a single example in the history of the Federal courts where a content-based law which has been subjected to that level of scrutiny has been upheld. In addition, you have this *Brandenburg* principle that if your justification is we think the people who receive the speech are going to behave badly, that is not a justification categorically.

So I think there are very high legal hurdles that on their face are almost impossible to get over. There is, however, a factual problem as well. We had a trial last November in the Illinois case where the leading researcher in this area, who is an advocate of legal regulation, a psychologist, Dr. Anderson from Iowa State, took the stand and had to actually explain on cross-examination the lim-

itations of the research that is out there. And he acknowledged, as he had to, that there is no long-term causal inquiry that has ever been made into the effects of video games. The evidence of that kind is not there. But he also acknowledged that what studies do exist do not show that children are more vulnerable to effects than adults. They do not show that video games are any more severe in their effects, even under his standards, than television. And they do not show that the graphic kinds of games that we have seen here today have any more severe effects than the cartoonish games that are created for little children.

So the research that he himself was conducting and describing—and he does eight out of ten of the studies that anybody ever cites—is so limited in what it tells the courts that it does not even get them to first base, frankly.

Senator FEINGOLD. Well, I think it is useful that you make the clear distinction between causality and the legal standard, which are two important distinct issues.

Professor Saunders?

Mr. SAUNDERS. There are a lot of cases that have been cited here, and in my statement I talk about two of them—or really three of them in terms of obscenity, in terms of being not protected by the First Amendment, like pinball games and in terms of different layers of protection, different levels of protection from the First Amendment. But it is easiest to get the court to accept a challenge, I think, based on danger than on accepting a new view of the Constitution.

I think there are problems with judges understanding statistics. In that Illinois case, the judge said something to the effect of some studies do not show this kind of correlation, and some studies, in fact, show a negative correlation. And I am suggesting, you know, if you look at baseball statistics, I might out-hit—well, I would never do it, but I might have out-hit Ted Williams in one game, but that does not mean that I am a better hitter than he is, or was. It is over a season that you make those distinctions, and meta analysis which Dr. Anderson has done does tend to show—to even out the variations from study to study.

It surprises me that Professor Anderson made that admission, if he made that admission, because he has in one of his articles called violent video games "the perfect learning environment for violence," indicating that they are different from television.

Senator FEINGOLD. Thank you, Professor.

One more question. Mr. Smith and Professor Saunders, how have courts treated laws regulating the use of video games by children as opposed to adults? Is there anything comparable to the "harmful to minors" doctrine in the indecency context?

Mr. SMITH. The courts have repeatedly rejected that argument, that there should be a lesser standard, an argument that Professor Saunders made very eloquently in some of his published writings. But the courts in at least three circuits have said that there is no "harmful to minors" exception except for sexual content, obscenity. And that is the Eighth Circuit, the Seventh Circuit, and the Sixth Circuit have all rejected the notion that we are going to apply a lesser standard than strict scrutiny just because somebody comes in and says it is a violent and we should call it harmful to minors.

Senator FEINGOLD. Professor?

Mr. SAUNDERS. Mr. Smith is correct there. The Sixth Circuit cases were before my work was published in that area, but the Seventh Circuit case, the district court in Indianapolis accepted the theory, and the Seventh Circuit rejected it. The Eighth Circuit, it was not the focus of the arguments in those cases, but it was not accepted there either.

Senator FEINGOLD. It is my understanding the Chairman wants me to conclude the hearing. Is that correct? Or does he want to come back?

All right. Well, I believe the Chairman wants me to conclude the hearing. Let me thank the witnesses on both panels very much for your testimony and your hard work in responding to our questions. We look forward to working with you on this issue, and I thank you all.

This concludes the hearing.

[Whereupon, at 4:03 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

TO: **THE SENATE COMMITTEE ON THE JUDICIARY**
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS
WASHINGTON, D.C.

FROM: **JAY A. SEKULOW, ESQ., CHIEF COUNSEL**
STUART J. ROTH, ESQ., SENIOR COUNSEL
COLBY M. MAY, ESQ., DIRECTOR, WASHINGTON OFFICE
ERIK ZIMMERMAN, LAW CLERK
AMERICAN CENTER FOR LAW & JUSTICE, INC.

DATE: **MARCH 31, 2006**

RE: **COMMENTARY ON THE GOVERNMENT'S COMPELLING INTEREST IN RESTRICTING THE SALE OF VIOLENT AND SEXUALLY EXPLICIT VIDEO GAMES TO MINORS**

Introduction

The American Center for Law and Justice (ACLJ) is a nonprofit, public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family. ACLJ attorneys have argued First Amendment and other constitutional law cases before numerous federal and state courts across the United States.[1] The ACLJ, because of its interest in supporting effective parental involvement while preserving First Amendment rights, supports the

[1] *See, e.g., Locke v. Davey*, 540 U.S. 712 (2004); *McConnell v. FEC*, 540 U.S. 93 (2003); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *United States v. Kokinda*, 497 U.S. 720 (1990); *Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

enactment of restrictions on the sale of video games to minors that contain violent and sexually explicit content.

As video game technology has improved exponentially during the past several years, there has been a corresponding increase in the amount and detail of graphic violence and sexual content in games popular among minors. There is a well-established link between prolonged exposure to such graphic content and a host of destructive behaviors in minors. The United States government has a compelling interest in protecting children and society from the severe adverse affects of video game violence and sexual content and also in helping parents better monitor the kind of video games to which their children are exposed. A restriction on the sale of video games to minors will promote this compelling interest without imposing constitutionally significant burdens on the free speech rights of minors. Importantly, those who create and sell video games do *not* have a First Amendment right to sell violent and sexually explicit games to minors without parental approval because the law recognizes the decision-making authority of parents.[2] Also, this restriction will in no way infringe upon the First Amendment rights of adults seeking to buy video games.

I. There is a Great Need for Government Regulation of the Sale of Violent and Sexually Explicit Video Games to Minors Because Such Content is Widespread and Poses a Serious Risk to the Well-Being of Children.

Graphic violence and sexually explicit material in video games pose serious dangers to the well-being of American youth that require the attention of Congress.

A. Violent and Sexually Graphic Video Game Content is Rampant.

[2] *See, e.g., Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (upholding a federal law which allowed parents to require those mailing information to their home to remove their name and their minor children's names from the mailing list and stop all future mailings despite the fact that this included "protected" speech).

Unfortunately, video game violence and sexually explicit material is not an isolated occurrence. The video game industry's trend of promoting increased violence began in 1992 with *Mortal Kombat*. "*Mortal Kombat* revolutionized the realistic depiction of violence, featuring blood-soaked 'fatalities' that included a head and spinal column being ripped from a losing character's body."[3] Jeremy Geiske of *KidScore Game Reviews* described the newest installment in the *Mortal Kombat* series, *Mortal Kombat: Deception*, by stating:

> Gruesome deaths are a highlight of the game, and are strived for by the "best" players. Players can throw their enemies onto spikes, piercing their bodies, knock them into giant metal presses that crush them, amongst many other bloody options. Characters bleed profusely as they are hit. Secret moves include many ways to enact "fatalities," with the goal to "try them all out" and see how many ways there are to kill off the opponent. Even the background images are disturbing. In one level, for example, several lifeless corpses dangle from rope, their necks broken. When bumped into, they swing in arcs, getting in the way of the battles' fray.[4]

The *Grand Theft Auto* series, one of the most popular video game series in America, is probably the least popular series among critics of video game violence. Tom Loftus of MSNBC described the game as "an interactive ode to gang banging, California style."[5] *Grand Theft Auto* allows players to beat up drug dealers with bats, flatten pedestrians with cars, participate in car-jackings, and call each other "nigger."[6] In addition to violence, the game has a more racy aspect:

> You can carjack any car, go to the seedy part of town, beep the horn and pick up a prostitute. Then you take her to a dark street and the car starts shaking. When the prostitute jumps out, your money is down but your energy is full.[7]

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[3] Peter Hartlaub, *Parents: Do you Know What Video Games your Kids are Playing?*, SAN FRANCISCO CHRONICLE, Jan. 2, 2006.
[4] Jeremy Geiske, KidScore Game Reviews, *Mortal Kombat: Deception*, *at* http://www.mediafamily.org/kidscore/games_mortal_kombat_deception.shtml (last visited Mar. 30, 2006).
[5] Tom Loftus, *"Grand Theft Auto" Back with a Vengeance*, Nov. 5, 2004, *at* http://www.msnbc.msn.com/id/6399463/ (last visited Mar. 30, 2006).
[6] *Id.*
[7] Stephen A. Crockett, Jr., *For Young Fans, the Name of the Video Game is Gore*, WASHINGTON POST, at A10, Aug. 24, 2002.

The *Grand Theft Auto: San Andreas* game "literally has a series of snuff films built into the plot."[8]

Although the graphic content of *Mortal Kombat* and *Grand Theft Auto* may be the most well known, those games are not unique in the video game industry. In *State of Emergency*, "[p]layers smash store windows, shoot security guards and chop off people's heads with an ax. The head then can be used as a weapon."[9] Jeremy Geiske of *KidScore* described the game *Doom 3* by writing:

> Red is the color of *Doom 3*. Blood is everywhere. It stains the floors, it sprays wildly as demons are shot and is smeared across the screen when the player is injured. Most hallways are decorated by long streaks of blood, body parts and an occasional decapitated or mutilated body. A visit into a bathroom will reveal an arm floating in the toilet bowl. . . . [T]he screams of former coworkers can frequently be heard in the background.[10]

In the game *Primal Rage*, a character named Chaos uses the "Golden Shower" to disintegrate his foes by urinating on them.[11] The game *Eternal Champions* contains a gruesome video game death sequence that lasts over thirty seconds. The losing character falls down a pit and goes through four different levels of gears and saws. As the character passes through each level, bones are broken and skin is lost until eventually only his skull remains, disintegrating when it finally reaches the bottom of the pit.[12] The game *Soldier of Fortune* "features 26 different 'killing

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[8] Hartlaub, *supra* note 3.
[9] *Id.*
[10] Jeremy Geiske, KidScore Game Reviews, *Doom 3*, *at* http://www.mediafamily.org/kidscore/games_doom_3.shtml (last visited Mar. 30, 2006).
[11] *See* http://www.gamesurge.com/strategies/Gameboy/Walkthroughs-P/Primal%20Rage.shtml (last visited Mar. 30, 2006).
[12] *See* http://www.whipassgaming.com/images/genesis/eternalchampdemo/midknight_overkill.gif (last visited Mar. 30, 2006).

zones' in the body and employs the first-person mode, which allows the player to view violence through the eyes of the video game character."[13]

One of the most troubling examples of video game violence comes from *Resident Evil 4*. Among the game's most graphic murder scenes is a sequence where a policeman is decapitated by a chainsaw wielding zombie.[14] The game is unique in that it actually puts a tangible, blood-soaked weapon into the hands of the player. Fans of *Resident Evil 4* can purchase the Chainsaw Controller complete with blood spatters and sound effects. As *amazon.com* explains:

> Based on a chainsaw found in the game, Resident Evil 4, the reddish-orange color and blood spatters make this controller more realistic than ever! However, the gore doesn't stop there. The Chainsaw Controller is housed inside a unique package, and there's even a "pull cord" located on the device itself that can be used to start the game—complete with a chainsaw roar![15]

The Chainsaw Controller provides children an experience the video game alone cannot give them: the thrill of wielding a tangible weapon.

This small sampling of the type of violence and sexual content available to children in video games is sufficiently disturbing to justify government intervention. The government has a compelling interest in helping to ensure that minors do not have access to video games that enable them to repetitively simulate gruesome acts of violence and vulgar sexual conduct without the knowledge or consent of their parents.

B. Prolonged Exposure to Violent and Sexually Graphic Images Poses a Grave Danger to the Psychological and Emotional Well-Being of Children.

An increasing amount of empirical evidence has shown that sustained exposure to violent and sexually graphic images can dramatically harm a child's development. The positive effects

[13] Douglas A. Gentile et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 27 JOURNAL OF ADOLESCENCE 5 (2004).
[14] *See* http://video.google.com/videoplay?docid=-1907403863858065985&q=Resident+Evilgoogle (last visited Mar. 30, 2006).
[15] *See* http://www.amazon.com (last visited Mar. 30, 2006).

that educational video games can have on children have long been recognized. Many schools have computer labs where students can play educational games and parents often buy educational games to help their children learn. One does not need to review empirical research to conclude that minors—especially younger children—learn behavior, values, and analytical skills from the games that they play. Although this conclusion is certainly true for both educational and violent video games, some have been reluctant to acknowledge that games can negatively impact children:

> It is ironic, though not surprising, that even though the studies documenting positive effects as a set are considerably weaker than the studies documenting negative effects of violent games; people seem to want to believe that video games can have positive effects but not that they can have negative effects.[16]

Douglas Gentile and Craig Anderson conducted an informative survey of the various studies documenting the negative effects on minors associated with violent and sexually graphic video games. After comparing all of the relevant studies, they concluded:

> [In] *all* of the studies conducted, video game violence exposure is positively associated with aggressive behavior . . . aggressive affect . . . aggressive cognition . . . and negatively associated with helping or prosocial behavior.[17]

In August 2005, the American Psychological Association decided that "due to the evolution of violence in video games and interactive media and the potential for greater effects on children by the interactive nature of the video games versus the passive nature of film and TV,"[18] it had become necessary to publish a *Resolution on Violence in Video Games and Interactive Media.*[19]

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[16] Douglas A. Gentile & Craig A. Anderson, *Violent Video Games: The Effects on Youth and Public Policy Implications*, *in* HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 229 (Nancy E. Dowd et al. eds., 2006).
[17] *Id.* at 232 (emphasis added).
[18] E. Packard, *APA Adopts Resolution on Violence in Video Games and Interactive Media*, MONITOR ON PSYCHOLOGY, at 70, Jan. 1, 2006.
[19] The American Psychological Association, *Resolution on Violence in Video Games and Interactive Media*, *available at* http://www.apa.org/releases/resolutiononvideoviolence.pdf (last visited Mar. 30, 2006).

Among other things, this Resolution states that "the practice, repetition, and rewards for acts of violence may be more conducive to increasing aggressive behavior among children and youth than passively watching violence on TV and in films."[20] Another study found that "[a]dolescents who expose themselves to greater amounts of video game violence [are] more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school."[21] Other researchers concluded that "[p]laying the violent video game Doom led participants to associate themselves with aggressive traits and actions . . . . [P]laying violent video games can lead to the automatic learning of aggressive self-views."[22]

In a 1999 report, the Senate Committee on the Judiciary determined that violent video games increase the likelihood of child aggression.[23] Some authorities have determined that "the more often children practice fantasy acts of violence, the more likely they are carry to out real-world violent acts." This is quite disturbing considering the fact that, in a 1993 study of the video game preferences of seventh and eighth grade students, over half selected "fantasy violence" or "human violence" as their favorite category of game. One researcher characterized some violent video games as sophisticated simulators like those used in military training. Indeed, Lt. Col. Dave Grossman warned, "We're not just teaching kids to kill. We're teaching them to like it."

In addition, the Federal Bureau of Investigation has listed video games as one of the activities to watch for in threat assessments for potential school shooters. The threat assessment perspective issued in 2000 noted that one of the characteristics to look for in a high risk student

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[20] *Id.*
[21] Gentile et al., *supra* note 13, at 5.
[22] Eric Uhlmann & Jane Swanson, *Exposure to Violent Video Games Increases Automatic Aggressiveness*, 27 JOURNAL OF ADOLESCENCE 41 (2004).
[23] *Children, Violence, and the Media: A Report for Parents and Policy Makers: S. Comm. of the Judiciary*, 106th Cong. (Sept. 14, 1999), *available at* http://judiciary.senate.gov/oldsite/mediavio.htm (last visited Mar. 30, 2006).

was "someone who spends inordinate amounts of time playing video games with violent themes, and seems more interested in the violent images than in the game itself."[24] The report added:

> [T]his does not mean that most people who play violent video games will later become violent. It *does* mean that their risk is elevated. If there are additional risk factors, the risk is further elevated. With enough risk factors, it becomes extremely likely that an individual will behave with inappropriate aggression at some point.[25]

While violent video game usage corresponds with active negative behavior in children, it also has a relationship with a diminished desire to be helpful or sympathetic toward others. Studies that have tracked children's behavior over long time periods have concluded:

> [C]hildren who had high exposure to violent video games changed over the school year to become more verbally aggressive, more physically aggressive, and less prosocial (as rated by their peers and teachers . . .). It appears that not only does repeated exposure to violent video games increase aggressive behavior, but it also decreases empathic helpful behavior.[26]

In sum, "the medical, public health, and psychological scientific communities have repeatedly stated [that] the scientific debate about *whether* there are harmful effects of media violence is over. . . . [I]t is time to move on to the more difficult public policy questions."[27]

C. Regulation is Needed to Address this Problem.

Since video game programmers have long since abandoned any attempt to keep the content of their games within generally accepted bounds of decency, the government must intervene to help parents protect their children. The effect of parental reviewing of video game usage on the behavior of children cannot be overstated. The empirical evidence shows that "[j]ust as playing violent video games is a risk factor for negative outcomes for children, active

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[24] M.E. O'Toole, U.S. Dep't of Justice, Federal Bureau of Investigation, *The School Shooter: A Threat Assessment Perspective* 20 (2000).
[25] Gentile & Anderson, *supra* note 16, at 234.
[26] *Id.* at 231.
[27] *Id.* at 241.

parental involvement in children's video games appears to be a proactive factor."[28] There is evidence that "[p]arents who put limits on the amount and content of games that children play have children who get better grades and have fewer aggressive outcomes."[29] In fact, "[a]lthough boys are more likely than girls to be involved in physical fights, if their parents are more involved in their media habits, their risk of fighting is decreased." Furthermore, "although girls are less likely overall to get into physical fights, if their parents are involved in their media habits, their risk for fighting is diminished by almost half."[30]

Prohibiting the sale of violent or sexually explicit video games to minors would bolster the ability of conscientious parents to monitor their children's video game usage. There is little meaningful parental control under the current system as minors may typically buy games with violent or sexually explicit content without their parents' knowledge or consent. Moreover, a seemingly innocent game may, without adequate warning, include sexually or violently graphic imagery. Such material may be randomly interspersed with more appropriate content, or may be effectively hidden from all but the most technologically savvy parents because it can only be unlocked through a special code found in gaming magazines and on Internet websites popular among minors. Restricting video game sales to minors would certainly help parents protect their children.

II. The Government has a Compelling Interest in Regulating the Sale of Violent and Sexually Explicit Video Games to Minors.

[28] *Id.* at 238.
[29] *Id.*
[30] *Id.* at 234.

Courts apply strict scrutiny in cases where the government seeks to directly regulate the content of speech that is protected by the First Amendment.[31] For a restriction to withstand strict scrutiny, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[32] Courts have applied strict scrutiny in cases dealing with restrictions on video games[33] because the definition of "obscenity," which is not protected by the First Amendment, does not include graphic violence or most sexual images.[34] Thus, the federal government must show that it has a compelling interest in helping parents to protect their children from violent and sexually explicit video game content.

A. The Government Has a Compelling Interest in Helping Parents Protect their Children From Violent and Sexually Graphic Video Games.

The Supreme Court has long recognized that the "protection of children is a compelling interest."[35] The government has "a compelling interest in protecting the physical and psychological well-being of minors [which] extends to shielding minors from the influence of literature that is not obscene by adult standards."[36]

> It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation

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[31] *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). "The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).
[32] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *see also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).
[33] *See Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Video Software Dealer's Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealer's Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005); *Entm't Software Ass'n v. Granholm*, 404 F. Supp. 2d 978 (D. Mich. 2005).
[34] *See Miller v. California*, 413 U.S. 15, 24 (1973).
[35] *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 755 (1996).
[36] *Sable Communications*, 492 U.S. at 126; *see also Ginsberg v. New York*, 390 U.S. 629, 640 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

> aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.[37]

This compelling interest stems from the fact that, "although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs."[38] "The state's authority over children's activities is broader than over like actions of adults. . . . What may be wholly permissible for adults therefore may not be so for children."[39] Common sense recognizes that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . . . Parents can and must make those judgments."[40] The Supreme Court has explained that "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."[41]

With regard to the First Amendment, the Supreme Court has recognized that the government has the ability to "adopt more stringent controls on communicative materials available to youths than on those available to adults."[42] For example, in *United States v. American Library Association*,[43] the Supreme Court upheld the Children's Internet Protection Act which sought to prevent minors from accessing harmful Internet material in public libraries. After noting that adults could have library Internet filters disabled upon request, Justice Kennedy stated in his concurring opinion:

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[37] *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (citations and quotations omitted).
[38] *See Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (Powell, J., plurality).
[39] *Prince*, 321 U.S. at 168-69.
[40] *Parham v. J.R.*, 442 U.S. 584, 603 (1979).
[41] *Bellotti*, 443 U.S. at 638-39 (Powell, J., plurality).
[42] *FCC v. Pacifica Found.*, 438 U.S. 726, 757 (1978) (Powell, J., concurring) (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975)).
[43] *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

> There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.[44]

Legislative attempts to help parents to protect their children from harmful materials have long been upheld as an appropriate exercise of government authority.

> The well-being of its children is of course a subject within the State's constitutional power to regulate . . . . [C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.[45]

"The Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."[46]

> [There are] three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to male critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.[47]

Regulation of the sale of violent and sexually explicit video games to minors serves the government's compelling interest in protecting children. This is just one example of how "[t]he State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."[48] Such regulation would support the efforts of parents that desire to protect their children from the

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[44] *Id.* at 215 (Kennedy, J., concurring).
[45] *Ginsberg*, 390 U.S. at 639.
[46] *Bellotti*, 443 U.S. at 635 (Powell, J., plurality).
[47] *Id.* at 634 (citation omitted).
[48] *Id.* at 637.

harmful effects of violent video games. By requiring that an adult purchase violent video games for minors, the government empowers parents to make decisions about what is best for their children. Since parents cannot monitor their children at all times, and those who sell violent and sexually graphic video games continue to sell them to minors, the government may act *in loco parentis* to help parents more effectively control their children's access to harmful games.

Although the government's compelling interest in protecting children from inappropriate video games is clearly supported by empirical evidence of the relationship between minors' video game usage and a host of negative behaviors, some courts have disagreed. For example, in *American Amusement Machine Association v. Kendrick*, the United States Court of Appeals for the Seventh Circuit refused to uphold a city ordinance restricting the sale of violent video games to minors.[49] In the Court's view, the city had failed to show that the ordinance served a compelling interest because the studies the city relied upon failed to show that video games "have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the level of violence to increase anywhere."[50] Similarly, in *Video Software Dealers Association v. Schwarzenegger*, a district court held that a "four-and-a-half-page bibliography" of evidence relied upon by the California legislature did not sufficiently establish that the government had a compelling interest in regulating video games.[51] The court stated that, while the bibliography included articles "dealing with the relationship between violence and video games," the research failed to "establish a solid causal link between violent video game exposure and aggressive thinking and behavior."[52]

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[49] *Kendrick*, 244 F.3d at 573-74, 580.
[50] *Id.* at 578-79.
[51] *Schwarzenegger*, 401 F. Supp. 2d at 1046.
[52] *Id.* (citation omitted); *see also Interactive Digital Software Ass'n*, 329 F.3d at 956-59 (enjoining an ordinance that restricted the sale or rental of violent video games to minors because the evidence offered by the County—the

A federal restriction on the sale of inappropriate video games to minors must be accompanied by extensive findings and research regarding the link between video game exposure and criminal or aggressive behavior by minors. The weight and credibility of the evidence relied upon by the government has been a key factor in cases involving video game regulations. In other words, the more empirical evidence there is showing the link between video game violence and antisocial behavior, the easier it is for the government to prove that it has a compelling interest in restricting the sale of violent games to minors. Courts will likely show more deference to the factual findings of Congress on this issue than the findings of state legislatures or municipalities, especially since hearings have been conducted and evidence has been gathered.

Additionally, restricting minors' access to harmful video games is a preventative measure that will promote the public welfare. The state has "an independent interest in the well-being of its youth" which is "to protect the welfare of children and to see that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens."[53] Any effort designed to limit the likelihood that a child will grow up to become a violent criminal—such as a restriction on the sale of violent video games to minors—benefits the government itself as well as the general public. Decreasing the number of potential violent criminals will lessen the number of people that will become the victims of crime and will also help to limit the high cost of prosecuting and imprisoning offenders that is borne by the taxpaying public.

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testimony of a psychologist, council members, and a high school principal—was "conclusory" and "ambiguous" and was not "substantial supporting evidence" demonstrating the link between video games and harmful behavior).

[53] *Ginsberg*, 390 U.S. at 640-41 (internal quotations omitted).

It is clear that the protection of children from the harmful effects of violent and sexually graphic video game content is an exceedingly compelling interest supported by empirical evidence.

B. A Restriction on the Sale of Violent and Sexually Graphic Video Games to Minors is Narrowly Tailored to Advance the Government's Compelling Interest.

Restricting video game sales to minors would be narrowly tailored because it would not restrict any more speech than necessary to advance the government's compelling interest in protecting minors. While it may be possible to imagine some less restrictive alternative course of action, it is only relevant for First Amendment purposes if it is as practical and effective as the means actually chosen by the government to achieve its goal.[54] Without some measure of leeway, "the undoubted ability of lawyers and judges to imagine *some* kind of slightly less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being."[55] Legislation is narrowly tailored if it is "reasonably restricted to the evil with which it is said to deal."[56]

Limiting the ability of minors to obtain objectionable video games is a narrowly tailored option because it neither prevents any adults from obtaining such material nor keeps any parent from purchasing the material for their minor children. While restrictions on objectionable television or Internet content designed to protect children inherently pose some risk that the activity of adults will also be affected, a restriction on the sale of violent or sexually explicit video games to minors would have no impact upon the availability of such materials to adults. In other words, regulation of video game sales to minors would not reduce the adult population to

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[54] *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 840 (2000) (Breyer, J., dissenting); *Reno v. ACLU*, 521 U.S. 844, 874 (1997).
[55] *Playboy Entm't Group, Inc.*, 529 U.S. at 841 (Breyer, J., dissenting).
[56] *Butler v. Michigan*, 352 U.S. 380, 383 (1952).

playing only those games that are suitable for children. A video game sales restriction would operate in a similar fashion to existing limits on the sale of alcohol, tobacco, and adult magazines to minors. Such restrictions leave minors, the very group that the government seeks to protect, as the only group directly affected by the regulations. The government may ensure that the decision of whether a minor is mature enough to play a particular video game will be placed in the hands of a responsible adult.

At least two courts addressing the "narrowly tailored" prong in cases dealing with video game restrictions have identified specific problems that can easily be avoided in future legislative actions.[57] *Video Software Dealer's Association v. Maleng* involved a statute that applied to video games where the realistic violence was directed toward law enforcement officers.[58] The district court stated that the statute was problematic because it included unintentional violence toward law enforcement officers but did not restrict many of the most violent games that did not depict violence toward law enforcement officers. This problem can be avoided by a regulation that does not single out one type of violence (i.e. against law enforcement officers) and focuses instead on a more general ratings system that takes all forms of violence into account. *Entertainment Software Association v. Granholm* involved the dissemination of video games that contain "[e]xtreme and loathsome violence" to minors. Although the state attempted to clarify the meaning of "extreme and loathsome violence," the court determined that the law would have a "chilling effect" on the production and sale of video games due to the fear of criminal penalties. Any proposed regulation should specifically define which video games are subject to the law by referring to an independent rating system like the

[57] *See Entm't Software Ass'n*, 404 F. Supp. 2d at 978; *Maleng*, 325 F. Supp. 2d at 1180.
[58] *Maleng*, 325 F. Supp. 2d at 1189-90.

one used in the movie industry rather than generally prohibiting the sale of violent games. An independent rating system would ensure that the law is narrowly tailored and would eliminate any potential "chilling" effect by clarifying exactly which games are safe to sell to minors.

The court in *Maleng* provided a three-part analytical framework for future video game regulation cases. First, "does the regulation cover only the type of depraved or extreme acts of violence that violate community norms and prompted the legislature to act?"[59] Incorporating an independent ratings scheme by law should ensure that only games containing "the type of depraved or extreme acts of violence that violate community norms" will be subject to the sales restriction. Second, "does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint or status?"[60] A ratings-based restriction on all games containing graphic violence would avoid the viewpoint discrimination problems present in *Maleng*. The final *Maleng* criterion is whether "social scientific studies support the legislative findings at issue."[61] As discussed previously, it is clear that empirical evidence supports the finding that violent and sexually explicit video games have a substantial harmful effect on the children exposed to them. A limitation on minors' ability to buy this type of game is a reasonable, narrowly tailored means of promoting the government's compelling interest in protecting children and promoting parental involvement.

C. Regulation of the Sale of Violent and Sexually Explicit Video Games to Minors is Similar to Other Valid Government Efforts to Protect Children From Harmful Materials.

Legislation dealing with video game violence and sexuality would be very similar to previous attempts to protect children from harmful materials that have been upheld in the face of

[59] *Id.* at 1190.
[60] *Id.*
[61] *Id.*

court challenges. The Government has a long track record of restricting minors' access to potentially dangerous products such as alcohol, tobacco, firearms, adult magazines, and R-rated movies. Video games pose a unique harm to children because, unlike many other harmful products, they are primarily designed for minors. Many video game outlets and toy stores popular among minors stock violent games and allow children to test games on unsupervised video game consoles. This may give children, "even those too young to read,"[62] access to violent and sexually explicit video games without parental consent or knowledge.

Restrictions on video game sales to minors are similar to the restriction on minors' access to indecent sexual material upheld in the *Ginsberg* case. The Court in *Ginsberg* noted that "[t]he world of children is not strictly part of the adult realm of free expression . . . [R]egulations of communication addressed to them need not conform to the requirements of the First Amendment in the same way as those applicable to adults."[63] As a result, the government may regulate a minor's access to materials (like indecent sexual material or violent video games) that are found to be harmful.

> [T]he concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.[64]

The same logic applies with regard to protecting children through restrictions on the sale of objectionable video games or adult magazines.[65]

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[62] *Pacifica Found.*, 438 U.S. at 749.
[63] *Ginsberg*, 390 U.S. at 639, n.6 (citation omitted).
[64] *Id.* at 636 (citation omitted).
[65] *See Upper Midwest Booksellers Ass'n. v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) (upholding ordinance requiring material harmful to minors to be packaged in a sealed wrapper).

In the *Pacifica* case, the Supreme Court upheld regulation of indecent broadcasting during hours minors would most likely be in the audience.[66] The Court found two main justifications for the regulation of broadcasting—the "pervasive presence" of the media "in the lives of all Americans" and the fact that it was "accessible to children, even those too young to read." Specifically, the Court held that "the government's interests in the well-being of its youth and in supporting parents' claim to authority in their own household . . . [coupled with the] ease with which children may obtain access to broadcast material . . . amply justify special treatment of broadcasting."[67] These same concerns also justify regulating minors' access to violent and sexually explicit video games given their accessibility to children. This would give parents much needed support in maintaining proper supervision of their children in the face minors' unprecedented access to a wide variety of media, including video games.

The regulation of video games to protect children is also similar to restrictions on minors' access to inappropriate movies. In *Interstate Circuit, Inc. v. City of Dallas*, the Supreme Court considered the constitutionality of a city ordinance which imposed penalties for exhibiting movies to children under 16 that are "not suitable for young persons."[68] The Court stated that "it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places."[69] The Court explained that "a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults."[70] While the Court acknowledged the importance of

[66] *Pacifica Found.*, 438 U.S. at 729.
[67] *Id.* at 748-50.
[68] *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).
[69] *Id.* at 684 (internal quotations omitted).
[70] *Id.* at 690 (citations omitted).

protecting children from harmful material, it held that the ordinance did not clearly specify the content that minors were prohibited from viewing.

Video game regulations based upon an independent rating scheme rather than a vague standard like "not suitable for young persons" should withstand constitutional scrutiny. The regulation of video game sales to minors is amply justified, as more than 228 million computer and video games were sold in 2005.[71] The easy accessibility of broadcast radio highlighted in *Pacifica* is analogous to the easy accessibility of graphic video games to children in today's society. The rationale of decisions like *Pacifica* and *Ginsberg* support the regulation of video game sales to minors to advance the government's compelling interest in protecting children.

Conclusion

The ACLJ supports the regulation of the sale of violent and sexually explicit video games to minors. This is the most effective way to address widespread parental concern over the inappropriate video game content reaching their children. The regulation of video game sales to minors would effectively serve the government's compelling interest in protecting children and helping parents to effectively monitor their children's video game usage. The regulation is constitutionally permissible and should be adopted.

[71] Entertainment Software Association, *Top Ten Industry Facts*, *available at* http://www.theesa.com/facts/top_10_facts.php (last visited Mar. 30, 2006).

Statement of
Crossan R. Andersen
President, Video Software Dealers Association

Hearing on
State Regulation of Violent Video Games and
The First Amendment

Subcommittee on the Constitution,
Civil Rights and Property Rights
Committee on the Judiciary
United States Senate

March 29, 2006

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Mr. Chairman,

In the past five years, six federal courts – applying black-letter First Amendment law – have enjoined local and state laws that attempted to restrict minors from playing, purchasing, or renting video games containing fictitious violent imagery. On behalf of the video retail outlets it represents, the Video Software Dealers Association (VSDA) has been a plaintiff in five of the six lawsuits, and we submitted an amicus brief to the Court of Appeals for the Seventh Circuit in the sixth case. VSDA also was a plaintiff in an earlier, seminal constitutional challenge to state regulation of depictions of violence in entertainment, *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

VSDA opposes the enactment of laws restricting minors' access to motion pictures and video games based on the depictions of violence in them because we are committed to protecting the First Amendment rights of retailers and their customers. The association's advocacy is not driven by abstract legal theories or economic calculations. Rather, it is propelled by the recognition that video games and other forms of entertainment can educate, amuse, inspire, challenge, and bring people together and that society is invigorated if individuals and families can decide for themselves, without the interference of government, what they shall see, read, hear, and play.

VSDA also has operational concerns about the proposals, as most lack meaningful standards that would allow retailers and their clerks to determine which materials are covered. We do not believe that retail clerks should be placed at risk of criminal sanctions if they unwittingly cross an unknowable line, as would result from some of the proposals.

Finally, while we must oppose legal restrictions, the home video industry understands we have an important role to play in helping ensure that children do not gain access to videos and video games their parents deem inappropriate for them. VSDA and its members are committed to actively assisting parents in this regard.

Enacted Restrictions Violate the First Amendment

There is no serious question that video games, like other forms of entertainment, are speech covered by the First Amendment. *See Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957-58 (8th Cir. 2003); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1056 (N.D. Ill. 2005); *Entertainment Software Ass'n v. Granholm*, 404 F. Supp. 2d 978, 981-82 (E.D. Mich. 2005); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1044 (N.D. Cal. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1184-85 (W.D. Wash. 2004).

It is also beyond dispute that minors have significant First Amendment rights, and "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975); *see also Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511-14 (1969); *Rabeck v. New York*, 391 U.S. 462 (1968).

U.S. Supreme Court decisions on entertainment products make it clear that, in order for government restrictions on video or computer games to be permissible, either: the material must be legally "obscene" or "obscene for minors"; or the restriction must be based on a compelling state interest and be narrowly tailored to alleviate the asserted harm. The state and local restrictions on video games that were challenged in the six lawsuits have met neither of these criteria.

In order for materials to be restricted as "obscene" or "obscene for minors," the material must be sexual in nature. *See Roth v. U.S.*, 354 U.S. 476, 487 (1957) ("Obscene material is material which deals with sex in a manner appealing to prurient interest.").

While sexual material can fail to qualify for First Amendment protection based on the grounds that it is obscene or obscene for minors, courts have repeatedly held that material that depicts violence but is not sexually oriented cannot be classified as obscenity. In *Winters v. New York*, 333 U.S. 507 (1948), the Supreme Court found that the magazines before it were "nothing but stories and pictures of bloodshed and lust." *Id.* at 512. Even though the Court saw "nothing of any possible value to society" in them, it nevertheless held that the magazines were protected by the First Amendment. *Id.; see also American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 574-76 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (obscenity law does not cover non-sexual depictions of violence); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d at 958 ("Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults."); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) ("Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene"); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1185 (obscenity law does not cover non-sexual depictions of violence); *Sovereign News Co. v. Falke*, 448 F. Supp. 306 (N.D. Ohio 1977) (only material that is sexual in nature may be construed as obscene); *State v. Johnson*, 343 So.2d 705, 709-10 (La. 1977) (prohibiting the sale of violent materials to minors exceeds permissible restrictions of obscene materials).

Likewise, courts have consistently found that states and localities have been unable to prove the existence of a compelling interest that could justify restrictions on minors' access to video games containing depictions of violence. *See American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 ("unlikely" that there could be a compelling state interest that could justify a restriction on minors' access to depictions of violence); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d at 958-60 (county failed to prove that violent video games cause psychological harm to minors, and governments may not "undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority"); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d at 1073-76 (rejecting studies that purport to show a causal relationship between playing violent video games and aggression or diminished brain functioning in minors); *Entertainment Software Ass'n v. Granholm*, 404 F. Supp. 2d at 982 ("it is unlikely that the State can demonstrate a compelling interest in preventing a perceived 'harm'"); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d at 1045-46 ("This court anticipates that the defendants ... may face ... problems proving the California legislature made 'reasonable inferences based on substantial evidence.'"); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1186-89 ("the court finds that the Legislature's belief that video games cause violence, particularly violence against law enforcement officers, is not based on reasonable inferences drawn from substantial evidence").

Enacted Restrictions Lack Meaningful Standards

The enacted restrictions suffer from a second constitutional infirmity: they provide no meaningful standards that would permit a conscientious retailer or clerk to know which video games are covered by the restrictions. The lack of meaningful standards is particularly worrisome where a violation would be a criminal offense. (For example, the ordinance that was successfully challenged in the *Interactive Digital Software Ass'n v. St. Louis County* case threatened retail clerks with a maximum penalty of one year in jail and a $1,000 fine. St. Louis County Ordinance No. 20,193 (Oct. 26, 2000)). No retail clerk should suffer the ignominy of a criminal record or incarceration where no reasonable person could determine whether a particular video game may legally be sold or rented to a minor.

Video games are complex, multi-layered, non-linear stories in which the players control the action, and thus the narrative of the game. It is impossible for a clerk to know every depiction that can appear in the numerous variations of every video game on the shelves of their store. But as noted in *Video Software Dealers Ass'n v. Maleng*, "The problem is not ... that a retail clerk might be unaware of the contents of a particular game... The real problem is that the clerk might know everything there is to know about the game and yet not be able to determine whether it can be legally sold to a minor." 325 F. Supp. 2d at 1190-91. The task is complicated by the fantastic nature of many video game characters. Aliens, zombies, supernatural beings, and other creatures that combine imaginary and human-like characteristics are common. Characters can appear to die or suffer grievous injuries, but reappear later with no apparent harm. Yet the challenged laws would apply real-world standards of violence to the fictional and fanciful world of video games, an environment in which they have no meaning.

A case in point is Part II of Michigan 2005 Public Act 108, which would impose civil penalties on retailers of video games for selling or renting to persons under age 17 an "ultra-violent explicit video game that is harmful to minors."[1]

A game is defined in the Act as "an ultra-violent explicit video game" if it "continually and repetitively depicts extreme and loathsome violence." "Extreme and loathsome violence" is defined as "real or simulated graphic depictions of physical violence against parties who realistically appear to be human beings, including actions causing death, inflicting cruelty, dismemberment, decapitation, maiming, disfigurement, or other mutilation of body parts, murder, criminal sexual conduct, or torture." As Federal District Judge George Caram Steeh noted in granting the preliminary injunction,

> There is a serious problem in determining which games are prohibited to be sold or displayed to minors under the Act. Without wholesale, indiscriminate refusals to sell video games to minors by store operators it appears impossible to protect sellers from prosecution. Store clerks cannot rely on the industry's voluntary rating system, other than potentially to invoke one of the affirmative defenses provided in the Act. Nor is it reasonable to expect store clerks to play each level of each game to determine if it falls within the Act's definition of ultra-violent explicit. Indeed, very few experienced video players can successfully reach the highest levels of many games in order to view their content. At oral argument, when asked by the court how a retailer could avoid criminal penalties under the Act, the attorney for the State suggested that a video retailer could call plaintiff's attorney to determine if a particular video game has ultra-violent explicit content. This is all but a direct concession that a retailer cannot reasonably, economically, or easily make a determination whether the content of a particular video game is prohibited under the Act as to minors.

Entertainment Software Ass'n v. Granholm, 404 F. Supp. 2d at 983.

Empowering Parents

The final failing of the legal restrictions on minors' access to video games that contain depictions of violence is that there are more effective avenues for making sure that children do not obtain video games that their parents do not want them to have, and these alternatives are less burdensome on constitutionally protected speech.

VSDA starts with the premise that the best control of entertainment is parental control.

It encourages parents to take a few simple steps to ensure that the videos and video games brought into their homes are appropriate for their family. The following is an excerpt from our advice to parents:

- "First, look at the rating and the content descriptors and use them to make sure the video or video game is appropriate for your child. All video games and most motion picture

[1] This statute, which is the subject of the *Entertainment Software Ass'n v. Granholm* lawsuit, has been preliminarily enjoined.

videos sold in a store carry a rating. Complementing the rating is a 'content descriptor' that explains why the movie or game got the rating that it did.

- "Second, watch the videos and play the video games with your children. Talk to your children about them. Make sure they understand what they are about, and what they can learn from them.
- "Third, set appropriate limits. Like any form of entertainment, videos and video games should not be permitted to interfere with school work, exercise, and other important activities.
- "Finally, for those lucky enough to have an Xbox 360 video game console, check out the parental controls. You can set the console so that Mature- and Adult Only-rated video games will not play on the system. (The soon-to-be-released PlayStation 3 and Nintendo Revolution will also contain parental-control mechanisms.)"

Video retailers are committed to assisting parents in making well-informed entertainment choices for their families and preventing children from buying or renting videos and video games their parents do not want them to have. Retailers do this through the "Pledge to Parents" program used by Movie Gallery and many other VSDA members and the similar, company-specific programs used by Blockbuster, Hollywood Video, and others.

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

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

In addition, as part of Pledge to Parents and similar programs, many video specialty retailers solicit from customers written instructions regarding what types of videos and video games can be rented by family members. These parental instructions become part of the check-out process and govern the transaction in those few occasions where the parent is not present at check-out. Thus, the voluntary systems of video stores allow parents, if they so choose, to be even more restrictive than any government-enforced system would be.

The Federal Trade Commission has found that "[p]arents have significant controls over the videos their children rent because of limitations established by the major rental outlets" and the rental of videos "requires a degree of parental involvement." Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* 20, 21 (2000). We believe these findings apply to the vast majority of other chains and independent video retailers, as video stores of all sizes have effective ratings enforcement policies.

Major mass merchant retailers that sell video games have also implemented policies to prohibit the sale of Mature-rated video games to minors. (As a matter of policy, major retailer do not sell video games rated "Adults Only.")

Since the full implementation of these policies by video game retailers, the ability of minors to purchase Mature-rated video games has been dramatically curtailed. The National Institute of Media and the Family (NIMF) annually sends persons under the age of 17 to stores to see if they can purchase Mature-rated games. In 2000, these purchasers were turned down only 19% of the time. In recent years, NIMF has found that these purchasers are now turned down between 56% and 66% of the time.

In addition, retailers educate parents about motion picture and video game ratings through posters, brochures, shelf talkers, kiosks, other in-store signage, and their websites. Placement of these materials varies, but video retailers try to place them so that they are prominent and noticed by parents. Some even add their own advisories. The most recent survey of retailer signage conducted by the Entertainment Software Rating Board, which covered more than 8,100 retail locations, found that 79% of the stores had signs explaining the video game rating system.

These rates of voluntary ratings enforcement and education can and will improve, and the progress made to date suggests that these cooperative endeavors are preferable to government-imposed restrictions.

Parents in Control

Parenting, if done conscientiously, involves a degree of "censorship." Every day parents make choices concerning what is appropriate for their children. They seek to shield them from crass language and harsh images when they are young and make individual judgments about exposing them to life's harsher realities as they mature. This is a course that can only be charted by parents, individually for their children, respecting their children's maturity and personalities. Retailers can effectively assist parents with ratings education and, in the absence of parental involvement, with voluntary ratings enforcement. The fact that parents can and do "censor" their children does not mean the government can step in if legislators believe some parents are engaging in "inappropriate child rearing," as reportedly asserted by the sponsor of one of the state video game restriction laws. Not every parent will get it right every time. But only parents can effectively make the individual judgments needed to raise youth to become responsible citizens.

We appreciate the opportunity to share our views with the subcommittee.

Video Software Dealers Association

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

March 29, 2006

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution,
Civil Rights and Property Rights

Hearing on "State Regulation of Violent Video Games & the First Amendment"

Written Statement of Robert J. Bach, President, Entertainment and Devices Division, Microsoft Corporation

Chairman Brownback and Ranking Member Feingold:

Thank you for the opportunity to submit written comments for the record. Last November Microsoft launched its Xbox 360 videogame console, a revolutionary product that has created exciting new interactive entertainment opportunities for consumers, among which are tools to ensure that our products and services are appropriate for every audience.

Microsoft Corporation strongly believes in the rights and responsibilities of parents to make educated choices from a wide variety of offerings. Parents are the ultimate judges of what is appropriate for their children. In order to help parents make such informed judgments, Microsoft strongly supports the Entertainment Software Rating Board (ESRB) ratings system. The ESRB is an independent board that determines game ratings and provides detailed content descriptors that empower consumers with information about the content in the games they purchase. These ratings and content descriptors are displayed on the front and back of every game sold and provide guidance on the age-appropriateness of the video game. In a recent survey, 90 percent of parents agreed that the ESRB rating system provides the kind of information they need. Three out of four parents surveyed indicated that the ratings system is effective in helping them shield their children from game content they view as inappropriate. Microsoft actively supports ratings systems for videogames games; we work to help consumers understand and apply those ratings, and we have built technology, including password protected parental controls called "family settings", that are designed to help parents ensure an appropriate interactive entertainment experience for their children. To this end, the original Xbox is the only game console to include password protected parental control features. We have continued this commitment in Xbox 360 with even more advanced family settings technology that help parents monitor their children's activities both offline and online.

In addition to our password protected family settings in Xbox 360, the forthcoming version of Microsoft's operating system - Windows Vista - will help parents take an active role in determining which content is appropriate for their children. Family Settings will allow parents to use the ESRB ratings system to select which general age ratings are allowed. Parents will also be able to customize particular descriptors, for example, allowing "Cartoon Violence" while not allowing "Intense Violence." Parents will also be able to allow or disallow particular games on a case by case basis and Windows Vista Family Settings will allow parents to control when games are played by setting particular schedules (for example 'no games after 9 pm.').

In addition to providing industry leading technology tools to parents, Microsoft has a robust review process for all game content created by its internal game development studios, as well as game content created by outside studios under Microsoft's name (both of which are known in the industry as first-party games, distinguishing them from third-party games published by third-party publishers and can play on the Microsoft Xbox and Xbox 360 consoles and/or competitive video game consoles). These first-party games published by Microsoft are reviewed from a copyright and trademark perspective as well as to ensure they are culturally appropriate. Microsoft will not publish any first-party Xbox, Xbox 360, or Windows video game that has been given an Adults Only (AO) rating by the ESRB, and game content is reviewed and screened based in part on this policy.

All Microsoft first-party games undergo a rigorous internal content review process prior to ESRB review. This process helps ensure that our ESRB submissions are comprehensive, and that we ourselves have an opportunity to evaluate potentially sensitive content. We also continually evaluate the review process to identify potential gaps or to address new types of game content. The review process involves multiple steps while a game is under development. It begins with a review of the initial game concept to determine if the game's fundamental premise and game play fits within our expectations for global release. During development, editors and testers submit specific visual, audio, and written elements from the game to internal experts who help evaluate issues that could be culturally, politically or legally sensitive. For each game, we review all scripts recorded or displayed in the game; song lyrics; all user-interface text that appears in the game; all characters, buildings, environments, levels, vehicles, weapons, signs, pictures, textures, and so forth. Content that is identified as potentially problematic is flagged for any necessary corrective action.

Microsoft employs full-time teams to test all aspects of game play. These teams verify that the content within first-party games is implemented as specified by agreed-upon design documents and that non-compliant aspects are identified, repaired, or removed as appropriate. In addition, Microsoft development teams are required to identify all hidden "Easter eggs" or game content that players can unlock so that this can be appropriately assessed and modified as necessary before the first-party game is released. Failure to do so may result in disciplinary action up to and including termination. Moreover, current game development agreements require that first party developers disclose to Microsoft all cheats, workarounds, Easter eggs and related game content and warrant that the game is compliant with all applicable laws and is non-infringing. Developers must indemnify Microsoft for any claims related to the game content as delivered to Microsoft.

Microsoft's entertainment products and services have a wide variety of content that appeals to diverse markets. By establishing the practices as outlined above, we are striving to provide a safe, secure, and appropriate gaming experience for every audience.

Thank you for the opportunity to submit this statement.

Yours truly,

Robert J. Bach, President
Entertainment and Devices Division
Microsoft Corporation

Testimony of
David S. Bickham, Ph.D.
Center on Media and Child Health
Children's Hospital Boston/Harvard Medical School
Before the Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Property Rights
March 29, 2006

Thank you for the opportunity to testify today. My name is David Bickham and I am a research scientist at the Center on Media and Child Health located at Children's Hospital Boston and affiliated with Harvard Medical School and Harvard School of Public Health. The center is an interdisciplinary group of pediatricians, psychologists, social scientists and child development experts with the mission to research and respond to the effects of media on the physical, mental and social health of children. In my own research, I have investigated media effects ranging from educational television's ability to increase children's literacy skills to violent television's interference with peer relationships. I am here today to review the scientific evidence on violent video games and the concern that these games may contribute to children's violent thoughts and behaviors.

Video games are a relatively new form of entertainment media. While the body of evidence on video game violence is growing, we must consider it within the broader field of research exploring portrayals of violence in television, film, and other forms of visual media. There are five decades of media violence research based on a sound theoretical and empirical understanding of learning, aggression, and social cognition. A core ongoing project of the Center on Media and Child Health is the consolidation of all existing research on media effects into one publicly available database. After 3 years of work, the database includes over 1,200 research reports published in peer-reviewed scientific journals investigating the effects of media violence. These studies show consensus in the state of the science that a strong and consistent relationship exists between viewing violent media and increased levels of anxiety, desensitization and aggressive thoughts and behaviors among young people. This body of research derives from a broad spectrum of academic fields, including psychology, communications, public health, and criminal justice, and it draws added strength from the vast array of methodologies utilized by the different disciplines.

Taken alone, no study is perfect. Even the best study design can be criticized for the limitations of its method. Taken together, however, each study about media violence provides a piece of a single puzzle that all interlock to reveal one picture. In this case, that picture is clear—using violent media contributes to children's violent behavior. A variety of complementary methodologies that have resulted in similar findings have been used to generate this overall conclusion. Scientists have exposed children to violent media in laboratories and found that they behave more aggressively than children who saw non-violent television or played non-violent games. Using survey studies, scientists have found that even after controlling for dozens of complex

environmental and individual characteristics linked to aggression, watching violent television and playing violent video games still increases the likelihood that a child will be violent. Researchers have followed children over their entire lives and found that viewing violent television as a child is one of the best predictors of criminal violent behaviors as an adult.

While the large body of research on violent television and film provide a solid foundation for our understanding of the effects of violent video games, there are reasons to believe that the influences of violent video games are stronger than those of other forms of screen violence. All media teach—whether by design or by default. Video games are exceptional teaching tools, incorporating many techniques that promote learning. First, video games are interactive, allowing the player to be closely involved with the main character and to control that character's actions. Second, video games directly reward the child's success in performing the actions, with visual effects, points, and opportunities to take on new challenges. Third, video games typically require almost complete attention, necessitating constant eyes-on-screen and hand-eye coordination to succeed in the game. Finally, video games are designed to be incredibly engaging and "fun," often leading children to slip deeply into a "flow state" in which they may be at increased susceptibility to the messages of the game. Scientific research has repeatedly demonstrated that children learn what video games teach, and often that lesson is doing violence.

Because the technology and media form are newer, investigating the effects of violent video games is a younger field than television violence research. Early video game research was inconsistent. Studies performed in the 1980s were limited by electronic gaming technology; at the time violent and non-violent games were often very similar. One study, for example, compared the effects of playing *Missile Command* (considered the violent game) to *Pac Man* (considered the non-violent game). Both games feature abstract geometric icons interacting with one another; both have the player's icons destroying or devouring other icons. As video games have become more graphically sophisticated and capable of depicting violence in a much more graphic and realistic way, the differences between violent and non-violent video games have dramatically increased. Not surprisingly, research exploring the effects of these newer games is much more clear and consistent than previous research. The newest research has definitively and repeatedly converged on the conclusion that playing violent video games is linked to children's aggression.

We all know that children are not automatons who mimic everything they see, their behavior is much more complicated than that. However, there is a widely held misconception that unless children immediately imitate the violence they experience in a video game, they are unaffected by it. Children who play *Grand Theft Auto* don't immediately begin stealing cars and shooting police officers. As a result, many would have you believe that this means that violent video games have no influence. We cannot assume that the absence of immediate and direct imitation means that there are no effects on children.

In rare situations violence from media may be directly imitated after a single exposure, but the most pervasive effects of violent media are not direct imitation and come from repeated viewings. With each exposure, the child's perception of the world is shifted to include violence as a common and acceptable occurrence. The child's behaviors evolve to correspond with this perception and can follow "behavioral scripts" established through experiencing violent media.

Four primary effects of violent media that have been consistently documented in the scientific literature: the aggressor, victim, bystander, and appetite effects. The *aggressor effect* is the most well known—using violent media increases the likelihood that a child will think and behave aggressively toward others. The *victim effect* is the tendency for users of violent media to see the world as a scary and violent place promoting anxiety and protective behaviors. The *bystander effect* describes how violent media desensitizes its users to the real life violence making them generally less caring and sympathetic to victims of violence and less likely to intervene when they witness violence. Finally, the *appetite effect* demonstrates that using violent media often increases children's desire to see more violence.

While each of these effects can have substantial influence on children's behaviors, the aggressor effect is perhaps the most troublesome because it puts children at immediate risk of committing violence. It is, therefore, critical to understand how exposure to violent video games translates into aggressive behavior. This process is grounded in our understanding of how children learn, how aggression in general is cultivated, and how video game violence affects its users.

Violent video games present a world in which violence is justified, rewarded, and often the only option for success. Exposure to this world primes children for hostile thoughts and behaviors immediately after playing a game. When children play violent video games, they become both physically and mentally aroused. Their heart rates increase and their blood pressure rises. They begin to think aggressively and to solve problems with violence. In this heightened and primed state, children are more likely to perceive other people's behaviors as aggressive and they are more likely to respond aggressively. In laboratory studies designed to test this effect, participants who played violent video games were more likely to punish competitors than participants who played non-violent games.

Over time, repeated exposure to violent media can have long-term effects. A person's pattern of behavior can become more aggressive through the adoption of aggressive skills, beliefs, and attitudes, desensitization to violence, and an aggressive approach to interactions with other people. Scientific findings have repeatedly provided solid evidence for this process—using violent media as a child predicts aggressive behavior in adulthood.

Violent video games often have subtle effects but may lead to dramatic consequences for some children. Certain characteristics make some children more susceptible to media effects, while other children are more resilient. However, no known factor or set

of factors has yet been identified that completely safeguards children from the influences of violent media.

Children's susceptibility to the effects of media violence varies with their age. Children younger than eight years are more vulnerable to media violence effects because they have not yet developed the ability to discriminate fully between fantasy and reality in media content. Research has consistently shown that young children often behave more aggressively than older children do after playing violent video games

Children who identify with the perpetrator of media violence are also at increased risk of becoming aggressive. Violent video games, particularly the aptly named "first-person shooter" games, place the player in the role of the violent perpetrator. This level of involvement is likely to increase the player's identification with the violence and its subsequent cognitive and behavioral effects.

Cognitive and emotional maturity tends to increase children's resistance to the effects of violent media. It is important to remember, however, that neither these nor any other set of characteristics fully protects a child from all of the subtle and pervasive effects of violent media.

Before moving on to suggesting some strategies for mitigating the effects of violent video games, I would like to clarify two common misconceptions about research on media violence.

First, sound scientific research in this field does not claim that media violence is the sole cause of human aggression. Nor does it claim that media violence is necessarily the original or most important cause—we all know that human aggression has been around much longer than violent video games. Violent media is, however, a substantial, pervasive, and controllable contributor to children's aggression and violent behaviors. Other factors that contribute to children's aggression such as biologic tendencies and family environment are much more difficult, if not impossible to change.

Second, this research does not show that there is something inherently dangerous about video games. As we have seen, video games can be powerful teaching tools. The danger posed by violent video games lies in what they teach, the content they present. Many non-violent puzzle-based games have been shown to increase children's cognitive skills, including visual attention, multitasking, spatial abilities and mental rotation. Well-designed educational video games are able to successfully teach a multitude of academic lessons. Even some violent video games have the potential to teach certain problem-solving and spatial skills. However, along with any positive skills children gain from these games, they also experience the negative effects of exposure to and repeated rehearsal of the violent content. The late Dr. John Wright, one of the founding fathers of this field of research, asserted, "The medium is not the message, the message is the message." If the message is a positive, healthy one, then the resulting behaviors learned will likely be positive and healthy as well.

In order for us to ensure the health and safety of our children, we must do our best to guard them against potentially dangerous environmental influences. Just as we are concerned about the effects of secondhand smoke and lead paint on children's physical health, so should we be concerned about the influence of violent video games on children's thoughts and behaviors.

Just as research has demonstrated this cause for concern, research can inform us on the most effective intervention strategies. We need to know more about individual characteristics that can increase a child's risks and resilience, as well as environmental, parenting, and social factors that can be protective. With this knowledge, we can develop prevention measures for all children and target at-risk children for intervention.

Next, we need to extend and further focus the research that ties violent video game play with real life violence. In order for parents to understand that they should actively monitor what games their children are playing, we need very clear evidence that clarifies the relationship between violent game play and common, problematic aggressive behaviors. One productive focus for this work would be in-school violence. There is anecdotal evidence that many school shooters have been heavy users of video games. Can game play have been a trigger that switched a troubled child from thoughts of revenge to actual behavior? We don't know, and given the nature of the crime we will never be able to directly study this. But we can examine the relationship between violent media use and precursors of school shootings, the much more common school violence behaviors of bullying and weapon-carrying.

The Children and Media Research Advancement (CAMRA) bill, sponsored by Senators Brownback, Lieberman and Clinton, is an important step in the right direction. When government demonstrates its concern about the effects of media use by dedicating Federal health research dollars, the field will be energized and validated, for scientists, for clinicians, for teachers, and for parents. The research that CAMRA can make possible will help to clarify the risks of violent media and to develop and evaluate practical and effective interventions.

Together with what is already known about the effects of violent video games, results from these studies will inform the creation of successful media literacy programs. Educational interventions based around teaching children to analyze and question media can dramatically reduce the effects of violent media. Children who learn critical thinking skills are equipped to recognize the falsities presented in violent media. When coupled with strategies to reduce their overall exposure, these techniques are particularly successful.

Building on what we already know about the effects of violent video games, results from these studies can inform the creation of successful media literacy programs. Preliminary studies have demonstrated that educational interventions that teach children to analyze and question media can dramatically reduce the influence of media. Children who learn critical thinking skills are equipped to recognize how media fragment, distort and manipulate their perceptions of reality. When coupled with

strategies to reduce children's media exposure, media literacy techniques have been particularly successful.

At the Center on Media and Child Health, we are currently evaluating the effectiveness of a school-based media literacy program. As part of their normal art and health classes, students in a Manchester, New Hampshire elementary school learn to deconstruct media messages. They are taught to question what they see and to recognize that the world of violence presented in television and video games is different from the one in which they actually live. Our preliminary evidence shows that children start to change their understanding of media and what they portray after a single class session. Although we have not followed these young people long enough to measure these outcomes, it is reasonable to anticipate that these changes in understanding and attitudes about violence will give rise to less fear, less desensitization, and less aggressive behaviors.

Thomas Jefferson proposed that the new nation he helped to form should offer public education to all citizens because a literate citizenry would be a good citizenry. Today we receive the vast majority of our information from non-print media. Children spend more time with media than they do in school – and they learn as much about the world and the way it works from media as they do from schoolbooks. We still teach the basics of reading and writing words, but our children receive little, if any, education in the language of their times. For children growing up in the Information Age, media literacy classes can be integrated into a variety of standard courses that meet national educational standards, so that children learn necessary academic fundamentals *and* develop the ability to assess and understand media, protecting themselves from potential negative effects.

As caretakers of the next generation, we have a responsibility to provide children with a safe environment in which to grow, develop, and learn. As a society, we have decided that we should understand and control the quality and safety of the air they breathe, the water they drink, and the food they eat. Research has shown that the media children use have real effects on their knowledge, attitudes, and behaviors. In the Information Age, media must be understood as a powerful, nearly universal environmental health influence. We ensure the safety of what we feed children's bodies, we owe it to their future and to the future of our society to ensure the safety of what we feed their minds.

Thank you.

U.S. Senate
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
March 29, 2006
Hearing on
"State Regulation of Violent Video Games & the First Amendment"

Written Statement of
Clay Calvert, J.D., Ph.D.
Associate Professor of Communications & Law
Co-Director of the Pennsylvania Center for the First Amendment
The Pennsylvania State University

Thank you Chairman Brownback and Ranking Member Feingold for the opportunity to submit written comments for the record on this important topic. My comments concentrate on First Amendment concerns and the current federal case law that is unanimously against the constitutionality of a slew of recent laws targeting violent content in video games. I have addressed these same issues in more detailed form in a series of recent law journal articles,[1] along with my colleague Professor Robert D. Richards of the Pennsylvania State University, so my comments here will attempt to be more concise.

While social scientists might debate forever whether the playing of violent video games by minors leads to any significant harms to either game players or those who come into contact with them, the First Amendment issues related to state and local laws restricting minors' access to violent video games and the labeling of those games with

[1] *See* Clay Calvert & Robert D. Richards, *Mediated Images of Violence and the First Amendment: From Video Games to the Evening News*, 57 MAINE LAW REVIEW 91 (2005); Clay Calvert & Robert D. Richards, *The 2003 Legislative Assault On Violent Video Games: Judicial Realities And Regulatory Rhetoric*, 11 VILLANOVA SPORTS & ENTERTAINMENT LAW JOURNAL 203 (2004); and Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO LAW REVIEW 1 (2002).

government-imposed ratings systems are today clearly resolved by federal courts in numerous jurisdictions across the United States. In brief, the laws are unconstitutional, and the wall of precedent against them now has grown extremely high and there are no cases on record to scale it.

In fact, the case law is now stacked so tall against these laws that a predictable cycle has arisen at the state level that follows a rinse-and-repeat formula: 1) a well-intended politician decries violence in video games; 2) the politician garners media headlines, and a labeling law or access-limitation law is soon passed and signed; and 3) the law is struck down by a federal court on First Amendment grounds as unconstitutional. The three-step process then repeats itself in another state, with each legislative body apparently believing it has managed to craft the perfect law.

In 2005 alone, three states – California, Illinois and Michigan – adopted laws regulating violent video games and, predictably, each law was enjoined by a federal court. The wreckage of these ill-fated legislative initiatives now lies littered and strewn across the pages of three judicial opinions, each carrying the name of a high-profile governor and each handed down in the final two months of 2005: *Video Software Dealers Association v. Schwarzenegger*,[2] *Entertainment Software Association v. Blagojevich*[3] and *Entertainment Software Association v. Granholm*.[4] In baseball lingo, that was three strikes in 2005 against laws targeting minors' access to violent games. A reasonable person might well think that the state politicians would be called out by their constituents for wasting taxpayer dollars on unconstitutional laws or, at the very least,

[2] 401 F. Supp. 2d 1034 (N.D. Cal. 2005).
[3] 404 F. Supp. 2d 1051 (N.D. Ill. 2005).
[4] 404 F. Supp. 2d 978 (E.D. Mich. 2005).

that the politicians would themselves call for a legislative ceasefire or truce against the video game industry.

2005 was not an anomaly. Similar measures targeting minors' access to violent video games were struck down in 2001 by the United States Court of Appeals for the Seventh Circuit,[5] in 2003 by the United States Court of Appeals for the Eighth Circuit[6] and in 2004 by a federal district court in the state of Washington.[7] In a nutshell, courts today recognize that video games depicting violent images are speech products protected by the First Amendment[8] and legislation targeting that content faces a steep, uphill battle.

Why are the laws held unconstitutional? First, it is important to note that there are two groups of people who have First Amendment interests at stake: 1) the creators, distributors and sellers of the games; and 2) the players of the games, including minors. The right of minors to receive speech may be ignored some, but it is not overlooked by courts. In striking down an Indianapolis ordinance that restricted minors' access to violent video games, the United States Court of Appeals for the Seventh Circuit wrote in 2001 in *American Amusement Machine Association v. Kendrick*[9] that "children have First Amendment rights." The court added in its unanimous opinion that shielding children "from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."

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[5] American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).
[6] Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003).
[7] Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).
[8] *See* Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GEORGIA LAW REVIEW 153, 154 (2005) (writing that "courts have properly begun to hold that video games fall within the protective scope of the First Amendment. These decisions incorporate two distinct findings: First, video games are a form of expression presumptively entitled to constitutional protection. Second, they do not fall into a category of unprotected speech such as obscenity or incitement") (footnote omitted).
[9] 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

My colleague in the Pennsylvania Center for the First Amendment, Professor Robert D. Richards, encapsulated well in a May 2005 article published in the *National Law Journal* much of the threshold legal examination when he wrote: "The legal analysis is quite simple. Video games have expressive elements in that they contain story lines – just like movies and books. And sometimes those story lines are violent – again, just like movies and books. And just as movies and books are protected by the First Amendment, so too are video games."[10]

To the extent that some politicians have argued that video games should be treated differently, for First Amendment purposes, from books and movies because video games are interactive, this line of reasoning has be soundly rejected by the courts. As the United States Court of Appeals for the Eighth Circuit wrote in 2003 in *Interactive Digital Software Association v. St. Louis County*[11] when striking down an ordinance that made it unlawful for any person knowingly to sell or rent graphically violent video games to minors, "there is no justification for disqualifying video games as speech simply because they are constructed to be interactive." The same federal appellate court went on to note that "the same could be said of action-packed movies like 'The Matrix' or 'Charlie's Angels'; any viewer with a videocassette or DVD player could simply skip to and isolate the action sequences. The fact that modern technology has increased viewer control does not render movies unprotected by the First Amendment."

Among the major legal problems that courts have found with content-based labeling laws and those restricting minors' access to violent video games – laws that are

[10] Robert D. Richards, *Videogame Restrictions: Law Are Unenforceable*, NATIONAL LAW JOURNAL, May 16, 2005.
[11] 329 F.3d 954 (8th Cir. 2003).

presumptively invalid because they single out a particular form of content for regulation[12] – are:

• vague and imprecise definitions of concepts and terms used in the laws that fail to let a reasonable person know what type of content is allowed and what type of content is prohibited;

• the failure of social science to demonstrate the requisite compelling interest that must be supported by real evidence in order to justify these laws. As the federal district court in Michigan noted in 2005 in enjoining the video game law in that state, "a cursory review of the research relied upon by the state shows that it is unlikely that the State can demonstrate a compelling interest in preventing a perceived 'harm.'" And as the federal district court in Illinois wrote in 2005 in striking down that state's video game law and in rejecting the claim that playing certain video games causes violence, "researchers in this field have not eliminated the most obvious alternative explanation: aggressive individuals may themselves be attracted to violent video games."[13]

The bottom line is that video games, with their fictional violence, make an easy target for state lawmakers, providing a surrogate means of addressing the very complex and complicated problems and causes of real-life tragedies like drive-by shootings, rapes and homicides that happen on a daily basis and that have absolutely nothing to do with video games. The laws make for feel-good legislation, at least until they are struck down in court and the taxpayers are left holding the bag. As I told an assembly committee in California in 2005, "To defend free speech here is not to endorse the content of these games. Before we go down the slippery slope of censorship and play the media blame

[12] "Content-based regulations are presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382, (1992).
[13] Entertainment Software Ass'n v. Granholm, 404 F. Supp. 2d 978 (E.D. Mich. 2005).

game, it is seriously worth considering these issues."[14] And as the United States Court of Appeals for the Eighth Circuit wrote in 2003 in striking down the St. Louis County, Missouri, law restricting minors' access to violent video games, "whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the First Amendment, we are obliged to recognize that 'they are as much entitled to the protection of free speech as the best of literature.'"[15]

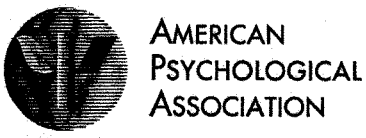
Because we cannot all agree on what speech is offensive, disagreeable or repulsive, we should not allow the government to impose its determinations and ratings about those subjects on consumers, including parents. As the United States Supreme Court once famously proclaimed, "one man's vulgarity is another's lyric" and matters of taste and style therefore are better left to private, individual decisions, not the dictates of government officials.[16]

When the government imposes its own ratings on video games and determines what is appropriate entertainment for minors, it has stepped firmly and deeply into the culture wars and interfered with First Amendment decisions affecting the freedom of speech. The proper arena for setting the bounds of personal culture is neither the courts nor the legislature; rather, it is the home, and the right and duty falls to parents. We should trust parents to make their own decisions about what games their kids should be able to purchase and play. Parents today are provided with information about video game content by the voluntary rating system now enforced by the Entertainment Software

[14] John M. Hubbell, *Bill to Ban Sale of Violent Video Games to Kids Fails in Committee*, SAN FRANCISCO CHRONICLE, May 4, 205, at B3.
[15] Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 958 (8th Cir. 2003).
[16] Cohen v. California, 403 U.S. 15, 25 (1971).

Rating Board. All a concerned parent needs to do is look online at the ESRB's Website to learn more about a particular game.

In summary, laws targeting violent video games have consistently been declared unconstitutional by the federal courts. Voluntary efforts, not government mandates, are the proper solution. Singling out video games for legislation when minors are bombarded with violent images from myriad sources, including movies, music, books and even continuous coverage of war-related devastation and terrorist torture tactics on television news and World Wide Web will prove both unconstitutional and ineffective. Thank you again for the opportunity to submit this written testimony.



Testimony

Elizabeth K. Carll, PhD
Chair, Interactive Media Committee
Media Psychology Division
American Psychological Association

Before the

Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

On

"What's in a Game? State Regulation of Violent Video Games and the First Amendment"

March 29, 2006

Thank you, Mr. Chairman, for initiating this important hearing on violence in videogames. I am Dr. Elizabeth Carll, the chair of the Interactive Media Committee of the Media Psychology Division of the American Psychological Association (APA). The effects of media violence on children has been a career long interest with the adoption of the APA Resolution on Violence in Video Games and Interactive Media being one of the initiatives when I served as the president of the Media Division of APA. I am also a psychologist in private practice in Long Island, New York, and have worked with children, teens, and families for more than 25 years. The APA is pleased to participate in today's hearing and thanks Sen. Brownback for his important work on issues surrounding media and children.

The Interactive Media Committee was formed to facilitate the implementation of the recommendations of the Resolution on Violence in Video Games and Interactive Media, adopted by APA in August 2005, which I will be discussing. APA's Media Psychology Division spearheaded the adoption of the APA Resolution with the recognition that there is often a disconnect between research, legislation and implementation of useful recommendations at the community level.

It may be of interest for the Committee to be aware that, as a result of the APA Resolution on Violence in Video Games and Interactive Media, a formal dialogue with the Electronic Software Ratings Board (ESRB) has begun to discuss ways in which the current ratings system may be improved.

It is also important to emphasize that electronic media plays an important role in the emotional development, social behavior and intellectual functioning of children and youth. There are many video games that are very helpful for children to facilitate medical treatment, increase learning, and promote pro-social behavior. However, there are also video games that include aggression, violence and sexualized violence that may have a negative impact on children. It is this group of video games that I will be discussing today.

Many of the issues that I will be discussing today were of concern when I first testified at the 1999 New York State legislature's hearings on the effects of violence in interactive media on children and discussed the unique characteristics of video games. However, what has changed since that time has been the rapid growth in the body of research that continues to point to the detrimental effects of violence in video games and interactive media on children, as well as the increasing public concern regarding this issue.

What are the unique characteristics of video games and interactive media vs. TV and film?

More than four decades of research have revealed that TV violence has a strong influence on the aggressive behavior of children and youth. Exposure to violent media increases feelings of hostility, thoughts about aggression, suspicions about the motives of others and demonstrates violence as a method to deal with conflict.

However, video games and interactive media have certain qualities that are distinct from passive media, (i.e., TV and film). For instance, video games:

- Require active participation enabling rehearsal and practice of violent acts, which enhances learning;
- Include frequent repetition of acts of violence as part of winning the game, which enhances learning;
- Reward game players for simulated acts of violence, which enhances learning. Often the winner of the game is the one who kills and destroys the most; and,
- Enables the identification of the participant with a violent character while playing video games, which enhances learning.

Therefore, this practice, repetition, identification with a violent character and being rewarded for numerous acts of violence may intensify learning of violence. With the development of more sophisticated interactive media, the implications for violent content are of further concern. This is due to the intensification of more realistic experiences, which may be even more conducive to increasing aggressive behavior as compared to passively watching violence on TV and in films.

What are the effects of exposure of children to violence in video games?

A comprehensive analysis of violence in interactive video game research suggests exposure increases aggressive behavior, aggressive thoughts, angry feelings, physiological arousal and decreases helpful behavior.

Studies further suggest that sexualized violence in the media has been linked to increases in violence towards women, the acceptance of rape myth and anti-women attitudes.

Research also suggests that the most popular video games contain aggressive and violent content. Girls and women, boys and men, and minorities are depicted in exaggerated stereotypical ways. Sexual aggression against women, including assault, rape, and murder, is depicted as humorous and is glamorized and rewarded.

What are some of the concerns regarding the current rating system for video games?

Efforts to improve the rating system for video games and interactive media would be a first step in providing additional helpful information as to the content of video games. Currently, the labels are very general and more content specificity is needed for parents to make more informed decisions about the video games their children play. For example, are there only a few depictions of violence or is it a main theme? What types of violence are depicted - sports violence, war violence, sexual violence (such as rape and

murder) or random thrill kill violence? Is violence linked with negative social consequences or rewarded? The scientific community should be involved in the development of a more accurate rating system to better inform parents and consumers.

Recommendations from the APA Resolution on Violence in Video Games and Interactive Media

- Advocate for funding to support research on the effects of violence in video games and interactive media on children, adolescents, and young adults. APA supports the Children and Media Research Advancement Act (CAMRA) to amend the Public Health Service Act to authorize funding to establish a program on children and the media within the Centers for Disease Control and Prevention to study the role and impact of electronic media in the development of children.

- Teach media literacy to children so they will have the ability to critically evaluate interactive media. This needs to involve educating teachers, parents and caregivers.

- Encourage the entertainment industry to link violent behaviors with negative social consequences. Showing violence without realistic consequences teaches children that violence is an effective means of resolving conflict. Whereas, seeing pain and suffering as a consequence can inhibit aggressive behavior.

- Develop and disseminate a content-based rating system that more accurately reflects the content of video games and interactive media and encourages the distribution and use of the rating system by the industry, parents, caregivers and educational organizations.

The complete text of the APA Resolution on Violence in Video Games and Interactive Media is available at http://www.apa.org/pi/cyf/violence_in_videogames_interactive_media.pdf and is included as an attachment to my statement.

I would like to thank the Committee for their interest in this important issue and Senator Brownback for his continued leadership in this area.

For further information contact Dr. Elizabeth Carll, Chair, Interactive Media Committee, Media Psychology Division, American Psychological Association, Tel: 631-754-2424, Mobile: 917-941-5400, Fax: 631-754-5032, Email: ecarll@optonline.net

American Psychological Association
Resolution on Violence in Video Games and Interactive Media

WHEREAS decades of social science research reveals the strong influence of televised violence on the aggressive behavior of children and youth (APA Task Force On Television and Society; 1992 Surgeon General's Scientific Advisory Committee on Television and Social Behavior, 1972); and

WHEREAS psychological research reveals that the electronic media play an important role in the development of attitude, emotion, social behavior and intellectual functioning of children and youth (APA Task Force On Television and Society, 1992; Funk, J. B., et al. 2002; Singer, D. G. & Singer, J. L. 2005; Singer, D. G. & Singer, J. L. 2001); and

WHEREAS there appears to be evidence that exposure to violent media increases feelings of hostility, thoughts about aggression, suspicions about the motives of others, and demonstrates violence as a method to deal with potential conflict situations (Anderson, C.A., 2000; Anderson, C.A., Carnagey, N. L., Flanagan, M., Benjamin, A. J., Eubanks, J., Valentine, J. C., 2004; Gentile, D. A., Lynch, P. J., Linder, J. R., & Walsh, D. A., 2004; Huesmann, L. R., Moise, J., Podolski, C. P., & Eron, L. D., 2003; Singer, D. & Singer, J., 2001); and

WHEREAS perpetrators go unpunished in 73% of all violent scenes, and therefore teach that violence is an effective means of resolving conflict. Only 16 % of all programs portrayed negative psychological or financial effects, yet such visual depictions of pain and suffering can actually inhibit aggressive behavior in viewers (National Television Violence Study, 1996); and

WHEREAS comprehensive analysis of violent interactive video game research suggests such exposure a.) increases aggressive behavior, b.) increases aggressive thoughts, c.) increases angry feelings, d.) decreases helpful behavior, and, e.) increases physiological arousal (Anderson, C.A., 2002b; Anderson, C.A., Carnagey, N. L., Flanagan, M., Benjamin, A. J., Eubanks, J., Valentine, J. C., 2004; Anderson, C.A., & Dill, K. E., 2000; Bushman, B.J., & Anderson, C.A., 2002; Gentile, D. A., Lynch, P. J., Linder, J. R., & Walsh, D. A., 2004); and

WHEREAS studies further suggest that sexualized violence in the media has been linked to increases in violence towards women, rape myth acceptance and anti-women attitudes. Research on interactive video games suggests that the most popular video games contain aggressive and violent content; depict women and girls, men and boys, and minorities in exaggerated stereotypical ways; and reward, glamorize and depict as humorous sexualized aggression against women, including assault, rape and murder (Dietz, T. L., 1998; Dill, K. E., & Dill, J. C., 2004; Dill, K. E., Gentile, D. A., Richter, W. A., & Dill, J.C., in press; Mulac, A., Jansma, L. L., & Linz, D. G., 2002; Walsh, D., Gentile, D. A., VanOverbeke, M., & Chasco, E., 2002); and

WHEREAS the characteristics of violence in interactive video games appear to have similar detrimental effects as viewing television violence; however based upon learning theory (Bandura, 1977; Berkowitz, 1993), the practice, repetition, and rewards for acts of violence may be more conducive to increasing aggressive behavior among children and youth than passively watching violence on TV and in films (Carll, E. K., 1999a). With the development of more sophisticated interactive media, such as virtual reality, the implications for violent content are of further concern, due to the intensification of more realistic experiences, and may also be more conducive to increasing aggressive behavior than passively watching violence on TV and in films (Calvert, S. L., Jordan, A. B., Cocking, R. R. (Ed.) 2002; Carll, E. K., 2003; Turkle, S., 2002); and

WHEREAS studies further suggest that videogames influence the learning processes in many ways more than in passively observing TV: a.) requiring identification of the participant with a violent character while playing video games, b.) actively participating increases learning, c.) rehearsing entire behavioral sequences rather than only a part of the sequence, facilitates learning, and d.) repetition increases learning (Anderson, C.A., 2002b; Anderson, C.A., Carnagey, N. L., Flanagan, M., Benjamin, A. J., Eubanks, J., Valentine, J. C., 2004; Anderson, C.A. & Dill, K. E., 2000); and

WHEREAS the data dealing with media literacy curricula demonstrate that when children are taught how to view television critically, there is a reduction of TV viewing in general, and a clearer understanding of the messages conveyed by the medium. Studies on media literacy demonstrate when children are taught how to view television critically, children can feel less frightened and sad after discussions about the medium, can learn to differentiate between fantasy and reality, and can identify less with aggressive characters on TV, and better understand commercial messages (Brown, 2001; Hobbs, R. & Frost, R., 2003; Hortin, J.A., 1982; Komaya, M., 2003; Rosenkoetter, L.J., Rosenkoetter, S.E., Ozretich, R.A., & Acock, A.C., 2004; Singer & Singer, 1998; Singer & Singer,1994)

THEREFORE BE IT RESOLVED that APA advocate for the reduction of all violence in videogames and interactive media marketed to children and youth.

BE IT FURTHER RESOLVED that APA publicize information about research relating to violence in video games and interactive media on children and youth in the Association's publications and communications to the public.

BE IT FURTHER RESOLVED that APA encourage academic, developmental, family, and media psychologists to teach media literacy that meets high standards of effectiveness to children, teachers, parents and caregivers to promote ability to critically evaluate interactive media and make more informed choices.

BE IT FURTHER RESOLVED that APA advocate for funding to support basic and applied research, including special attention to the role of social learning, sexism, negative depiction of minorities, and gender on the effects of violence in video games and interactive media on children, adolescents, and young adults.

BE IT FURTHER RESOLVED that APA engage those responsible for developing violent video games and interactive media in addressing the issue that playing violent video games may increase aggressive thoughts and aggressive behaviors in children, youth, and young adults and that these effects may be greater than the well documented effects of exposure to violent television and movies.

BE IT FURTHER RESOLVED that APA recommend to the entertainment industry that the depiction of the consequences of violent behavior be associated with negative social consequences.

BE IT FURTHER RESOLVED that APA (a) advocate for the development and dissemination of a content based rating system that accurately reflects the content of video games and interactive media, and (b) encourage the distribution and use of the rating system by the industry, the public, parents, caregivers and educational organizations.

LIST OF RELEVANT RESOURCES

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Resolution 2006-1
Supports the prohibition
of any sale, rental or distribution
of Violent Video Games

WHEREAS, the Florida Police Chiefs Association strongly supports the strict prohibition of any sale, rental or distribution of any video game, which contains graphic violence and obscene sexual content.

WHEREAS, the Florida Police Chiefs Association believes children are susceptible to the dangerous psychological effects from exposure to violent and obscene games.

WHEREAS, the extreme graphic violence and sexual content of video games such as "25 to Life" are inherently harmful and easily accessible to minors through retail sale or any other viewing capacity.

WHEREAS, the campaign and legislation requires that each violent video game imported into or distributed in the State of Florida for retail sale, rental, or playing in a video arcade be labeled in a specified manner.

WHEREAS, the campaign and legislation authorizes an enforcing authority to commence a civil action to seek injunctive relief to restrain or enjoin a person from violating the act or to impose a civil penalty.

WHEREAS, law enforcement officers and innocent people are injured or killed each day as a result of violent acts inspired by video games.

NOW, THEREFORE, BE IT RESOLVED, on this day, March 13, 2006, that the Florida Police Chiefs Association supports this most worthy effort and encourages all like-minded State of Florida residents to join this anti-violence cause and support legislation currently proposed before the Florida Legislature to prohibit the sale and distribution of violent and obscene games.

FRATERNAL ORDER OF POLICE
PENNSYLVANIA STATE LODGE

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March 23, 2006

HONORABLE SAM BROWNBACK
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Phone: (202) 224-6521
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Re: 25 to Life
Violent Video Games

Dear Senator Brownback,

As the State President of the Fraternal Order of Police, Pennsylvania State Lodge, representing more than 40,000 law enforcement officers across Pennsylvania, I write to you concerning the violent video game entitled '25 to Life.'

This product was recently unleashed from the Eidos Corporation.

Eidos Interactive www.eidos.com
651 Brannan St, Ste 600 San Francisco, California 94107
Company phone: 415-547-1200 Company Fax: 415-547-1201

This violent video game depicts and encourages the savage killing of law enforcement officers and the general public by each player to win.

Words cannot fully convey the depths of pain and anguish experienced by the families of our fallen law enforcement heroes each time another officer is killed in the line-of-duty.

Promoting the killing of our law enforcement officers as entertainment and depicting the use of the general public as human shields in gun battles against law enforcement is reprehensible, irresponsible and tears at the very fabric of our free and law abiding society.

Thank you very much for having the courage to take a stand on an issue such as this.

Sincerely,

MARK KOCH, PRESIDENT
Fraternal Order of Police
Pennsylvania State Lodge

cc: C. Canterbury, Nat'l. FOP Pres.

GAMES AND YOUTH VIOLENCE
INDEPENDENT RESEARCH FINDINGS IGNORED BY APA

Williams, D. & Skoric, M. (2005). "Internet Fantasy Violence: A Test of Aggression in an Online Games." June, 2005.

Williams and Skoric set out to determine the effects, if any, of engaging in a violent massive multiplayer online role-playing game. Setting out with no preconceived results to predetermine their research, they found that there was no effect on levels of aggressiveness or in belief and behaviors of the gamers.

They wrote, "Research on violent video games suggests that play leads to aggressive behavior. A longitudinal study of an online violent video game with a control group tested for changes in aggressive cognitions and behaviors. The findings did not support the assertion that a violent game will cause substantial increases in real-world aggression."

The results determined that, "...game play—controlling for gender, age, and time one aggression scores—was not a significant predictor of aggressive cognitions. Compared to the control group, participants after the experiment were not statistically different in their normative beliefs on aggression than they were before playing the game."

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

In 2001, the U.S. Surgeon General released the most exhaustive U.S. government study to date on youth and violence from a public health perspective. The report found that there is insufficient evidence to suggest that video games cause long-term aggressive behavior.

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

Notably, much of the research cited by the APA was available to the Surgeon General.

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

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

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

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

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

"In conclusion, current research evidence is not supportive of a major public concern that violent video games lead to real-life violence." (p.256) need to use chart deck which updated this in 2002. or use both.

Olson, C. (2004) "Media Violence Research and Youth Violence Data: Why Do They Conflict?" Academic Psychiatry, 28:2, Summer, 2004.

Cheryl K. Olson, clinical instructor of Psychiatry at the Harvard Medical School's Center for Mental Health and Media, examines statements about the relation between violent video games and real-life violence in a 2004 article in the journal Academic Psychiatry.

First, Dr. Olson notes that "...there is no evidence that targeted violence has increased in 's schools. While such attacks have occurred in the past, they were and are extremely rare events." She goes on to write that, "...there's no indication that violence rose in lockstep with the spread of violent games."

Dr. Olson then details the limitations of current studies of the issue, including: vague definitions of aggression; failure to put use of violent media in context with other known contributors to aggression (such as illegal substance use and family poverty); results which are difficult to generalize to the real world; small, non-random, non-representative samples; and lack of consideration of moderating factors such as the subjects' age or developmental stage.

Dr. Olson concludes: "In summary, it's very difficult to document whether and how violent video and computer games contribute to serious violence such as criminal assault and murder...." She writes,"It's time to move beyond blanket condemnations and frightening anecdotes and focus on developing targeted educational and policy interventions based on solid data. As with the entertainment of earlier generations, we may look back on some of today's games with nostalgia, and our grandchildren may wonder what the fuss was about."

"Playing With Fire? How Do Computer Games Influence the Player?" Commissioned by the Danish Government and published by the Unesco Clearinghouse on Children, Youth and Media. Egenfeldt-Nielsen, Simon, et al., (2004).

In their review of the existing body of research commissioned by the Danish Ministry of Culture, the authors determined that the results of research into the effects of violent games have "often pointed in different directions." The authors state: "...the studies that purport to show [a connection from violent games to violent behavior] have been exposed to serious and continuing criticism. This criticism is primarily that it is an oversimplification to perceive computer games as a phenomenon that can be isolated from the player's everyday life...."

Further, the authors conclude that: "It is not possible to say anything conclusive about the potentially adverse effects of violent games. The empirical evidence is too limited and the criticism of the extant research too serious....We can say that the question of the extent to which computer games in general have an adverse effect on all or on many gamers is too broad for a specific answer."

Southwell, B. & Doyle K. (2004) "The good, the bad, or the ugly? A multilevel perspective on electronic game effects." *American Behavior Scientist,* 48(4), 391-401. 2004.

In a meta-analysis of research on video games, Southwell and Doyle find that negative analyses of games "often fail to recognize that variability exists at different levels of analysis and in the interactions: between game players, between games, between contexts, and so forth."

They also find write that "we should be mindful of the possibility that available literature is biased by the historical reticence of some journals to publish null findings."

"Aggressive and Non-Violent Videogames: Short-Term Psychological and Cardiovascular Effects on Habitual Players." Stress and Health, Vol. 20, July, 2004, pp. 203-208. Baldaro, Bruno, et al.

Researchers set out to evaluate the short-term effects of playing violent and non-violent videogames among young adults. The results of the study determined that there were no increases in the participants' hostility measurements.

Specifically, the authors write: "The increasingly widespread use of videogames among young people has led to many studies into their potential negative effects. Research into progress in school and personality of young videogame players has partly eased some general worries. Owning videogames does not in fact seem to have negative effects on aggressive human behaviour....The results of [this] study showed a range of short-term effects of playing violent and non-violent video games on arterial pressure and on the state anxiety of subject, but not on hostility measurements (emphasis added)."

"Does viewing violent media really cause criminal violence? A methodological review." Aggression and Violent Behavior, vol. 10, pages 99-128, 2004. Savage, Joanne.

Joanne Savage reviews the research purporting to show negative effects of media violence on children. Dr. Savage concludes that there is no causal link between media violence and violent crime. She writes:

"The question addressed here is not whether or not the effect is plausible, but whether the effect has been demonstrated convincingly in the scientific literature–and the answer is 'not so far.'...At this point it must be said, however, that there is little evidence in favor of focusing on media violence as a means of remedying our violent crime problem."

Cumberbatch, G. (2004). "Video Violence: Villain or Victim?" *Video Standards Council*, U.K.

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

> The real puzzle is that anyone looking at the research evidence in this field could draw any conclusions about the pattern let alone argue with such confidence and even passion that it demonstrates the harm of violence on television, in film and in video games. While tests of statistical significance are a vital tool of the social sciences, they seem to have been more often used in this field as instruments of torture on the data until it confesses something which could justify a publication in a scientific journal.
>
> If one conclusion is possible, it is that the jury is not still out. It's never been in. Media violence has been subjected to lynch mob mentality with almost any evidence used to prove guilt.
>
> This is perhaps most clearly shown in claims that some of the most distressing crimes of late have a media link...However, as social scientists, they should be ashamed of themselves in offering only second hand undocumented hearsay support for a link. The

> uncritical use of media stories speculating that there might be a link sits uneasily with the values of empirical psychology.

"Videogames," By Dr. J. Newman, lecturer on Media and Cultural Studies at Bath Spa University.

Dr. Newman takes on the research already completed by those who are studying video games and their purported effects on children. Dr. Newman argues that these studies are fundamentally flawed because a researcher cannot understand the effects of a game from a superficial glance at its violent content. Further, Dr. Newman argues that there are very few well-conducted studies, and he questions the reliability and validity of the procedures used to measure aggression.

In "Assessing the Research," Dr. Newman notes the 'inconclusive and often contradictory' findings of research, and the fact that 'methodological flaws blight many of the studies,' for example, 'there is no consistency in the definitions' of 'violence' and 'aggression.' Newman cites an observation that measures of aggression are potentially unreliable (for example, measuring 'aggressive thoughts', which 'does not necessarily translate into aggressive behavior' or fantasy aggression. 'The use of analogues of aggression', such as the administering of a loud noise to another subject, as in the Anderson and Dill (2000) study, is a potential area of concern, as such action can be deemed 'pretty remote from real aggression.' (p. 67).

Goldstein, J. (2005) "Violent Video Games" from *Handbook of Computer Game Studies*. Edited by Joost Raesens and Jeffrey Goldstein, Massachusetts Institute of Technology Press. January, 2005.

In his chapter exploring games and youth violence, Dr. Goldstein writes that "discussions of violent video games are clouded by ambiguous, poorly designed research, and the continued confusion of correlation with causality."

He continues:

> "Correlational studies are inherently unable to establish cause-and-effect, so psychologists resort to laboratory experiments in which some factors are manipulated, whereas others are controlled.
>
> "Few studies have considered how and why people play violent video games, or why people play at all. Experimental research does not recognize the fact that video game players engage freely in play, and are always free to stop. They enter an imaginary world with a playful frame of mind, something entirely missing from laboratory studies of violent video games. One of the pleasures of play is this very suspension of reality. Laboratory experiments cannot tell us what the effects of playing video games are, because there is no sense in which participants in these play."

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

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

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

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

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

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

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

Legal Brief in St. Louis Video Game Case, (2002). Produced by the Free Expression Policy Project.

Thirty-three media scholars, historians, psychologists, and games researchers filed a brief with the U.S. Court of Appeals for the Eighth Circuit opposing a law that bars minors from video games containing "graphic violence." The scholars' brief states that most laboratory experiments and other efforts to prove adverse effects from media violence have yielded little results. The brief explains that those researchers reporting "aggressive" effects have often manipulated the numbers, ignored negative findings, and used measures of "aggression" that are artificial and often ridiculous (for example, popping balloons or recognizing "aggressive" words on a computer screen).

> Most studies and experiments on video games containing violent content have not found adverse effects. Researchers who do report positive results have generally relied on small statistical differences and used dubious "proxies" for aggression, such as recognizing "aggressive words" on a computer screen. Indeed, research on media violence more generally has also failed to prove that it causes – or is even a "risk factor" for – actual violent behavior. (p.2)

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

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

He further wrote;

> To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.

> Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own. Protests from readers caused Dickens to revise Great Expectations to give it a happy ending, and tourists visit sites in Dublin and its environs in which the fictitious events of Ulysses are imagined to have occurred. The cult of Sherlock Holmes is well known.

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

> There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the interactive character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments. It is highly unlikely that they are more harmful, because 'passive' entertainment aspires to be interactive too and often succeeds.

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

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

> If the first amendment is versatile enough to 'shield [the] painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,'...we see no reason why the pictures, graphic design, concept art, sounds, music, stories and narrative present in video games are not entitled to similar protection.
>
> We do not mean to denigrate the government's role in supporting parents, or the right of parents to control their children's exposure to graphically violent materials. We merely hold that the government cannot silence protected speech by wrapping itself in the cloak of parental authority...To accept the County's broadly-drawn interest as a compelling one would be to invite legislatures to undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority.

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

> The...conclusion that there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health is simply unsupported in the record...[T]his vague generality falls far short of a showing that video games are psychologically deleterious. The County's remaining evidence included the conclusory comments of county council members; a small number of ambiguous, inconclusive, or irrelevant (conducted on adults, not minors) studies; and the testimony of a high school

> principal who admittedly had no information regarding any link between violent video games and psychological harm...Where first amendment rights are at stake, 'the Government must present more than anecdote and supposition.'

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

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

From The Honorable Robert Lasnik, District Court Judge:

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

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

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

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

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

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

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

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
March 29, 2006
Hearings on "State Regulation of Violent Video Games & the First Amendment"
Written Statement of James Paul Gee
Tashia Morgridge Professor of Reading
University of Wisconsin-Madison

I am grateful to Chairman Brownback and Senator Feingold, ranking member of the committee and my senator, for this opportunity to submit written comments for the record.

Consider these quotes: "Much of the contempt for social conventions for which the rising generation is blamed is due to the reading of this poisonous sort of fiction". "The harm done … is simply incalculable. I wish I could label each one of these books 'Explosives! Guaranteed to Blow Your Boy's Brains Out'". These quotes are from the early 20th century and the dangerous books are books like T*he Hardy Boys* and *The Rover Boys* (Rehak 2005, p. 97). No one today, I hope and suspect, finds the *The Hardy Boys* threatening and there is no outcry against Nancy Drew, even when she's in a computer game.

There is, of course, an outcry today against violence in video games. In my view, here is what we know from the research on this issue thus far: Under contrived laboratory conditions, people who play, say, *Castle Wolfensteain*, will, afterwards, blast a competitor in a button pushing task with a noise blast .21 seconds longer than someone who played *Myst* (Anderson & Dill 2000). This is pretty much tenor of this sort of

research. Additionally, it is pretty clear that video games can make young boys, in particular, aroused for a short period of time after play, an effect that seems to follow from pretend-play as super heroes as well, if schools that ban super-hero shirts are to be trusted (Anderson & Bushman 2001; Sherry, Curtis, & Sparks 2001). Finally, despite some claims to the contrary, the fact of the matter is that the effect size of video-game play on aggression is smaller than the effect size for television (Sherry 2006) thereby rendering the claim that there is something special about the interactivity of games as a source of aggression suspect. None of this is to say that future research won't discover other additional information, pro or con.

However, none of the current research even remotely suggests video games lead to real-life violence in any predicable way. As a good many people already know, since it has been repeatedly pointed out by conservative politicians and policy makers as a sign of the effectiveness of their social policies (e.g., Fukyuama 1999), there has been a pronounced decrease in violent crime since the earlier 1990s, the very time when violent video games were introduced, e.g., *Mortal Kombat*, *Doom*, *Quake* (Sherry 2006: p. 231). Even more to the point, if playing violent video games leads to a statistical increase in violence we should see a rise in violent crime, say, after QuakeCon each year, an event which draws thousands of gamers to play violent games. And the streets of L.A. should be awash with violence each year after E3. So far no one has found any such thing. On the other hand, some researchers have argued that video games have beneficial effects in regard to violence: for example, that teens use violent games as a way to manage feelings of anger

or as an outlet for feelings of a lack of control (e.g., Gee 2005; Kestenbaum & Weinstein 1985).

Finally, let me point out, before moving on to what I think are more important issues, that some ways of keeping M-rated games away from children may be unworkable for economic or institutional reasons. Carding purchasers of M-rated games might seem like a good idea, until you realize that if Wal-Mart, say, refused to card people and, thus, refused to sell such games at all, this would hurt an industry whose productivity and profits are pretty crucial to our economy. Then there is the more pressing problem that parents of young children today are fast becoming young enough to be gamers themselves. Indeed, I have found, in giving talks to school children, that often they have access to M-rated games because their parents have purchased them to play them themselves. As this trend continues, carding will be less than fully effective and education will be the most effective tool to solve the problem, as, in reality, it is today and has been in the case of cigarettes. Of course, controls on advertising to young children are intelligent as well.

We know that human beings respond to media—movies, for example—as if what was happening on the screen was actually happening in the world (Reeves & Nass 1996). That's why people cry at movies. People are this way because their evolutionary past had no screens and screens have not been around long enough for people to have evolved a different set of emotional responses to virtual realities as they have to real ones. This effect has long been known, is well studied, and has long been exploited in the market

place. It has also long been known that people can choose to suppress this effect and that, of course, poorly designed media can ruin it.

That we respond emotionally to media as if they were real—and that, indeed, this is part of what makes media powerful to us humans—does not imply that people will go so far as to leave the movie theater and act out or respond to the events in the film. If this were so, our streets would be full of movie-inspired sex, violence, and comedy. What is striking, in fact, is how vanishingly few humans actually act out the emotional responses they have had to media. The reason is relatively simple: action requires the cooperation of our affective (emotional) responses and our higher-order thought processes and, at the level of conscious control and awareness, all but the very sick know a movie or a game is not reality. What is equally striking is that certainly a great many more people have acted out their emotional responses to books—at least "sacred" ones like the Bible—in the real world, often in terms of violence, though, of course, also often in terms of doing good, than have ever done so in regard to a movie or a video game (though *Birth of Nation* comes to mind as an example of a movie that inspired real world violence, perhaps because people "read" it as a documentary).

Here is something else we know. Movies, books, television, or video games—i.e., technologies—do not have any effects, good or bad, all by themselves. The question as to whether video games (or computers, or television, or what have you) are good for you (or children) or bad for you (or children) is actually meaningless. Technologies have effects—and different ones—**only as they are situated within specific contexts** (e.g.,

Gee 2004; Greenfield 1984; Guantlett 1998). So we always have to ask—though reporters rarely do—how the technology was used and in what context it was being used. For example, we have known for some time that television is good for children's cognitive growth if they are watching it in a reflective state of mind, for example because an adult is interacting with them and discussing what they are watching with them (Greenfield 1984). If they child is just passively consuming the television, then it is not necessarily of any great use. It is also clear that children raised in a culture of violence or abuse may consume media—not to mention their real-world interactions—as fodder for their anger and confusion. In these cases, we would hope, of course, that policy makers would speak to the real-world culture of violence or abuse and not just the virtual images the child sees.

People have the idea that video games are somehow more potent than movies or books because the player does things in the virtual world via his or her avatar. This is akin, I suppose, to the claim that because I have planted lots of corn in *Harvest Moon* I will run out and plant corn in my back yard—in reality we have as little real corn from *Harvest Moon* as we have real killings from *Grand Theft Auto* (which is not to rule out the rare case of either—given enough time even low probability events occur—though, of course, by definition, rarely). In my view, the power of video games in not in operating an avatar *per se*. Rather, it is in situating one's body and mind in a world from the perspective of the avatar, whether this is a policeman in *S.W.A.T.4*, a waitress in *Diner Dash*, or a young farmer in *Harvest Moon*. What video games do—better than any other medium in my view—is let people understand a world from the inside. What does it feel like to be a

S.W.A.T. team member? What's it like to act like one? To accept for a time and place the values of one? What do ideas and words mean from the position in which S.W.A.T. team members stand? Do I like this way of looking at and being in the world or not? What all this means is not that I will run out and pretend to be a S.W.A.T. team member—or even sign up for real training—it means, first and foremost that *S.W.A.T. 4* is primarily a tool for *understanding*. The emotional response *S.W.A.T.4* triggers—thanks to our human response to media—deepens that understanding.

This is the source of video game's great pleasure. But this is, in my view, also the great potential that video games hold. They are new tools for letting people understand from the inside out the worlds other people inhabit or worlds no one has yet seen (Gee 2003, 2004, 2005). If we have a *Full Spectrum Warrior* that lets me see and be in the world as a soldier, why can't we have a *Full Spectrum Scientist*? Of course, we will never get one as long we demonize and trivialize the medium of video games. Understanding does not lead to acceptance or action—we humans are still choosers, but real understanding can lead to better choices. I enjoyed *Operation Flashpoint* immensely and it made me sure I would never want to be a soldier if I could ethically avoid it. Ditto for *S.W.A.T 4*—I couldn't even take the pressure in my living room, let alone want it in my real life, but it is a great game and I really appreciate and admire S.W.A.T team members now.

There IS a danger here, in my view, though. The danger exists if games show, or kids see, only one world, one world view, only one narrow type of game. Real intellectual and ethically growth comes from having been in many worlds, some of them different

enough to get you thinking for yourself. So I would not ban games—ban worlds—but mandate lots and lots of them. Again, too bad, there is no *Full Spectrum Astronaut*, *Biologist*, *Urban Planner* (oops, there's *SimCity*), *Community Activist*, *Doctor*, *Craftsman*, or *Public Heath Official* (scouring the world for viruses before they kill us all). For that matter, there should be a *Full Spectrum Virus*, so we all know what the world looks and feels like from the perspective of a virus. But none of this means we should get rid of *Metal Gear Solid*, *Thief*, *S.W.A.T 4.*, *Grand Theft Auto*, or *Diner Dash*. It does mean, perhaps, though, that we should all think about how to deepen the moral dimensions of all these games, enrich them yet more as thinking/reflective spaces—my prediction, by the way, is that this will make them more fun. But, then, witness *Shadow the Hedgehog*, where the (even young) player can choose moment-by-moment to support one side or another while seeking to find out what exactly constitutes in this world being good or bad—which, after all, often involves, even in the real world, trying to find out what the "big picture" is.

Good video games are thinking tools. Their deepest pleasures are cognitive. The drug the video game industry discovered was learning—humans love it when it's done right. We need to discuss the content of games—just as we do the content of books and movies—as a society. We need to ensure that there are lots of different worlds on offer. We need to educate parents about the good games can do their kids when their content is appropriate for their age and the game is part of effective adult-child interactions—just as with books, television, and movies. We need to educate how, under other conditions, games, like books, television, and movies, can waste their children's time, even if they

are not violent. But, the most important thing, in the end, is that educate ourselves about how to draw the most good from this new and powerful technology, one that has so captured our children and, for some of us, ourselves.

Video games are powerful forms of expression. They move their players emotionally and they move them to think, but not necessarily to act in the real world, any more than books do, without the help of a supporting culture of violence, for bad, or altruism, for good. They don't cease to be expressions of viewpoints because they are interactive, rather, they come to express the viewpoints of their designers and the virtual choices of their players, which play on, but don't remove, those designers' viewpoints.

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U.S. Senate Committee on the Judiciary Subcommitttee on the Constitution, Civil Rights and Property Rights

March 29, 2006, Hearing on "State Regulation of Violent Video Games & the First Amendment"

Written Statement of Jeffrey H. Goldstein, Ph.D., Department of Social & Organizational Psychology, Utrecht University, The Netherlands

Thank you Chairman Brownback and Ranking Member Feingold for the opportunity to submit written comments for the record.

Biographical Information

I received a PhD in psychology from Ohio State University, following which I was professor of psychology at Temple University (Philadelphia) from 1969 to 1991. Since 1992 I have been with the Department of Social and Organizational Psychology at Utrecht University, the Netherlands. Among the books I have written or edited are *Aggression and Crimes of Violence* (Oxford University Press), *Toys, Play and Child Development* (Cambridge University Press), *Why We Watch: The Attractions of Violent Entertainment* (Oxford University Press), and the *Handbook of Computer Game Studies* (2005, MIT Press), for which I wrote a chapter on violent video games.
I am a Fellow of both the American Psychological Association and the American Psychological Society. I serve on advisory committees of the Netherlands Institute for the Classification of Audiovisual Media, responsible for rating films and television programs, and PEGI, the European video game rating system. As a consultant, I summarize psychological research about play and media for clients, including the Entertainment Software Association.

My research on aggression and entertainment tends to be conducted, not in an experimental laboratory with college students as participants, but in natural settings -- in schools (Jukes & Goldstein, 1993), at movie theaters (Goldstein, Rosnow, Raday, Silverman, & Gaskell, 1975), sports arenas (Russell & Goldstein, 1995), hospitals (Goldstein, Mantell, Derks & Pope, 1989), and a home for the elderly (Goldstein, Cajko, et al., 1997). This reflects my belief that entertainment cannot readily be studied in the experimental laboratory.

In 2000 I submitted a statement about violent video games to the United States Senate Commerce Committee, in 2005 I submitted written testimony in connection with *Entertainment Software Association v. Blagojevich* (Illinois), and a deposition in *Video Software Dealers Association v. Arnold Schwarzenegger* (California) in 2006.

Research on violent video games

It is not the purpose of this statement to provide a comprehensive overview of research on violent video games. Rather, a number of studies and literature reviews are presented that cast doubt on the reliability, validity, and applicability of this research.

If one looks carefully at the body of research on violent video games, there is little that is consistent or convincing. There is no compelling evidence that violent video games cause aggressive behavior. Many reviews concur that inconsistencies and ambiguities in the research prevent any sound conclusions about the effects of violent video games on aggression (Bensley & van Eenwyk, 2001; Cumberbatch, 2001; Federal Trade Commission, 2000; Goldstein, 2005; Griffiths, 1999; Gunter, 1998; Lager & Bremberg, 2005; Newman, 2004; Olson, 2004; Schechter, 2005; Unsworth & Ward, 2001; van Feilitzen, 2000).

Research on violent video games tends to suffer from inadequate samples, questionable measures of aggresion (such as noise blasts) and aggressive thoughts/ cognition (such as word completion tasks), the confusion of aggressive play with aggressive behavior, a focus on immediate short-term effects, and participants who may not be unaware of the purpose of the experiment. No evidence has been produced to suggest that video games are more influential than other media, such as film and television, despite the often-repeated claim that their interactivity and growing realism make them so. I am aware of no evidence that video games are more influential in youth delinquency and crime than other factors such as poverty, inadequate parenting, the availability of firearms, alcohol and drug abuse.

Problems of definition – violence and "violence"

When people refer to 'violent video games' or 'violence in the media' they rarely distinguish between real violence – people hurting one another as in war or a slap in the face – and symbolic or fantasy violence, in which characters engage in mock battle. Psychologists define violence or aggression as the intentional injury of another person. However, there is neither intent to injure nor a living victim in a video game. The notion that players rehearse and are rewarded for committing violent acts is not literally true. No crimes are committed, there is no literal killing, only fantasy play.

Aggressive themes have always been part of play and entertainment (Guttmann, 1998; Twitchell, 1989; Schechter, 2005), and even preschool children who enjoy them seem to be aware of the difference between real aggression and fantasy violence (Holm Sorensen & Jessen 2000, Holmes & Pellegrini 2005, Kirsh, 2006).

Studies of elementary school children often fail to distinguish between aggressive play and aggressive behavior (e.g., Irwin & Gross, 1995). After playing a martial arts video game, children, especially boys, are likely to engage in martial arts play-fighting. To some adult observers, the children appear to be acting aggressively when in fact they are playing, with no intent to injure anyone. An experiment by Cooper & Mackie (1986) of

Princeton University found that, although violent video games influenced the post-game play of 10-11 year olds, the video games had no effect on interpersonal aggression. The review by Lager & Bremberg (2005) concludes that playing video games increases preference for aggressive toys, but has no effect on aggressive thoughts and no consistent effect on aggressive behavior.

How we know it is "violence" and not violence

The same features that inhibit an opera audience from rushing the stage to prevent 'murder' are also present in video games. There are physical cues to the unreality of the violence before you, including the willing suspension of disbelief, and the knowledge that you have control over events, by pausing or stopping play altogether. In video games, there are sound effects, scorekeeping, a joystick or keypad in your hand, and often playmates commenting on the performance. Without background music, special effects, or fantasy characters, bloody images lose their appeal (McCauley, 1998). As with other forms of entertainment, such as film and literature, the violence in a video game is embedded in a fantasy narrative. However, in laboratory experiments violent images are removed from the story context, and games are played for only a few minutes, thus depriving them of a key play element.

How is aggression measured?

It is not possible to observe real aggression in the laboratory, so researchers must improvise indirect indicators of potential aggressive behavior. Criticisms of the methods used in laboratory experiments of aggression have been made many times (Freedman, 2002; Gauntlett, 2001; Olson, 2004; Ritter & Eslea, 2005; Tedeschi & Quigley, 1996). In laboratory experiments of violent video games the following have been used as measures of aggressive cognition or aggressive behavior:

- hitting an inflatable 'bobo doll' (Schutte et al. 1988)
- coding children's interpretations of ambiguous stories (Kirsh 1998)
- completing partial words, such as KI_ _[1] (Carnagey & Anderson 2005)
- listing aggressive thoughts and feelings (Calvert & Tan 1994)
- administering blasts of white noise to an unseen person, in a reaction time task[2] (Anderson & Dill 2000; Bartholow & Anderson 2002; Bartholow, Bushman & Sestir, 2006).
- withholding money from another (Winkel, Novak & Hopson 1987)
- 'killing' characters in a video game (Anderson & Morrow 1995; Ask,

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[1] This measure of aggressive cognition asks the participant to complete words, such as 'K I _ _.' Words like 'Kill' or 'Kick' would be regarded as aggressive cognitions, while 'Kiss' or 'Kind' would not be. But immediately after playing a violent video game, violence-related words would be more salient to players. If after playing an auto racing game the subjects had to complete the word 'C A –', they would probably be more likely to write 'CAR' than 'CAT' or 'CAP'. Calling this task a measure of 'aggressive thinking' or 'aggressive cognition' is unwarranted.

[2] In the 'competitive reaction-time task' (CRT) the research participant competes with an unseen 'opponent' and can set the level of noise the opponent will receive should he or she lose the competition. The CRT resembles a violent video game, so it would not be surprising that those who play violent video games would also play this 'game' more aggressively. For further criticisms of these methods see Tedeschi & Quigley (1996) and Ritter & Eslea (2005).

Autoustinos & Winefield 2000)
- time elapsed to recognize aggressive words (Anderson & Dill 2000).

In my opinion these are inadequate measures of aggressive behavior or aggressive cognitions or beliefs.

According to Freedman (2001), it is difficult to do adequate experimental research on violent video games. It is difficult to find two video games that are equal in all respects except one of them contains violence and the other does not. Only then could we be sure that, if they have different effects, this is due to the violent content and not to some other feature of the games, such as their level of excitement, involvement, activity, or sound effects. Furthermore,

> *"when experimenters choose a violent game, they may be giving the message that they approve of such games and might therefore approve of or even expect the subjects to behave violently.... The possibility of [experimenter] demand causing the results is not unlikely or far-fetched. It is a well-known phenomenon in experimental research and a continual almost ubiquitous source of problems in interpretation... This leaves almost all of the results open to the alternative and uninteresting interpretation that they are caused by demand factors rather than the variable of interest, namely the direct effect of violence in the video game"* (Freedman, 2001).[3]

Selected reviews of research on violent video games

Statements about the consistency of research data and consensus within the scientific community about the effects of media violence are incorrect. Many reviews of research on violent video games have concluded that the evidence of a causal connection between violent video games and aggressive behavior is weak or non-existent: Bensley & van Eenwyk, 2001; Cumberbatch, 2001; Federal Trade Commission, 2000; Goldstein, 2005; Griffiths, 1999; Gunter, 1998; Lager & Bremberg, 2005; Newman, 2004; Olson, 2004; Schechter, 2005; Unsworth & Ward, 2001; van Feilitzen, 2000.

Following are selected comments by reviewers.

Anderson & Dill (2000) review published studies on video games and aggressive behavior and note that every study suffers from flaws in methodology, ambiguous definitions, is open to alternative explanations, or reports inconsistent findings.

Washington State epidemiologists Bensley & van Eenwyk (2001) note: *"At present, it may be concluded that the research evidence is not supportive of a major public health concern that violent video games lead to real-life violence."* Because of mixed results,

[3] It is possible to do videogame research of a high standard. One excellent example is the series of correlational and experimental studies by Green & Bavelier (2003) on violent video games and visual skills.

the research indicates that at this time *"it is not known whether video game play affects aggression or hostility in this age group."*

Cumberbatch (2001) reviewed research on violent video games for the (British) Video Standards Council (www.videostandards.org.uk). He writes: *"The real puzzle is that anyone looking at the research evidence in this field could draw any conclusions about the pattern, let alone argue with such confidence and even passion that it demonstrates the harm of violence on television, in film and in video games."*

The Federal Trade Commission (2000) report, *Marketing violent entertainment to children*, contained a review of research on the impact of violence in entertainment media. Concerning violent video games, the FTC concludes:

> *"Most researchers are reluctant to make definitive judgments at this point in time about the impact of violent electronic games on youth because of the limited amount of empirical analysis that has so far taken place. Although some surveys of the literature lean toward seeing a detrimental effect from playing violent video games, others are more skeptical."*

Griffiths (1999, pp. 209-210) concludes, *"The majority of studies on very young children tend to show that children become more aggressive after playing or watching a violent video game, but these were all based on the observation of free play."* [emphasis added]

In his overview of video game research, Gunter (1998, p. 109) concludes, *"Even with experimental studies, there are problems of validity that derive from the fact that they do not measure 'real aggression' but rather simulated or pretend aggression."*

An editorial in the British medical journal *The Lancet* (1999, p. 525) commented:

> *"It is inaccurate to imply that the published work strongly indicates a causal link between virtual and actual violence. Experts are divided on the subject.... The American Academy of Pediatrics' concerns seem woefully misplaced.... While future research may prove the danger of the media to children, we know already the harm that poverty, abuse, and weapons can have. Forced to choose between facing a teenager holding a firearm or his classmate clutching a video of a Quentin Tarantino movie we would all opt for the latter."*

The Swedish Public Health Institute (Lager & Bremberg, 2005, www.fhi.se) reviewed video game research consisting of controlled experiments and prospective longitudinal studies. The following were studied in at least three experiments: spatial abilities, reaction time, aggressive play, aggressive thoughts/ interpretations, aggressive feelings and aggressive behavior. They conclude,

> *"This implies, all in all, limited support that video and computer game playing cause children to choose more aggressive toys afterwards – but no support for*

> *links between computer game playing and aggressive feelings, thoughts or behaviors although these outcomes are well studied. The fact that the choice of toys is affected, points to the fact that the contents of the games are not passing by unnoticed by the children, but whether the choice of toys in the studies primarily should be interpreted as an expression of aggressiveness could perhaps, in the light of the other studies, be discussed"* (p.14).

Newman (2004) writes that there is no consistency in the definitions of violence and aggression. *"Glib statements relating aggression to game playing, whether appearing in the mass media or scientific journals, seem totally unwarranted"* (pp.67-68). The problem with research on violent video games, says Newman, is the idea that you can understand the effects of a video game from a superficial glance at its violent content (p. 69).

Olson (2004), of Harvard Medical School, challenges statements about the relation between violent video games and real-life violence. She notes that between 1994 and 2001 there was a broad decline in juvenile arrest rates for violent crimes. *"There is no indication that violence rose in lockstep with the spread of violent games"* (p. 146).

> *"Several academic studies (primarily experiments) have received broad coverage in the popular media and are cited by the press and some advocacy groups as evidence that video games create dangerous, aggressive thoughts, feelings, and behaviors. Local, state, and federal legislation, including criminal penalties for selling or renting certain games to minors, have been introduced based on these studies"* (p. 146).
>
> *"Here are some of the <u>limitations of current studies as a basis for policy making...</u>*
>
> - *<u>Vague definitions of aggression</u>. "Aggressive play that follows exposure to games or cartoons containing violence is not distinguished from aggressive behavior intended to harm (Irwin & Gross, 1995; Silvern & Williamson, 1987). Aggressive thoughts, feelings, and behaviors may be presented as equivalent in importance and treated as valid surrogates for real-life violence, with the assumption that reducing these factors will reduce harm"* (p. 146).
> - *<u>"Use of violent media is not put into context with other known contributors to aggression or violence</u>."* (p. 147).
> - *<u>"Test conditions that are difficult to generalize to the real world</u>."* Subjects may have only 10 minutes to play a game in an experiment. Young people commonly play games with others (p. 147).
> - *<u>"Small, nonrandom, nonrepresentative samples"</u>* (p. 147).

Experiments that rely on college students as participants may be unable to tell us much about the effects of video games on those who typically play them. Experiments with college students may be uninformative about the effects of video games on young people under the age of 18. [The heavy reliance on college students as subjects in experiments is regarded by some psychologists as a weakness of psychological research that limits its generalizability (Jaffe, 2005).]

- Potentially "*moderating factors, such as age or developmental stage, are often not considered*" (p. 147).

- "*Study findings are combined in ways not appropriate for policy use*" (p. 147). Given the different populations, measures, and exposures, it is inadvisable to combine them in a single meta-analysis.

Schechter (2005, pp. 151-152), in his history of violent entertainment notes, *"Nearly all the studies that purport to show a link between exposure to media violence and aggressive behavior are afflicted with significant problems, ranging from methodological flaws to bizarre assumptions about the way the human imagination processes and makes use of fantasy. To begin with, they tend to be conducted under highly artificial conditions that bear no resemblance to a child's actual day-to-day experience.... There is an enormous difference between real aggression that is meant to inflict harm on another person and the kind of rough-and-tumble horseplay that young males have gleefully engaged in from the inception of the species."*

Southwell & Doyle (2004, p. 393) ask, *"Are there unique aspects of electronic game use that negatively affect school performance? ... As is often the case with media studies, the cause-effect link is tenuous. Are there certain aspects of games themselves, or of some categories of games, that can affect cognitive functioning? Consideration of this question yields some surprising answers: There is reason to believe that interaction with electronic games actually might offer some positive benefits."*

> *"What about violence? Several exhaustive reviews of available games literature reach somewhat different conclusions. Anderson & Dill (2000) and Anderson & Bushman (2001) highlighted a distinct role for electronic games in promoting violence. Anderson and Bushman's meta-analysis suggests that available experimental evidence supports the conclusion that violent video games encourage aggression. But the Federal Trade Commission (2000), Bensley & Van Eenwyk (2001), and others were more tentative in their conclusions, often arguing that the evidence is insufficient for either a yea or nay conclusion. Moreover, we should be mindful of the possibility that available literature is biased by the historical reticence of some journals to publish null findings' (p. 394).*

Unsworth and Ward (2001) conclude, *"The inconsistencies in the findings of a vast body of research and the rate of advancement in video game technology make it difficult to*

draw any firm conclusions about the relationship between exposure to video game violence and aggressive behavior."

Weak, null and inconsistent data

Many correlational studies have failed to find statistically significant relationships between frequency of playing video games and emotional or behavioral problems (Colwell & Payne, 2000; Gibb, et al., 1983; Kestenbaum & Weinstein, 1985; McClure & Mears, 1986; Winkel, et al., 1987), or no significant relationship between the amount of time children spent playing video games and aggressive behavior (Funk, Hagan, et al., 2002; van Schie & Wiegman 1997).

Experiments that fail to find any effects of violent video games on aggressive behavior or aggressive cognition include Ballard & Lineberger (1999); Graybill, Strawniak, et al. (1987); Kirsh (1998); Winkel, et al. (1987); and Williams & Skoric (2005).

Even research said to support a link between violent video games and aggressive behavior is not as convincing as is sometimes portrayed. For example, the Anderson & Dill (2000) studies are often cited as evidence of the effects of violent video games. Anderson & Dill (2000) examined both the correlates of playing violent video games, and conducted an experiment on the effects of violent video games. In their correlational study, a significant relationship was found between self-reported aggression and exposure to violent video games. This does not mean that video games cause aggression. It may be that aggressive individuals are drawn to violent video games, or that some unknown factor is responsible for both aggressive behavior and attraction to violent video games.

In the experiment by Anderson & Dill, college students played a violent video game (*Wolfenstein 3D)* or a nonviolent game (*Myst*). Women and men played each assigned video game 3 times for 15 minutes. The researchers' measure of 'aggressive thoughts' was the time it took to recognize aggressive words (for example, 'murder') flashed on a computer screen. Aggressive thoughts were not measured directly in this experiment, only reaction time to words flashed on a screen.

The average reaction time to aggressive words was faster among those who had played the violent video game. Anderson & Dill interpret this to mean that *"the violent video game primed aggressive thoughts. This result suggests one potential way in which playing violent video games might increase aggressive behavior, by priming aggressive knowledge structures" (p. 786).* Calling the recognition of aggression-related words 'aggressive thoughts' and aggressive 'knowledge structures' does not mean that there is any connection with aggressive beliefs, intentions or behaviors.

Participants who had played *Wolfenstein 3D* delivered significantly longer noise blasts after losing trials than those who played the nonviolent game *Myst*. There was no effect on the intensity of noise blasts delivered to the 'opponent.' Yet Anderson & Dill conclude, *"Playing a violent video game increased the aggressiveness of participants after they had been provoked by their opponent's noise blast"* (p. 786). Anderson & Dill

focus exclusively on the trivial finding that people who played the violent video game depressed a noise button longer than those who played *Myst*, and they ignore the fact that there was no difference in the intensity of noise delivered to the opponent.[4] This is hardly convincing evidence that violent video games cause aggressive behavior.

Experiments that measure hostility and a 'hostile attribution bias' after playing violent video games sometimes find no effects (e.g., Anderson & Ford, 1986; Baldaro et al. 2004; Scott, 1995; Sheese & Graziano, 2005).

Some studies find an inverse relationship between violent video games and aggressive behavior. For example, a study in Japan found that a preference for aggressive video games was associated with lower aggression scores, "*and this raises questions for the causal hypothesis*" (Colwell & Kato 2003).

In a meta-analysis Sherry (2001) reports an inverse relationship between the amount of time spent playing violent video games and aggressive behavior -- the more time spent playing violent video games, the less aggression. Sherry writes, *"The results suggest that playing even the most violent of games for extended times may not increase aggression.... Parents' intuitive reaction to limit playing time may actually be counterproductive, pulling the child from the game at a time when the largest aggressive effects are likely."* If allowed to continue playing, Sherry implies, the aggression would subside.

If violent video games are a cause of aggressive behavior, there should be a dose-response relationship between exposure to violent video games and their aggressive effects, with greater exposure resulting in more aggressive behavior. However, in the Sherry (2001) meta-analysis, playing time was a negative predictor of aggression (r = -.19). That is, the more one played violent video games, the weaker the relation to aggressive behavior. In studies by Ballard & Lineberger (1999), Scott (1995), and Winkel et al. (1987), the level of aggressive content in video games bore no relation to the level of subjects' own aggressive behavior afterwards.

In a study by Funk, Buchman and others (2003), playing a violent versus a non-violent game did not affect aggression in a group of 5 to 12 year old boys and girls. Those children who played a violent video game did not differ in either aggression or empathy scores from children who played a nonviolent video game. Neither was long-term exposure to violent video games associated with aggressive responses to story vignettes.

In an Australian experiment (Fleming & Rickwood 2001), boys and girls age 8 to 12 years played a violent or a nonviolent video game for 4 minutes. Measures of arousal,

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[4] In contrast, a study by Bartholow & Anderson (2002) using a similar research design found significant effects for intensity of noise blasts but not for duration. In both studies the researchers conclude that violent video games affected aggressive behavior, but they could just as easily have concluded the opposite, since in each study one of these two measures was significant while in the other it was not. In a study by Bartholow, Bushman & Sestir (2006), a combined noise intensity and duration measure was used, but intensity and duration are not reported seperately.

heart rate, and aggressive mood were assessed. According to the researchers, the results *"offer no support for the hypothesis that children will report more aggressive mood after playing violent video games. There is also no statistical evidence to support the hypothesis that this effect would be stronger for boys than for girls."* In fact, they found that *"mood was significantly more positive after playing the violent game than after the paper-and-pencil game."*

A longitudinal study of violent video games by Williams & Skoric (2005) enlisted more than 200 people from 14 to 68 years old who had not previously played online multiplayer role-playing games. Some of them were randomly assigned to play a violent computer game for at least 5 hours a week for one month. Pre- and post-play measures included normative beliefs in aggression, and questions about aggressive social interactions (getting into a serious argument). Based on Anderson's General Aggression Model, the researchers predicted increases in aggressive beliefs and aggressive behavior following one month of play.

> *"Despite a robust exposure that averaged 56 hours over the month of the study, the results did not support the hypotheses. Simple correlations between hours played and the three dependent variables were non-significant... Game play – controlling for gender, age, and time1 aggression scores – was not a significant predictor of aggressive cognitions. Compared to the control group, participants after the experiment were not statistically different in their normative beliefs on aggression than they were before playing the game. Similarly, game play was also not a predictor of aggressive behaviors"* (p. 226).

Comparisons of the effect of video games to other media

It is sometimes argued that violent video game exposure could have a stronger impact on the player than violent television or movie exposure because of the active involvement of the player, identification with violent characters, and reinforcement of violent actions (American Psychological Association, 2005, http://www.psychologymatters.org/videogames.html). But there is no evidence to support these contentions. In Sherry's (2001) meta-analysis, the effect of violent video games on aggression was smaller than that of televised violence.

Holm Sorensen & Jessen (2000, pp. 120-121) write, *"[Interactivity], which is usually described as a problem in relation to violent computer games – the fact that the player himself must conduct violent deeds – actually makes children aware that their actions take place in a fictitious universe. For children, computer games are in fact 'games' with their own rules. From an early age, they are aware that these rules do not apply outside the realm of the game, with the exception that children can include elements and rules from the games in their play."*

As a unique medium, video games differ from television and film not only in their interactivity, but also in the nature of their stories, their open-endedness, the control and choices afforded players, and in their ability to satisfy different needs of their users.

Thus there are compelling theoretical reasons to believe that video games may have less emotional impact on players because, in a video game, the player has control over the action and in many cases over the story line. This sense of control may mitigate any negative effects that video game content might have.

Control as a moderator of videogame effects

Video games begin, pause and end at the will of the player (with the exception of experiments in which people are compelled to play them). One of the attractions of video games is the control afforded to players (Grodal, 2000). Control moderates the reactions associated with task performance under stressful conditions (Peters, Godaert, et al., 1998; Weinstein, Quigley & Mordkoff, 2002).

The social character of video games

People play video and computer games in groups, and they tend to talk about games with their friends. Many boys play violent video games because it is expected of them by their peers, just as many adult men follow sports because it is socially useful to do so. In *Video Kids*, Provenzo (1991, p. 58) notes, *"Pool, pinball, or video games allow a means by which to establish hierarchies of skill and ability, and ultimately leadership."* But in experiments participants are treated as individuals divorced from their social world.

Why aren't researchers themselves affected by their long-term cumulative exposure to media violence? I believe they can tolerate media violence because their exposure serves a higher purpose, namely, the advancement of science. Young people who play violent video games may also have a higher purpose – to learn about a game because their peers talk about it, to become expert in a peer-valued activity, to experience excitement, to distract themselves from pain and suffering.

Might violent video games help children cope with anger?

Olson (2004) and Salonius-Pastenak & Gelfond (2005) note the need for research on potential benefits of violent games for some children and adults. For everyone who may be influenced negatively by violent video games, there may be an equal number of people who use video games to distract themselves from anger, in the same way that an active sport, or counting to 10, can help a person cope with anger or other unpleasant emotions.

Jansz (2005) writes that violent video games are *"private laboratories in which an adolescent can experiment safely with the uncertainty of his identity and emotions.... Playing a violent video game also enables an adolescent to experience emotions that are problematic for him in ordinary life and allows him to come to terms with uncertainties about his identity"* (p. 231). Violent video games enhance *"the gamer's potential to cope with the inevitable insecurities of adolescence"* (p. 237).

Conclusion

Existing research on violent video games is inconsistent, ambiguous, and insufficient to allow one to draw conclusions concerning the effects of violent video games on the aggressive behavior of young people. I remain unconvinced that the evidence to date points to the conclusion that violent video games cause aggressive behavior, and doubt whether the research tools available to social psychologists are capable of providing an answer. The continued controversy over the effects of media violence in the scientific community attests to the fact that the data are not conclusive.

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United States Senate
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
March 29, 2006
Hearing on "State Regulation of Violent Video Games and the First Amendment"

Written Testimony of David Horowitz,
Executive Director of the Media Coalition

I would like to thank Chairman Brownback and Senator Feingold for the opportunity to submit written comments for the record. First, let me introduce the Media Coalition. It was established in 1973; its members are trade associations representing book and magazine publishers, movie, recording and video game manufacturers, booksellers, librarians, and recording, video and video game retailers in the United States.

The hearing addresses important legal issues and a broad range of complex research relating to video games with violent content. The members of the Media Coalition understand that children today are exposed to a greater amount of media than ever before. We recognize the concerns of some parents that their children may be consuming media they consider inappropriate. While acknowledging these concerns, it is important to stress that any regulation of Constitutionally-protected speech based on its content is immediately suspect. As a general rule, government regulation of speech based on its violent content is not permissible. In addition, minors have a First Amendment right to see and hear video games as they do other media. Although video games are a relatively new form of speech, there is no legal basis for imposing restrictions on speech with violent content in this format. In addition the video game industry's rating system is voluntary; such a system would be unconstitutional were it mandated by the government. Finally, assumptions about the effect on minors of viewing or listening to depictions or descriptions of violence are anything but conclusive. Different researchers, often looking at the same data, have come to very different conclusions about causality, and it is clear that little correlation exists between the availability of media, violent or otherwise, and actual crime statistics.

REGULATION OF SPEECH WITH VIOLENT CONTENT IS UNCONSTITUTIONAL

Speech is presumed to be protected by the First Amendment unless it falls into a few very narrow categories. As the Supreme Court stated in Free Speech Coalition v. Ashcroft: "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children." 535 U.S.1382, 1389 (2002). The Court has never approved the restriction of speech based solely

on violent content. Indeed, as shown below, federal courts consistently have rejected government attempts to do so.

Regulation of Speech with Violent Content Violates the First Amendment

The courts consistently have held that speech with violent content is protected by the First Amendment and may not be banned or restricted either for adults or minors. The case law includes a growing body of law striking down restrictions on violent media that were enacted.

- $ Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) granting preliminary injunction barring enforcement of California law barring the sale or rental of video games with violent content and mandating labeling of games.
- $ Entertainment Software Ass'n v. Blagojevich, 404 F. Supp 2d 1051 (N.D. Ill. 2005) granting permanent injunction barring enforcement of Illinois law barring the sale or rental of video games with violent content and mandating labeling of games and posting signs about industry rating system.
- $ Entertainment Software Ass'n v. Granholm, 404 F. Supp. 2d 978 (E.D. Mich. 2005) granting preliminary injunction barring enforcement of California law barring the sale or rental of video games with violent content.
- $ Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) enjoining enforcement of a county ordinance that barred the sale or rental of video games with violent content.
- $ American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) enjoining enforcement of a city ordinance that limited minors' access to violent video games.
- $ Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 118 (W.D. Wash. 20004) barring enforcement of a state law that barred dissemination to minors of video games that included violence against "a public law enforcement officer."
- $ Bookfriends v. Taft, 233 F.Supp.932 (S.D. Ohio 2002) deeming speech with violent content as fully protected by the First Amendment and enjoining enforcement of Ohio's "harmful to juveniles" law that would have criminalized dissemination to a minor of speech with violent content.
- $ Eclipse Enterprises Inc. v. Gulota, 134 F.2d 63 (2d Cir. 1997) finding unconstitutional a law barring the sale to minors of trading cards of notorious criminals.
- $ Davis-Kidd Booksellers, Inc. v. McWherter, 886 S.W. 2d 705 (Tenn. 1993) striking down a restriction on the sale to minors of material containing "excess violence."
- $ Video Software Dealers Assn. v. Webster, 968 F.2d 684 (8th Cir. 1992) holding that "unlike obscenity, violent expression is protected by the First Amendment."

Distinguishing "Good" Violence from "Bad," "Excessive," or "Gratuitous" Violence

The impossibility of distinguishing "acceptable" from "unacceptable" violence is a fundamental problem with government regulation in this area. The evening news is filled with images of real violence in Iraq and Afghanistan routinely perpetrated by the "bad" guys. Often this horrific

violence goes unpunished. Some of our most celebrated literature, cinema, and music is filled with graphic depictions of violence. Books including the Bible, Shakespeare's *Titus Andronicus* and Truman Capote's *In Cold Blood*, movies such as *Saving Private Ryan* or *Bonnie and Clyde* and music from opera to country are filled with depictions or descriptions of violence that at times is horrific. It would be virtually impossible for the government to create a definition that would allow "acceptable" violence but would restrict "unacceptable" violence. As noted above, no court has been satisfied that the government has solved this problem.

Government-Mandated/Enforced Rating Systems Are Unconstitutional

While voluntary ratings exist to help parents determine what is appropriate for their children, a government-mandated rating system or government enforcement of an existing voluntary rating system would have a profound chilling effect on the distribution of constitutionally protected material and would likely be unconstitutional. Even government pressure on industries to change or amend a voluntary rating regime veers alarmingly close to a government-mandated system. Courts in nine states have held it unconstitutional for the government to enforce the Motion Picture Association of America's rating system or to financially punish a movie that carries specific rating designations. In MPAA v. Specter, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing, as determined by CARA ratings. In Eastern Federal Corporation v. Wasson, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% on all admissions to view movies rated either "X" or unrated was an unconstitutional delegation of legislative power to a private trade association. See also Swope v. Lubbers, 560 F.Supp.1328 (W.B. Mich, S.D. 1983); (use of MPAA ratings was improper as a criteria for determination of constitutional protection) Drive-In Theater v. Huskey, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

The Rights of Minors to See and Listen to First Amendment-Protected Material

While parents have great influence over what media their kids read, hear, or view, and while minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. Supreme Court has ruled that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." Erznoznick v. City of Jacksonville, 422 U.S. 212-13 (1975). In Ginsberg v. New York, 390 U.S. 629 (1968), the Court established a three-part test for determining whether material is "harmful to minors" and may, therefore, be banned for dissemination to minors. The Ginsberg test is specifically limited to sexually explicit material; it does not contemplate regulation of violent content as "harmful to minors."

Other Resources Are Available to Educate Parents

For those parents who are concerned about their children's viewing habits, there are many resources available to help them determine whether material is appropriate for their kids. In addition to the industry rating system, many organizations, including religious institutions and

advocacy organizations, review and rate media for the specific types of content they consider objectionable. Also, many newspapers and magazines have reviews of video games that include ratings or comments about programming that some might find objectionable.

RESEARCH DOES NOT SUPPORT THE CONCLUSION THAT MEDIA CAUSES ACTUAL ANTI-SOCIAL BEHAVIOR

The rationale for restricting access to media with violent content is the belief that it causes actual violence. We do not think the current research supports this conclusion. In publishing our report, *Shooting the Messenger: Why Censorship Won't Stop Violence*, and reviewing and assembling legal documents in many of the cases cited above, we reviewed many documents that address the state of existing research regarding the effects of media with violent content. These various sources review multiple problems with the conclusions ascribed to some research suggesting that there is any meaningful link between media violence and actual violence. We will highlight some of the arguments they make.

Very Complex Problem with Many Factors, Research Is Inconclusive at Best

As noted in many studies, the causes of violence are myriad and complex. The National Research Council's comprehensive 1993 report, *Understanding and Preventing Violence*, offered a matrix of the risk factors for violent behavior. Media with violent content is omitted entirely as a factor. The Surgeon General's lengthy 2001 report *Youth Violence: A Report of the Surgeon General* extensively explored the causes of youth violence. The authors briefly addressed the impact of consumption of media on children's behavior. They concluded that despite a "diverse body" of research, it was not possible to come to a conclusion about the effect of media consumption on minors in either the short- or long-term.

Researchers often look at the same data and reach starkly different conclusions about what it means. Certain researchers have consistently concluded that their data has shown a connection between media violence and real violence. Other researchers have reviewed the same data and disagreed with these conclusions. Some of the reasons researchers have reached different conclusions are explored in our report, *Shooting the Messenger: Why Censorship Won't Stop Violence*.

No Correlation Between Media Violence and Actual Crime Statistics

There is a long history of blaming the media for increases in crime and other anti-social behavior. At one time or another, books, movies, opera, jazz, blues, rock and roll, heavy metal and rap music, comic books and video games all have been accused of causing anti-social or violent behavior among minors (and adults). Crime statistics do not support these claims. Despite the explosive growth of media generally and video games specifically, crime statistics have not risen correspondently. In the past decade media consumption has grown enormously, but crime in general and youth crime in particular has declined steadily in much of the country.

Conclusion

We recognize the challenges that parents face in raising their children in the information age. Nevertheless, restrictions on video games that have violent content are contrary to the First Amendment. Nor is there a legal rationale for imposing or enforcing a rating system on video games or any other media. Furthermore, the basis for these restrictions is uncertain; the research does not support the claims that media violence leads to actual violence. We believe it is best to leave to individual parents the responsibility to determine what their kids see.

Thank you for allowing us to share our views with the Committee.

The members of Media Coalition are:

American Booksellers Foundation for Free Expression
Association of American Publishers
Comic Book Legal Defense Fund
Entertainment Software Association
Freedom to Read Foundation
Interactive Entertainment Merchants Association
Magazine Publishers of America
Motion Picture Association of America
National Association of Recording Merchandisers
PMA, The Independent Book Publishers Association
Recording Industry Association of America
Video Software Dealers Association.

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Statement of
Hal Halpin
President, Interactive Entertainment Merchants Association

Hearing on
State Regulation of Violent Video Games and the First Amendment

Subcommittee on the Constitution, Civil Rights and Property Rights
Committee on the Judiciary
United States Senate

March 29, 2006

Mr. Chairman,

On behalf of the Interactive Entertainment Merchant Association (IEMA), representing approximately seventy-five percent of retailers in the $10 billion dollar computer and video game business in the U.S., I appreciate the opportunity to highlight for your committee our constitutional concerns with government efforts to regulate the video game industry.

The IEMA remains firmly committed to ensuring that children do not gain access to video games their parents deem inappropriate for them. But just as the Government has not and should not involve itself in determining what movies minors may watch and what music they may listen to, the Government should not decide what games they may play. The measures put forward by various state legislatures would do just that, and as such, have been consistently struck down by courts on First Amendment grounds.

Retailers Aggressively Enforce Ratings System

Before examining constitutional concerns expressed by the courts, it is important that the Subcommittee fully understand the extent to which the retail community has responded to concerns expressed by lawmakers. Just as the motion picture industry restricts access for minors to inappropriate content through its rating system, IEMA retailers have committed to a similar self-regulatory enforcement system. For video games, the Entertainment Software Ratings Board (ESRB) ratings are: EC (games suitable for Early Childhood); E (Everyone, suitable for persons age 6 and older); E10+ (age 10 and older); T (Teen, age 13 and older); M (Mature, age 17 and older); and AO (Adults Only). On the back of the package is a "content descriptor" that explains why the game received the rating that it did.

Indeed, the IEMA was instrumental in the widespread adoption of ratings on games. We have mandated that all publishers looking to sell their products on member-company shelves have a user-friendly rating explaining the content for parents. The IEMA has further supported voluntary ratings systems and the ESRB in particular by working closely with them in educating the general public about their importance.

In December 2003, ALL of our member companies voluntarily committed to an aggressive and sweeping carding program in an effort to inhibit the sale of Mature-rated games to minors. Additionally, we incorporated ratings training into staff manuals so that new store clerks will understand our policies and procedures. Many of our stores have developed cash register prompting technology, which tells the clerk to ask for ID when the bar code is scanned at the point of sale. Our members have also posted informational ratings signage and literature in each and every store at the point of merchandising, so that parents can make informed purchasing decisions. In addition, retailers educate parents about video game ratings through posters, brochures, shelf talkers, kiosks, other in-store signage, and their websites. The most recent survey of retailer signage conducted by the ESRB, which covered more than 8,100 retail locations, found that 79% of the stores had signs explaining the video game rating system.

It is also important to understand the breadth of the IEMA's member base, in that the top twenty retailers in the industry represent over 75% of all sales. These are corporations that range from large mass merchandisers and electronics stores to major video rental and toy chains. Our members employ hundreds of thousands of workers in each and every one of the fifty states. Most of the IEMA members are Fortune 500 corporations and are publicly traded. Our executives have gone on the record committing to that which we have stated here. It is for that reason that we are confident that the rate of voluntary ratings enforcement and education can and will improve.

Between 2000 and 2005 independent sting operations have conclusively proven that the successful prevention of M-rated game sales to minors has seen a steady incline – from a low of 19% when the stings began in 2000 to a high of approximately 66% in 2004 ... just a few percentage points shy of the movie theatre owners, whom legislators and watchdog groups often hold up as the Gold Standard. The industry is confident that current efforts by the Federal Trade Commission to determine retail compliance with game ratings will demonstrate even higher rates of compliance as industry efforts take hold.

State Legal Restrictions Overreach

State measures attempting to regulate the industry ignore these strides. Instead, they often would place retail clerks in the position of making a legal determination as to whether a particular computer or video game is considered "violent" or "harmful," based on such legal prongs as whether the game appeals to the "prurient" or "shameful" interests of minors, or whether it is offensive to prevailing community standards. Courts have rightly noted that few clerks, no matter how well-meaning, can reasonably make this determination. Fining and incarcerating store employees as criminals for this failure is an excessive overreach of the state's authority, and one that courts are loath to embrace. (See the *Interactive Digital Software Ass'n v. St. Louis County*, where the ordinance in question threatened retail clerks with a maximum penalty of one year in jail and a $1,000 fine. St. Louis County Ordinance No. 20,193 (Oct. 26, 2000)).

Most retailers have a uniform store policy of carding for Mature-rated computer and video games. Sales clerks would be confused, as would be parents who have been recently educated on the rating system, if this standard were changed. It is also worthy of note that for each retailer to begin to understand a game's intricacies would require in excess of 30 person-hours per game, and even then there is no guarantee that hidden levels containing potentially objectionable material may be missed. Having a retailer determine which computer or video games are considered "offensive" imposes many burdens upon the retailer, particularly a mass merchant selling multiple entertainment products such as movies and music. Courts have noted

as much, stating that "a retailer cannot reasonably, economically, or easily make a determination whether the content of a particular video game is prohibited." (*Entertainment Software Ass'n v. Granholm*, 404 F. Supp. 2d at 983. See also *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d at 1076-77 (striking down the Illinois Violent Video Game Law for vagueness).

S. 2126 Would Violate the U.S. Constitution

Court decisions have been unambiguous. In the past five years, six federal courts have enjoined on First Amendment grounds local and state laws that attempted to restrict minors from playing, purchasing, or renting video games depicting violent imagery. See *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (obscenity law does not cover non-sexual depictions of violence, and it is "unlikely" that there could be a compelling state interest that could justify a restriction on minors' access to depictions of violence); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (finding no evidence of a compelling government interest that could justify the county's restrictions on violent video games); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) (obscenity law does not cover non-sexual depictions of violence, and there is no compelling state interest that could justify a law barring dissemination to minors of video games that depict violence against law enforcement officers because there is no evidence that such depictions lead to real-world violence against law enforcement); *Entertainment Software Ass'n v. Granholm*, 404 F. Supp. 2d 978 (E.D. Mich. 2005) ("the State has been unable to demonstrate the perceived harm it seeks to protect against"); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005) (there is no substantial evidence that playing violent video games leads to violence or even aggression); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (granting preliminary injunction against statute imposing restrictions on minors' access to violent video games because state is unlikely to be able to show a compelling state interest that could justify the restrictions).

Given U.S. Supreme Court decisions on entertainment products, it is clear that, in order for government restrictions on video or computer games to be permissible, either: the material must be legally "obscene" or "obscene for minors"; or the restriction must be based on a compelling state interest and be narrowly tailored to alleviate the asserted problem. The courts have found that the enacted restrictions on video have met neither of these criteria.

We appreciate the opportunity to share our views with the Committee.

Interactive Entertainment Merchants Association

Established in 1997, the Interactive Entertainment Merchants Association (IEMA) is the non-profit U.S. trade association dedicated to serving the business interests of leading retailers that sell interactive entertainment software (including video and computer games, multimedia entertainment, peripherals and other software). Member companies of the IEMA collectively account for approximately 75 percent of the $10 billion annual interactive entertainment business in the United States

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Testimony of Rep. Jeff Johnson before the United States Senate Subcommittee on the Constitution, Civil Rights and Property Rights

Thank you, Mr. Chairman and Committee members, for allowing me to talk with you today. My name is Jeff Johnson. I'm a third-term Republican serving as Assistant Majority Leader in the Minnesota House of Representatives and Chairman of the House Civil Law Committee. More importantly, I'm the father of two little boys who would play video games 12 hours a day if my wife and I didn't limit them to three hours a week.

I am the House author of a bill in Minnesota that takes a rather modest step towards restricting access by our kids to extremely violent or sexually explicit video games. Sen. Sandy Pappas, a Democrat from St. Paul, has already passed this bill off the Senate floor. I hope to do the same in the Minnesota House in the next few weeks.

The bill is very simple and narrowly tailored. It provides that children under 17 cannot rent or buy video games that are rated "M" (for Mature) or "AO" (for Adults Only). If they attempt to do so, they are subject to a $25 fine. Our bill also requires each retailer of these games in Minnesota to post a clearly visible sign regarding this restriction.

My intent with this legislation is not to make criminals out of kids or to make money for the state $25 at a time. I suspect there will be little or none of that. I am hopeful, however, that the new law will catch the attention of at least a few of the painfully oblivious parents in our state who are paying absolutely no attention to some of the garbage their little kids are playing on their video game machines.

As I mentioned, I have two little boys at home. Our oldest is in second grade and I'm amazed at how many of his friends play "M" rated video games on a regular basis. I would like to believe that at least some of their parents would put a stop to that if only we could get their attention.

I have been working on other ways to get their attention with Dr. David Walsh and the Minneapolis-based National Institute on Media and the Family, which is probably the most respected organization in the country addressing the impact of the media on children and families. But I believe we also have to do something legislatively.

I assume you all know that we're not talking about the equivalent of an R-rated slasher movie. Many of these games are absolutely horrific. They allow kids to learn firsthand how to kill, torture, mutilate and rape in graphic detail and vivid reality. They don't watch someone else do it, they get to do it themselves, and in many of these games, the more violent, merciless and gruesome you are, the more points you score.

I could not leave here today without being certain that you all comprehend the nature of the violence in these games, so I brought with me brief descriptions of four popular M-rated games that are all readily available at any large retailer or video rental store in Minnesota.

Grand Theft Auto – This was the most popular video game in America last year. The player is a young man who is trying to gain the respect of street gangsters and other criminals. The

more creative and brutal you are in killing innocent people, the more respect you gain and the more points you score. One example of a creative kill would be to beat someone to death with a bat until he drowns in his own blood and then when the ambulance arrives, you can kill the driver and use the ambulance to kill more people on the street. Another way to score points is to have sex with a prostitute, then if you beat her to death afterward and take your money back you score some bonus points.

Clock Tower 3 – This is a survival horror game about a young girl who is being chased by murderers who are attempting to kill her and her family. In one scene, a little girl with pigtails is caught by her attacker who repeatedly smashes her head against a wall with a sledgehammer. Later you see her ghost covered in blood playing a piano while her father is impaled onto a fence. Another scene shows the killer gouging out a man's eyeballs then lowering the man's elderly mother into a vat of acid as she begs for mercy.

Manhunt – In this game, the player is a mass murderer who sometimes wears a clown mask to disguise himself. You score points by, of course, killing people in creative and gruesome ways. For example, you can use piano wire to grab a man from behind and saw at his neck, pushing your foot up against his back until his head falls off. You can suffocate someone with a clear plastic bag. You can twist large shards of glass into someone's eyeballs or you can use a sickle to split open someone's stomach or stab a crowbar into the back of someone's head and pry it apart.

Postal 2 – In this serial killer game, the player earns points by killing as many innocent people as possible. You can beat people to death or chop their heads off with a shovel (and play soccer with their severed heads). You can kill them with a sledgehammer, a sickle or any other number of weapons. You pile up the bloody bodies on the screen to score more points. You get extra points if you are able to urinate in a victim's mouth before you kill him or her. And you can even open fire on a gay pride march, a minority community celebration and a parade of police officers.

I don't enjoy reading these descriptions. They literally make me sick to my stomach, especially knowing that little kids all over the state of Minnesota are playing these games. We need to do something about it.

In our Minnesota bill, we have crafted very narrow language in order to address the constitutional concerns that exist about content-based restrictions of speech. We are not restricting adults or parents in any way. If a parent is comfortable with their child playing adult video games, we don't interfere with that. We don't restrict the ability of kids to play these games. If they have them, they can play them. We are simply seeking to stop children under 17 from themselves renting or buying adult video games.

Despite dire warnings from the Entertainment Software Association, I believe that our bill would survive a constitutional challenge. Let me tell you why.

There is only one court decision that has any precedential value in Minnesota on this issue. That is the case of Interactive Digital Software Association v. St. Louis County, 329 F.3d 954 (8th Cir. 2003). In that case, the Eighth Circuit Court of Appeals ruled in favor of the video

game industry and struck down a St. Louis County ordinance that made it unlawful to sell, rent or make available violent video games, or to permit minors to play such games without a parent or guardian's consent.

First of all, the St. Louis ordinance in question was a great deal broader than our very narrowly tailored bill in Minnesota, an important distinction as the Eighth Circuit in this case, along with courts in the handful of other cases on this issue, made a point that any restriction of speech must be narrowly tailored to serve a compelling state interest. We have a very narrowly tailored bill; St. Louis County did not.

Much more important, however, is the fact that the St. Louis County case was argued more than three years ago and the court determined **at that time** that there was no compelling state interest to support the ordinance because no credible evidence was presented at trial showing a link between excessively violent video games and the psychological health of children.

With respect to evidence of this link, the court found that nothing more than the "vague generalities" of one psychologist and "conclusory comments" from county council members and a high school principal were presented at trial. Stating that the Government had the burden to present more than just "anecdote and supposition", the Court held that the St. Louis County ordinance was not constitutional.

Much has changed in the three to four years since the St. Louis County case was argued. I think I could spend an hour on the Internet this afternoon and present the Eighth Circuit with better evidence of a compelling state interest than was presented in 2002 when this case was argued. In fact, we've probably heard more compelling testimony in a matter of a few minutes here today than was heard at that entire trial. The scientific evidence has advanced dramatically in the past few years and, I suspect, will continue to do so.

A court in Minnesota will only need to look at the very defined scope of this bill, the nature of these games as they exist today as opposed to 2002 (as we know they get exceedingly violent and brazen each year as one game tries to top the last) and the recent and voluminous studies showing the effects of these games on our children, and I am very confident that this modest bill will survive any constitutional challenge that comes along.

Maybe I have a misplaced faith in our court system, but I just can't believe otherwise. Our little Minnesota bill puts some very minor restrictions on young children buying video games that teach them how to kill cops, beat prostitutes to death, and torture and murder as many innocent people as they can find. If that small measure violates our Constitution, I'm not sure I recognize my own country anymore.

Thank you for allowing me to speak to you today and for taking time to look into this very important issue.

Rep. Jeff Johnson
4620 Minnesota Lane
Plymouth, MN 55446

STATEMENT OF SENATOR HERB KOHL
"What's in a Game? State Regulation of Violent Video Games and the First Amendment"
March 29, 2006

Herb Kohl

Thank you Senator Brownback for holding this important hearing today. For more than ten years we have monitored the video game industry. Our efforts led to the creation of a uniform ratings system, the Entertainment Software Ratings Board (ESRB), for the video game industry that did not exist before we became involved in this issue.

Recent events – like last year's Rockstar Games episode – help illuminate where we need to focus our efforts to keep violent video games out of the hands of children. Moreover, Dr. Walsh of the National Institute on Media and the Family – a well-known expert on video games – suggested in his 2005 video game industry report card that our rating systems could do better. He voiced some concerns about the accuracy of the ESRB ratings and the enforcement of them by retailers. Unfortunately, any ratings system – including the ESRB – only works so long as it is not flawed and is properly enforced.

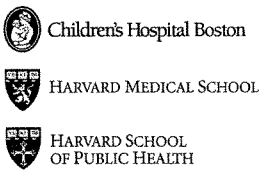
Let us look at a few findings from last year's study. What struck us immediately was the poor enforcement of the ESRB rating at the point of sale by retailers. In fact, 44 percent of the time underage children were able to successfully purchase an M or "mature" rated game according to this year's report card – this is even worse than last year's 34 percent success rate. Keep in mind that M-rated games are intended for ages 17 and above. Clearly, this negative trend is disturbing. Retailers simply must take their responsibility to police purchase of these games more seriously.

What is even more upsetting is that we have been saying this for years. Video game retailers would do well to adopt a video game sales policy similar to the Best Buy model. According to the report card, Best Buy performed "flawlessly" during the secret shopper survey. If Best Buy can do it, so can other retailers.

The 2005 report card also calls into question the accuracy of the ESRB ratings system and we share those concerns. The report reveals that compared to just a few years ago, there is more violence, sexual content, and obscenities finding their way into T-rated (teen) and M-rated games. If ratings slippage is occurring and more mature content is finding its way into T and M-rated games, then we must re-examine the ESRB ratings system. And if the current system is inaccurate, we must consider whether an overhaul is necessary.

Towards that end, I intend to write to the Federal Trade Commission and the General Accounting Office to solicit their help in evaluating the integrity of the ESRB ratings system. Specifically, we will ask the FTC to update its annual media violence report with a focus on violent video games and the ability of minors to purchase M-rated games. Furthermore, we will ask the GAO to undertake a comprehensive review of the ESRB ratings scheme in order to determine whether the ratings are accurate and properly enforced. We hope that the work of these agencies will help us answer the question whether or not we need to seriously reform the video game industry's self-regulated ratings system.

Video games are only becoming more popular. To be sure, we cannot and will not ban the creation or sale of violent video games – the First Amendment prohibits that. But, parents across America deserve a ratings system for video games that is accurate and trustworthy. Parents who rely on the rating should have confidence that it reflects what is in the games their children are playing. We do not raise our children to be assassins, drug lords, or gang leaders. The video game industry must be accountable for their product. And the retailers must be responsible for enforcing it. All we ask for is a reliable, accurate, and effective ratings system with impeccable integrity.



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TESTIMONY AND STATEMENT FOR THE RECORD ON RESEARCH ON BRAIN IMAGING AND VIDEO VIOLENCE IN CHILDREN AND YOUNG ADULTS

United States Senate Hearing: Wednesday, 29 March 2006

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and

Senior Scientist, Visiting Scholar
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This Hearing on Video Game Violence is an important opportunity to bring together recent research the effects of video violence viewing and video game violence in the context of 50 years of research on media violence and children (Pecora, Murray & Wartella, 2006). Several recent studies have been focused on brain activation patterns in relation to viewing video violence. In addition, some of these studies have included assessments of the extent of the viewers' involvement in playing violent video games. These three recent reports (Bartholow, et al., 2006; Murray, et al., 2006; & Weber, et al., 2006) have shed new light on the ways in which the brains of young children and young adults respond to viewing video violence.

Each study took a slightly different approach to assessing the neurological responses of viewers, but each study came to the same general conclusion, namely: viewing video violence activates specific areas of the brain that are known to be involved in recognizing, remembering, and rehearsing or activating aggressive behavior.

For example, in the case of the study by John Murray and his colleagues, young children (8 to 13 years old) watched video clips of a violent boxing match from a popular movie (Rocky IV) while their brains were scanned in a Magnetic Resonance Imaging (MRI) unit. The study demonstrated that there were very distinct patterns of brain activation when the children watched this violence, contrasted with viewing nonviolent video scenes from other TV programs. In particular, children responded to the video violence by activating areas of the brain involved in fear responses—the amygdala (the organ in the brain that recognizes threat in the environment and prepares the body for "fight or flight") was activated along with the posterior cingulate (an area of the brain that stores traumatic events for long-term memory—such as that found in PTSD, posttraumatic stress disorder in victims of violence). In addition, there was evidence of activation of the premotor cortex, indicating that the children were attempting to imitate the boxing scenes while viewing the movie.

In the case of the study by Rene Weber and his colleagues, young males played a violent video game while they were resting in an MRI. The young adult males (18 to 26 years) were experienced video game players who played, on average, about 15 hours each week. When viewing and playing the very violent

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sections of the video game, as contrasted to the sections of the game that involved search for a target rather than active violence, there were changes in an area of the brain (the anterior cingulate cortex—ACC) that indicated a separation of thinking or judgment vs. emotion—a suggestion that the repeated playing of violent video interactions leads to a desensitization to the infliction of pain and suffering as portrayed in the violent video game.

In the study by Bruce Bartholow and his colleagues, young adult males (average age 19.5 years), who were extensive video game players, were shown images depicting real-life violence while electrodes placed on their scalps measured brain wave responses (EEG or electroencephalogram). The researchers found that a particular brain wave (the "P300" wave), which has been demonstrated to indicate the extent of aversive response to threat, was diminished among the heavy violent game players. In particular, violent game players had less cortical activity to violent images than did nonviolent game players. Furthermore, in a later part of the study, when the young men were allowed to aggress against a partner by blasting him with unpleasant noise, the subjects with the lowest P300 responses (i.e., the most desensitized to violence) were the most aggressive.

So, what story do these studies tell us about the harmful effects of video violence? Also, we must remember that these studies must be seen in the context of a long history of research (approximately 50 years of studies, see; Pecora, Murray, & Wartella, 2006 and Vorderer & Bryant, 2006) on the topic of the harmful behavioral effects of viewing video violence. Basically, this new research on brain responses to viewing violence begins to identify how and where the neurological processes of children and young adults are modified by the experience of viewing violence. When added to the behavioral research that has accumulated over the past half century, we now know that the effects of so-called "entertainment" violence is far from entertaining. This is a serious source of violence in society; one that parents, teachers, and public officials should take seriously.

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NEEDED RESEARCH ON CHILDREN AND MEDIA
Brief Suggestions for a 5-Year Research Agenda

Prepared for Cherie Harder, Office of Senator Frist

John P. Murray, Professor of Developmental Psychology, Kansas State University and
Senior Scientist/Visiting Scholar, Center on Media and Child Health,
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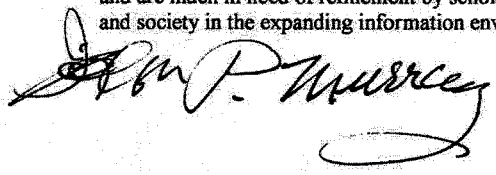
The history of research on children and media is largely the history of research on the impact of television on children's attitudes, values and behavior. Although there were some early studies of other media before the advent of television (notably, comic books, movies, and radio serials), the start of Congressional Hearings on TV violence and children in the 1950s stimulated an extensive program of research on the impact of television on children. That research has been summarized in a recent book, *Children and Television: 50 Years of Research*, which will be published in April 2006.

What we have learned from the research on television and children has direct application to the newer technologies of interactive media, such as computer and video games. However, there is still much we need to learn about the impact of these new technologies and still more to learn about the existing older media. A few suggestions for research:

1. One emerging area of research that holds great promise for understanding the impact of both existing and newer media is the area of brainmapping. Advances in neuroimaging allow researchers to study the patterns of brain activations of children and adults while they watch and interact with various media content. Much of the interest has been focused on the issue of violence (Murray, et al., 2006) but there is extensive interest in understanding how children and adults process the video and computer images and information (Anderson, et al., 2006).

2. A second area of needed research is the issue of cross-media use. How do children learn from multiple sources of information? Which medium is best for assisting in the enhancement of children's understanding of science, mathematics, and the humanities—a goal that fits with the broad concerns about reforming our education system and preparing youth for the 21st century work environment.

3. Finally, it would be helpful to know more about the role of media in family life and the contributions of media to creating a civil society. These are broad issues and are much in need of refinement by scholars who are concerned with media and society in the expanding information environment.



U.S. Senate
Committee on the Judiciary
Subcommitttee on the Constitution, Civil Rights and Property Rights
March 29, 2006, Hearing on
"State Regulation of Violent Video Games & the First Amendment"
(Written) Statement of
Professor Howard C. Nusbaum, Chair
Department of Psychology
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I would like to thank Chairman Brownback and Ranking Member Feingold for the opportunity to testify (submit written comments for the record). Speaking as a scientist and educator, the issue of the state regulation of violent video games concerns me for reasons that go beyond the extremely important First Amendment issues. State video games laws (e.g., in California and Illinois) are predicated on the interpretations of a very small number of neuroscience research reports that are not substantiated more broadly in the scientific literature. These laws specifically incorporate these questionable interpretations, putting states in the position of adopting unsupported speculation as law. For example, these laws presume that playing violent video games reduces activity in the frontal lobes of the brain, increases violent behavior, and produces psychological and neurological harm to minors. Yet there is no clear scientific support for these statements and they are questionable given the current research.

I want to briefly outline my credentials as a scientist in the areas of psychology and cognitive neuroscience to provide background for my testimony. I received a PhD in Cognitive Psychology in 1981 from the State University of New York at Buffalo and I am currently a tenured Professor of Psychology at the University of Chicago and Chair of the Department of Psychology. I am also a member of the Committee on Computational Neuroscience (which grants PhDs in neuroscience at the University of Chicago) and Co-Director of the Center for Cognitive and Social Neuroscience. I am currently on the editorial board of the journal *Brain and Language*, a journal that focuses on understanding brain mechanisms of language use and I serve as a reviewer for a wide range of journals including but not limited to the *Journal of Cognitive Neuroscience*, *Cerebral Cortex*, *Cognitive, Affective and Behavioral Neuroscience*, *Psychological Science*, and *NeuroImage*. I teach courses on cognitive neuroscience and on the use of neuroscience research methods.

My research is in the area of cognitive psychology and cognitive and social neuroscience. This research examines the psychological and neural mechanisms that are important in learning, categorization, attention and working memory (characterized sometimes as "executive function"), and social interaction. This work has included a study of the role of sleep in learning perceptual skills published in *Nature* (Fenn, Nusbaum & Margoliash, 2003), the role of attention in perceptual learning (e.g., Francis & Nusbaum, 2002), the role of working memory in communication (e.g., Goldin-Meadow, Nusbaum, Kelly, & Wagner, 2001), as well as experiments using functional Magnetic Resonance Imaging (fMRI) on the role of attention in understanding different speakers (Wong, Nusbaum, &

Small, 2004), and the role of the motor system in face-to-face communication (Skipper, Nusbaum, & Small, 2005). Recently we have been using video games that incorporate virtual shooting to investigate perceptual and motor learning and racial bias in social interactions.

I started carrying out neuroscience research using fMRI in 1998 and have published three papers concerning the use and interpretation of fMRI methods in understanding behavior and psychology. Although there has been a dramatic increase in the amount of fMRI research published in recent years, interpreting the results of fMRI studies can be extremely difficult. Critically, measures of neural activity, such as provided by fMRI, are only correlations with behavior and cannot be taken on face value as evidence of causality. Moreover, behavior and brain activity do not relate in a simple, direct, and unique way. One of my papers, published in the *Proceedings of the National Academy of Science* (Cacioppo & Nusbaum, 2003) addressed problems in interpreting fMRI data regarding the brain mechanisms involved in making risky decisions under uncertainty. A second paper (Small & Nusbaum, 2004) addressed the problems of using fMRI to understand complex behavior, such as communication, that is sensitive to context. The third paper (Cacioppo, Berntson, Lorig, Norris, Rickett, & Nusbaum, 2003) provided guidance to social psychologists interested in using neurophysiological measures such as fMRI to understand complex social and emotional behavior.

Summary

There is no evidence from any of the research on neuroimaging or brain electrical activity that playing violent video games produces any kind of neurological deficit. Moreover, there is no evidence from the neuroimaging studies that playing violent video games reduces neural activity in the frontal lobes of game players. Furthermore, there is no evidence that playing violent video games has a negative effect on executive function or self control.

The basic approach of several studies (Mathews et al., 2005; Kalnin et al., 2005; Wang et al., 2002) is to take adolescents diagnosed as having a Disruptive Behavior Disorder as a measure of what an "aggressive brain" looks like and compare patterns of brain activity in this group to a group of normal adolescents with more or less experience with violent media. However, uncontrolled group differences make this assumption unwarranted. Furthermore, there are no meaningful behavioral differences between the groups with respect to exposure to violent media.

The assumption that specific brain regions are uniquely causal in behavior (e.g., anterior cingulate for self-control of impulsive behavior) is not consistent with the standard assumptions neuroscience research. Most areas of the brain participate in many different psychological processes. Moreover, correlations between brain activity and behavior does not establish a causal link between them (Uttal, 2001).

Behavioral Research on Violent Video Games

To date, research on the neurophysiological effects of playing violent video games starts with specific assumptions from psychological research arguing that playing video games with violent content leads to aggressive behavior, thoughts, and feelings. Research on neural effects of violent video game playing generally assumes a causal relationship between exposure to violent media and subsequent aggressive behavior, thoughts, and feelings, and then sets out to show the brain activation that underlies this causal relationship. However, the previous psychological research, examining aggression and the effects of media and video game exposure (e.g., Anderson & Bushman, 2001; Anderson & Dill, 2000), is itself controversial. This research has critical problems that mitigate any possible strong conclusions regarding the relationship between playing video games with violent content and aggressive behavior, thoughts and feelings as well as any subsequent conclusions about the causal role of changes in brain activity in this relationship.

Studies that compare adolescents who have a history of playing video games with violent content with adolescents who do not play those games (e.g., as reviewed by Anderson & Bushman, 2001) cannot draw conclusions based on any psychological or behavioral differences between those groups and aggressive behavior because aggressive children may prefer games with violent content rather than violent content causing aggression. Studies that use laboratory proxies for aggression when playing video games (e.g., playing a noise that is longer) conflate the notion of competition with aggression (Anderson & Dill, 2000). Indeed, there is no widely accepted scientific definition for aggressive behavior and research on violent video game playing does not typically relate game experience to a history of police reports of violence or other more objective measures than self-reports or parent reports. There is no evidence that playing such games increases the chances of being arrested or suspended from school for violent or aggressive behavior. Moreover, the size of the effects that are reported in studies tend to be small, something on the order of 4 percent of the variability in the behaviors examined (e.g., making a noise slightly longer, as in Anderson & Dill, 2000). Some researchers have compared video games findings to other kinds of exposure effects and health (e.g., smoking and cancer). But it is important to recognize that there is no demonstrated causal biological evidence showing how exposure to violent video games has an effect on subsequent behavior, while there is clear biological evidence of a causal mechanism in such contexts as the relationship between smoking and cancer.. It is also important to note that the latter kind of biological research involves direct manipulation and complete control of the physical environment of test animals (e.g., for smoking or asbestos exposure) and then biological assessments of the consequences of that exposure. There is no comparable biological method for studying the effects of playing violent video games.

Background Assumptions About Brain Functioning

The current research on the effects of violent video game exposure on neurophysiology consists of three published studies (Bartholow et al., 2005; Mathews et al., 2005; Weber et al., 2006) and two unpublished conference presentations (Kalnin et al., 2005; Wang et

al., 2002). Three of these (Mathews et al., 2005; Kalnin et., 2005; Wang et al., 2002) reflect work carried out in collaboration as part of a single research team (see Kronenberger et al., 2005, also). There are some common assumptions in these studies that are questionable at best and simply incorrect at worst.

In order to understand the studies' first common assumption, it is important to point out that fMRI does not directly measure neural activity in the brain. Rather it is sensitive to the changes in blood flow that result from metabolic activity. The results of fMRI studies are not direct images of brain responses but are instead the result of mathematical models of neural responses. Therefore, changes in the assumptions of the model change the pattern of results. Similarly, measures of brain electrical activity (e.g., Event Related Potentials or ERPs) reflect only a small part of neural activity and are reported after analysis by sophisticated signal processing models that also make a number of assumptions.

Weber et al. (2005) and others base their research on a particular theoretical model of the neural basis aggression and violent behavior proposed by Davidson et al. (2002). Again, this model is just a theory that has been derived by Davidson et al.'s review of the research literature. In simple terms, this model assumes that there are two sets of brain regions that are important in violent and aggressive behavior, the limbic system including the amygdala, and a set of prefrontal and frontal cortical systems associated with a variety of functions including attention, motor behavior, and executive function. This model, which is an untested theory, proposes that increased sensitivity in the amygdala and decreased responsivity in orbitofrontal and vemtromedial prefrontal regions may lead to aggressive behavior. It is also important to point out that this model is extremely similar to another model proposed by Davidson et al. (2002) to explain depression without aggressive symptoms. This means the model is not specific to a neural basis for aggressive behavior.

Related to this theory is a common assumption that there is a simple causal relationship between brain activity and behavior such that showing a change in brain activity in any particular study may predict future aggressive behavior (e.g., Bartholow et al., 2005; Mathews et al., 2005; Weber et al.,, 2006). In fact, brain activity is only correlated (and not causally linked) with behavior and any particular measure may reflect other kinds of thoughts or unexamined physiological changes. Thus, the model that Weber's and others' research is based upon is of doubtful validity.

Another common assumption of many of these studies is that reductions in brain activity (e.g., as seen in Mathews, et al., 2005, fMRI study or Bartholow et al., 2005, for brain electrical activity) reflects a kind of neural deficit or problem. This is simply wrong. Reductions in brain activity can occur for a number of other reasons such as expertise or development of a skill (Poldrack et al., 2005).

Another assumption (Mathews et al., 2005; Weber et al., 2006) is that important psychological functions can be related to a single brain area. For example, the assertion of an effect of video game violence on "executive function" in cognition (Kronenberger

et al., 2005a) leads to a prediction that there should be effects of video game violence on frontal cortex (Mathews et al., 2005; Weber et al., 2006). Based on this kind of assumption, in other studies, subsequent changes in neural activity within a brain region are assumed to predict specifically changes in psychological function. Thus, if dorso-lateral prefrontal cortex were assumed to be a brain area responsible for self-regulation, a change in processing within that area should reflect a change in the psychological process of self-regulation. One classic example of the problems underlying this kind of assumption comes from fMRI research arguing that our psychological expertise in face perception (as demonstrated in various behavioral studies, e.g., Yin, 1969) is mediated by a single brain region called the "fusiform face area" (Kanwisher, McDermott, & Chun, 1997). The claim of this research is that this area of the brain responds uniquely to information about faces and provides no information about other visual patterns (claim one) and that this brain area is responsible for perception of faces and no other area of the brain has the necessary information (claim two). But in a more sophisticated analysis, researchers using fMRI demonstrated (Haxby, Gonbini, Furey, Ishai, Schouten, & Pietini, 2001) that the fusiform area of the brain conveys sufficient information to distinguish among objects besides faces, such as houses, cats, and chairs (contrary to claim one) and that many other parts of the brain outside the fusiform area have sufficient information to classify faces (contrary to claim two). Any particular part of the brain may be and typically is (as demonstrated by scientific research) associated with a wide range of psychological processes.

Some researchers have argued that exposure to video games with violent content leads to aggressive thoughts and behavior because video game exposure has an adverse impact on neural mechanisms related to self-control and executive functioning (e.g., Kronenberger et al., 2005a; Mathews et al., 2005). There is no evidence to support this argument. The research presented by Dr. Kronenberger addressing "executive functioning" cannot be used to this conclusion for several reasons

First, there is no clear evidence in Kronenberger et al. (2005a), Kalnin et al. (2005), or Mathews et al. (2005)[1] that exposure to violent media has a reliable adverse effect on self-control or, for that matter, the Stroop task (a psychological test used in these studies).

Second, there is a fundamental flaw in the logic of many brain imaging studies (including Kalnin et al., 2005, Mathews et al., 2005; Wang et al., 2002) in assuming that a particular pattern of brain activity is a unique and specific predictor of violent or aggressive behavior. While a pattern of brain activity might be associated with a pattern of aggressive behavior, that same pattern might be associated with many other patterns of behavior. As a result, a pattern of brain activity does not cause or uniquely predict a single pattern of behavior.

Third, Kronenberger et al., (2005b) suggest that the effects of violent media generally can be applied to ascertain the effect of exposure to video games specifically. The rationale

[1] My citations to Wang et al. (2002, Kronenberger et al. (2002a), Kronenberger et al. (2005), Kalnin et al. (2005), and Mathews et al. (2005) refer to the primary studies relied upon by Dr. Kronenberger in rendering his opinions, and cited. Dr. Kronenberger was a co-author on each of these studies.

for this appears to be a correlation showing that exposure to violence in video games is correlated with exposure to violence in other media. The implication is that because exposure to one form of entertainment is associated with exposure to both, total exposure can be treated as a proxy for the specific causal effects of exposure to video games. However, to the extent that there is concern specifically with the effect of video game exposure, this assumption represents a serious confound that makes valid scientific inferences impossible. Since there is no research that establishes that video game exposure has exactly the same effects as exposure to violence in television or movies, they cannot be treated as equivalent in their effects, even if some children would tend to be exposed to all such media.

Interpretations of fMRI Activity

Mathews et al. (2005) state that activation of certain brain regions (i.e., the frontal lobes) occurs during emotional regulation, attention, and inhibitory control. However these are complex functions distributed over a broad set of brain areas that involve aspects of the frontal lobes as well as other brain regions. For example, while the DLPFC (dorsolateral prefrontal cortex) is active during tasks that involve visual attention (e.g., looking for your car in the parking lot), it is not specifically or uniquely implicated in emotional control or self-regulation (contrary to statements about the DLPFC made in Mathews et al., 2005; *see* Davidson et al., 2000). The frontal lobes have a lot of neurons and cortical areas and represent a broad range of functions that also include motor control and planning, and encoding of information into memory (e.g., what you had for breakfast this morning). Also, many of the functions attributed to the frontal lobes, e.g., attention, involve a broad network of brain areas that connect the frontal lobe (e.g., DLPFC) to other parts of the brain such as the superior parietal cortex and the thalamus. Although different parts of the frontal lobes may be involved in different psychological functions, few, if any, carry out only a single function and few, if any represent the entire brain involvement in that function. Mathews et al. (2005) and Weber et al. (2006), argue that reduced activation of certain brain areas may be associated with a wide range of problems, including difficulties in attention, self-monitoring, and impulse control, among others. This is presented so that it implies a causal relationship (explicitly stated by Weber et al.), which cannot be inferred (e.g., see Uttal, 2001), between the reduced activity in these brain areas and these behavioral or psychological problems

First, as noted previously, reduced activity in specific brain regions is not a clear, unique and specific "marker" of psychological or behavioral problems. Activity in "these regions" can decrease as a result of expertise (e.g., Poldrack, Sabb, Foerde, Tom, Asarnow, Bookheimer, & Knowlton, 2005) as well as deficits in attention.

Second, reduced activity in some regions may be accompanied by increased activity in other regions, reflecting a change in the distribution of brain activity, but not necessarily a deficit of any kind. In a comparison of younger and older adults who perform comparably on certain tasks involving memory, the younger adults show less activation than the older adults in some of the brain areas (Reuter-Lorenz, 2002) referred to by Wang et al. (2002) and Mathews et al. (2005). Thus, changes in brain activity level

downward or upward cannot be interpreted in a single, simple way. Moreover, changing the relative distribution of brain activity cannot be interpreted in any simple way.

Bartholow et al., (2005), Weber et al. (2006), and others (Mathews et al., 2005; Kalnin et al., 2005; Wang et al., 2002) suggest that reduced brain activity reflects some kind of neurological deficit resulting from playing violent video games. It should be noted that Weber et al. (2006) report evidence that rejects this prediction showing some increases in anterior cingulate activity and decreases in amygdala activity while playing violent video games—exactly the opposite of the results reported by others (Mathews et al., 2005; Kalnin et al., 2005; Wang et al., 2002). Furthermore, just as decreases in activity in a brain region does not have a unique interpretation (e.g., "functional deficit"), increases in brain activity in particular regions do not have a unique interpretation. For example, in a listening task with different sounds in both ears, the amygdala is activated (Pollmann et al., 2004) and in making choices under statistical uncertainty the amygdala is activated (Fukui et al., 2005). As noted previously, patterns of fMRI data simply correlate with patterns of behavior and causality cannot be inferred from this association of measurements.

The DLPFC (dorsolateral prefrontal cortex) and ACC identified in recent neuroimaging studies (e.g., Mathew et al., 2005; Weber et al., 2006) as important for control of behavior are more generally viewed as important for attention than behavioral control, whereas orbitofrontal cortex (OFC) and ventromedial frontal cortex are more typically viewed as involved in behavioral control (e.g., Davidson et al., 2000). Moreover, in a Stroop task study of pathological gamblers, a group with real clinical problems in behavioral control, the reduced activity compared to normal subjects was in the ventromedial prefrontal cortex and not in the DLPFC or ACC (Potenza et al., 2003). In other words, when a real clinical group with behavior control problems is examined, the difference in performance is in a very different brain area. Thus, real behavior control problems do not appear to be associated with reductions in activity in DLPRC and ACC.

It is interesting to note that Green and Bavelier (2003) showed that extensive experience playing games with violent content such as *Grand Theft Auto 3*, *Half-Life*, and *Halo* produce substantial improvements in cognitive function in visual attention tasks that involve selection and control of processing. Moreover, this research showed that these improvements are specifically obtained as a result of experience with video games with violent content and not for video games without violent content. Training on a first-person shooter game produced significant improvements in visual information processing and attentional control compared to training on a non-violent puzzle game. The researchers do not attribute these benefits to the violence but to the way these games engage the player. (The Green and Bavelier (2003) study is one of the few studies that selected subjects based on specific video game experience to examine using performance tests the psychological consequences of this experience, and then tested the conclusion by specifically providing that experience to novices and administering the same tests.) It is extremely important to note that these improvements in behavior would likely be accompanied by reductions in fMRI measures of brain activity in the DLPFC and ACC

since these areas are involved in attention (LaBerge, 1995). Indeed, Poldrack et al. (2005) found just such reductions in cortical activity after attentional training.

Conclusion

Several states have written laws stating that minors who play video games with violent content are more likely to engage in violence or aggression, are more likely to experience feelings of aggression, and are more likely to experience a reduction in brain activity in the frontal lobes. There is no strong scientific evidence supporting the first two of these assertions that playing video games with violent content causes aggressive behavior and thoughts. Furthermore, the research to support the third proposition is seriously flawed. However, even if the third contention were correct, given all the qualifications and concerns already raised previously, it is not clear that it has any significance regarding the first two claims. Reductions in frontal lobe activity, as reported in the research reviewed here, are not in areas that have been most closely identified with problems of behavior or aggression control, namely the orbitofrontal or ventromedial cortex. Instead, the areas that are demonstrated to show reductions, the dorsolateral prefrontal cortex and anterior cingulate, are areas of the brain more closely associated with attention. The assumption that such reductions reflect deficits in brain function is not warranted, given that extensive experience with video games leads to improvements in attentional function and that studies that examine brain activity following improvements in attention function reveal reductions in these areas.

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Written Statement of

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before the

United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Property Rights

March 29, 2006

Mr. Chairman, I want to thank you and the Committee for the opportunity to share my thoughts on the shielding of children from violent video games. My name is Kevin Saunders and I am a Professor of Law at Michigan State University. I have spent the last dozen years studying the constitutional issues surrounding attempts to limit the access of children to depictions of extreme violence and other negative media influences. I have been involved, in one way or another in most of the recent round of attempts by state and local governments to limit either arcade play by, or retail sales to, minors of violent video games. While the attempts have thus far been unsuccessful, when challenged in court, *see Interactive Digital Software Ass'n v. St. Louis Co.*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Machines Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001); *Entertainment Software Ass'n v. Blagojevich*, 404 F.Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F.Supp. 2d 1034 (N.D. Cal. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F.Supp. 2d 1180, 1186 (W.D. Wash. 2004); *see also Entertainment Software Ass'n v. Granholm*, 2006 WL 148756 (E.D. Mich. 2006)(refusing to dismiss industry suit) , there are bases on which restrictions may overcome First Amendment limits and protect children from the dangers these products present.

The first two potential bases I will mention only briefly, because they have met with at best limited success in the courts, and later courts may well take these earlier decisions as authoritative. The bases are, however, not completely unavailable, since the Supreme Court has not ruled on the theories involved. One approach is to argue that sufficiently violent material, particularly when presented to children, may come within the obscenity exception to the First Amendment. This theory, argued for in my book *Violence as Obscenity*, was accepted by the federal district court in the Indianapolis litigation but was rejected by the Seventh Circuit, *see American Amusement Machines Ass'n v. Kendrick*, 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001). It is important to note that the Supreme Court has never ruled that violent material cannot be restricted. In the only case directly raising the issue to reach the Court, *Winters v. New York* 333 U.S. 507 (1948), the statute was struck down as vague, but the Court specifically warned against taking its holding as a conclusion that a properly drawn statute could not stand up to constitutional scrutiny.

The second theory that has had some limited success is that video game play, like the play of pinball machines, is not an activity protected by the First Amendment. This theory was

asserted by the district court in the St. Louis litigation but was rejected by the Eighth Circuit, *see Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp.2d 1126 (E.D. Mo. 2002); *rev'd*, 329 F.3d 954, 959 (8th Cir. 2003). The important distinction here, one not well spelled out by either court, is between the creative activity of the programmer and the communication of the product of that activity to the player on the one hand and the player's playing of the game on the other. This sort of distinction was recently recognized by the Fourth Circuit in another context, in *Willis v. Town of Marshall*, 426 F.3d 251 (4th Cir. 2005). That court distinguished between the creative performance of a band at a community dance and the activity of a dancer on the dance floor. The band was engaged in protected activity, but the dancer was said not to be engaged in communication and not to have the protection of the First Amendment for her sexually provocative dancing. The dancer actually has a better claim to First Amendment protection than the video game player; there are others who saw her performance, while there is no one there to whom the player communicates. This argument, which applies to arcade play rather than retail sales is spelled out in greater detail elsewhere, *see* Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*," 2003 L. Rev. M.S.U.-D.C.L. 51, 93-105.

Lastly, before turning the issue analyzed at greatest length by the courts, I will mention one last, and as yet untested, theory. In a recent book, *Saving our Children from the First Amendment*, I argue against the assumption that the dissemination of material to children is as protected by the First Amendment as dissemination to adults is unwarranted. The harms to children are greater and the benefits to self-government and autonomy do not apply with the same strength.

The theory to which the courts have paid the most attention is based on the claim that, even if violent video game play by children comes within the protection of the First Amendment, restrictions may stand, based on the danger the games pose. As in other areas of constitutional protection, the infringement of a constitutional right does not mean that the limitations are automatically struck down. Instead, the existence of a constitutional right requires that the restriction meet strict scrutiny. The government must show that the limits are necessary to, or narrowly tailored to, a compelling governmental objective. All the courts to examine the issue of violent video games, or indeed of violent depictions in other contexts, have accepted that the state has a compelling interest in the physical and psychological well-being of youth. The courts have not, however, been willing to find the restrictions at issue in those cases to be necessary to that interest.

Courts have questioned the scientific evidence and have been concerned that, even accepting evidence of correlation between violent video game play and real world violence, correlation does not demonstrate causation of that real world violence. Actually, the evidence is not only correlational. There are experimental and longitudinal studies that more directly demonstrate causation. The courts' unwillingness to find causation is particularly interesting, in the face of this evidence, given the overwhelming consensus of the health and science community that media violence causes real world violence. *See, e.g.,* Amer. Acad. of Pediatrics, et al., Joint Statement on the Impact of Entertainment Violence on Children, Statement to the Cong. Pub. Health Summit (July 26, 2000). Further, the courts' difficulty connecting the

correlation demonstrated by empirical studies with causation is despite the fact that the correlation found is stronger than for other areas in which there is no real dispute over causation. As the work of Professors Anderson and Bushman demonstrates, the correlation of media violence with real world violence is as strong as that for second hand smoke and lung cancer, lead exposure in children and lower IQs, use of the nicotine patch and smoking cessation, and asbestos exposure and cancer of the larynx. *See* Brad J. Bushman & Craig A. Anderson, *Media Violence and the American Public: Scientific Facts and Media Misinformation*, 56 Am. Psychol. 477, 481 (2001). While this reluctance to accept causation here, despite the acceptance in these other areas, may stem from the seemingly more mysterious processes of brains compared, for example, to lungs, the causal route is becoming more understandable through increased understanding of the development process taking place in the judgment and inhibition region of the adolescent brain and the effect of the environment on that development. *See* Barbara Strauch, *The Primal Teen: What the New Discoveries About the Teenage Brain Tell Us About Our Kids* (2003)(presentation of the neuroscience developments in a way accessible to a lay audience).

Despite this agreement in the health and scientific community and the continuing development of the relevant science, the courts have been unwilling to accept these conclusions. It is interesting to note that, among the first three video game cases, the district courts have been more receptive than the appellate courts. In both the Indianapolis and St. Louis litigation, the district court found danger in allowing children to play these games. The district judge in the Washington case also seemed to credit the evidence that video games generally present a danger. *See Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1188 (The court held that the State had "presented research and expert opinions from which one could reasonably infer that the depictions of violence with which we are constantly bombarded . . . have some immediate and measurable effect on the level of aggression experienced by some viewers and that the unique characteristics of video games . . . makes video games potentially more harmful to the psychological well-being of minors than other forms of media. In addition, virtually all of the experts agree that prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or anti-social behavior . . .") What the judge rejected was the focus of that state's statute on games in which the players shoot law enforcement officers. There was no evidence of special psychological impact for those games. Where the protective effort met its real resistence in that first round of cases was at the appellate level. Judge Posner in holding the Indianapolis ordinance unconstitutional rejected the empirical evidence, concluding that "[c]ommon sense says that the City's claim of harm to its citizens from these games is implausible, at best wildly speculative." *American Amusement Machines Ass'n v. Kendrick*, 244 F.3d 579. This is in sharp contrast to the St. Louis district court judge's statement that "For plaintiffs to . . . argue that violent video games are not harmful to minors is simply incredible." *Interactive Digital Software Ass'n v. St. Louis Co.*, 200 F. Supp. 2d at 1138.

Of course, this is not simply a matter of common sense. The issue of danger is a matter of science and the courts will need to understand that science. As indicated, some courts have accepted that science. The most recent examinations of the issue, perhaps affected by the appellate court reversals of the Indianapolis and St. Louis district court opinions, *see Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d at 1059 n.3 (quoting the Seventh Circuit's rejection of the evidence in the Indianapolis litigation), have been less receptive. In the

Illinois litigation, Judge Kennelly did, to his credit, examine the evidence with some thoroughness. The *Blagojevich* opinion expressed concern over effect size, that is the size of the increase shown in testing the effect of exposure to violent media. While that effect size might well indicate that a normal child will not become homicidal after playing a violent video game, no one makes that claim. Even a small effect size acting on the whole range of susceptibilities may have serious consequences in the more susceptible population.

Judge Kennelly also expressed concern over the size of the community of those studying the issue and the relationships among the scientists. He noted that, of the seventeen research articles relied on by the Illinois General Assembly, fourteen were authored or co-authored by Professor Craig Anderson, one by a colleague of Professor Anderson, and two by a scientist who relied on Professor Anderson's research in designing his own studies. This concern might be eased by recognizing that the articles all survived peer review, but the concern might simply transfer to the peer review process and the small community from which referees might be drawn. It should, however, be noted that Professors Anderson's and Bushman's meta-analysis of the research in the field included studies by a significant number of scientists unaffiliated with Professor Anderson. *See* Craig A. Anderson & Brad J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Effect, Physiological Arousal and Prosocial Behavior: A Meta-Analytic View of the Scientific Literature*, 12 Psychol. Sci. 353 (2001): Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. Of Adolescence 113 (2004). While these concerns of the court do not even currently seem valid, the continuing development of this area of scholarship and the attention paid by an increased number of scientists should eventually overcome the perceived shortcoming.

A second complaint may reflect less understanding of statistical inferences. The court noted that not all studies show a correlation between media violence and real world aggressiveness and that some even demonstrate a negative correlation. Correlation does not require that every sample demonstrate the same relationship. Differences in results from relatively small samples in particular are likely to occur, as indeed they do in studies of smoking and lung cancer. Such studies may be combined through meta-analysis to reach a conclusion across the body of research in a way conceptually similar to a comparison of season batting averages being a better basis for comparing players than their performances in any particular game.

Judge Kennelly also rejected the legislature's reliance on a functional magnetic resonance imaging study that purports to show a decrease among children exposed to violent media in the activity of the region of the brain that controls behavior. The video game industry offered an expert who suggested that decreased activity in the part of the brain studied could indicate an alternative method for accomplishing the work of that region. Even if true, the study did seem to show a difference between the control group and those who had more exposure to violence, and it was a difference that matched that for those with disruptive behavioral disorders. There are also several other studies that have found similar results in brain activity, using different experimental methods.

I am not a scientist and do not have the understanding of the issues that others testifying

today have. It also seems likely that none of the judges involved in the cases have been scientists. I, legislators, and the judiciary, must be open to recognizing the continuing development of this area of research. From a legal point of view, it is important to note that the courts' decisions on the scientific issues can have no long term precedential effect. Unlike any conclusions of law, which may have precedential value or at least be taken as authority in future cases, the conclusions on the science are contingent. A conclusion by an earlier court that the science fails to establish the danger perceived by the public and the legislature is only a conclusion that the science at that time was lacking. It does not establish the conclusion that the science at the time of any future legislation or litigation is also lacking. Each time the issue arises, the courts must consider the science anew.

Lastly, returning to the sort of argument offered in *Saving Our Children from the First Amendment*, I think it important to consider the costs of the two possible errors here. If, in fact, violent video games are causing an increase in aggressiveness and real world violence and the courts refuse to allow limitations, the cost is psychologically, and perhaps neurologically, damaged children and, in the extreme, the deaths of the victims of that real world violence. The other possible error would be to allow restrictions, when media violence does not in fact have the effects suggested by the science. The costs there would seem to be to the values behind the First Amendment's expression clauses. But, the most important values behind protecting expression are those tied to self-governance. To be self-governing, we must have access to information, but children do not vote. True, as Judge Posner pointed out in the Indianapolis litigation, they need to be competent voters when they turn eighteen. That is why I have counseled legislators to limit only those under seventeen. That allows seventeen year olds a year to play as many violent video games as it takes to become a competent voter. The other strongest value thought by some to underlie the Expression Clauses is the autonomy found in making one's own decisions as to what to read, see or perhaps play. But, we do not really believe in autonomy for children, or we would allow them to smoke, drink and engages in any number of vices legal for adults.

I hope that legislatures will continue in their efforts to protect children from this serious danger. Absent a Supreme Court decision on the issues, at least some lower courts may consider the constitutional theories suggested. Even with a negative Supreme Court opinion on all the positions asserted, a failure to find adequate science at any one point does not bar relitigation at a later point. Despite past losses, as the science continues to develop, the effort can continue and the danger theory is never permanently dismissed.

UNITED STATES SENATE

SENATE JUDICIARY COMMITTEE

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS

"WHAT'S IN A GAME? STATE REGULATION OF VIOLENT VIDEO GAMES AND THE FIRST AMENDMENT"

TESTIMONY OF PAUL M. SMITH

WEDNESDAY, MARCH 29, 2006

I appreciate the opportunity to appear before the Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights to discuss the constitutionality of state regulation of violent video games.

My perspective is that of an appellate advocate who has litigated First Amendment issues for the better part of three decades. Most recently I have been involved in litigation regarding the constitutionality of state laws that ban minors from purchasing or renting so-called "violent" video games. In each case I have been involved with, as well as every other to consider the issue, courts have struck down as unconstitutional legal restrictions on minors' access to "violent" video games. *See Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("*IDSA*"); *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) ("*AAMA*") (Posner, J.); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005); *Entertainment Software Ass'n v.*

Granholm, 404 F. Supp. 2d 978 (E.D. Mich. 2005); *Video Software Dealers Assn v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 167 (D. Conn. 2002); *Sanders v. Acclaim Entm't Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002). In fact, just recently, courts in Illinois, California, and Michigan have enjoined similar laws, holding that the First Amendment forbids such content-based regulation.

These cases have established beyond dispute that video games, just like books, movies, and television, are fully protected expression under the First Amendment. *See, e.g.*, *Schwarzenegger*, 401 F. Supp. 2d at 1045; *IDSA*, 329 F.3d at 957-58 (video games as protected as "the best of literature"); *James*, 300 F.3d 683, 695-96 (the First Amendment protects against the regulation of video games' "expressive content" or "communicative aspect"); *AAMA*, 244 F. 3d 572, 577-78 (describing in detail video games' expressive qualities); *Maleng*, 325 F. Supp. 2d at 1184-85. Like motion pictures and television programs, video games tell stories and entertain audiences through the use of complex pictures, sounds, and text. Video games feature the artwork of leading graphic artists, as well as music — much of it original — that enhances the game's artistic expression in the same way as movie soundtracks. These games often contain storylines and character development as detailed as (and sometimes based on) books and movies. *Id.* These games frequently involve familiar themes such as good versus evil, triumph over adversity, and struggle against corrupt powers. Although video games are

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largely designed to entertain, they also can inform, and even promote certain viewpoints. *See, e.g., AAMA*, 244 F.3d at 578 (describing a "feminist" video game that has "a message, even an 'ideology,' just as books and movies do").

Laws that restrict the expressive medium of video games based on "violent" content strike at the core of First Amendment protection and are subject to "strict scrutiny." *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-27 (2000); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Such content-based regulation of speech and expression is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Repeatedly, courts have struck down parallel laws attempting to restrict the distribution of "violent" video games because they failed to meet the exacting standards of strict scrutiny, namely that the law must support a compelling interest on the basis of substantial evidence, and that it must directly advance that interest while being narrowly tailored. *See Blagojevich*, 404 F. Supp. at 1076; *Schwarzenegger*, 401 F. Supp. 2d at 1046; *Granholm*, 404 F. Supp. 2d at 982-983; *ISDA*, 329 F.3d at 958-59; *AAMA*, 244 F.3d at 576-77; *Maleng*, 325 F. Supp. 2d at 1190.

There is no exception to these First Amendment principles because these laws target *minors'* access to video games. Minors have a constitutional right to access protected speech, with the narrow exception of certain sexual speech that does not apply here. *Erznoznik*, 422 U.S. at 212-214 ("In most circumstances, the values protected by the First Amendment are no less applicable when the

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government seeks to control the flow of information to minors."); *IDSA*, 329 F.3d at 959-60 (holding that ordinance restricting minors' access to "graphically violent" video games violated minors' First Amendment rights); *AAMA*, 244 F.3d at 576 ("Children have First Amendment rights."); *Maleng*, 325 F. Supp. 2d at 1186. As Judge Posner observed in *AAMA*, preserving children's First Amendment rights is "not merely a matter of pressing the First Amendment to a dryly logical extreme. . . . People are unlikely to become well-functioning, independent-minded adults, and responsible citizens if they are raised in an intellectual bubble." *AAMA*, 244 F.3d at 576-77. The State has no authority to censor material in order to achieve a desired effect in minors. Moreover, a law barring purchases of particular expressive works based on their content also violates the rights of the creators and would-be sellers of those works.

Every court to have considered the issue has found "violent" video game laws would not pass constitutional muster because the government lacks a legitimate and compelling interest in restricting video game content. Under well-settled First Amendment principles, expression may not be censored on the theory that it will cause some recipient to act inappropriately, unless it falls into the narrow category of speech "directed to inciting" and "likely" to incite "imminent" violence. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The courts have uniformly held that restrictions on video games do not satisfy the stringent requirements of the *Brandenburg* standard. *See, e.g.*, *James*, 300 F.3d at 698 (the

"glacial process of personality development" allegedly affected by "violent" video games "is far from the temporal imminence" required by *Brandenburg*); *AAMA*, 244 F.3d at 575 (no evidence that "violent video games incite youthful players to breaches of the peace," as Supreme Court precedent requires); *Blagojevich*, 404 F. Supp. 2d at 1073-74 (holding that Illinois statute did not satisfy *Brandenburg*).

The courts also have rejected the argument that restrictions on "violent" video games can be justified as a means to prevent "psychological harm" to minors. *See, e.g.*, *Blagojevich*, 404 F. Supp. 2d at 1074-75; *IDSA*, 329 F.3d at 958-59; *AAMA*, 244 F.3d at 578-79; *Maleng*, 325 F. Supp. 2d at 1187. That is because the government does not have a legitimate, much less compelling, interest in controlling minors' "thoughts" or "attitudes." *Blagojevich*, 404 F. Supp. 2d at 1074. The Supreme Court has said that the government cannot suppress minors' speech "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-214 (1975). As the federal court in Illinois recently observed, "[i]n this country, the State lacks the authority to ban protected speech on the ground that it affects the listener's or observer's thoughts and attitudes." *Blagojevich*, 404 F. Supp. 2d at 1074; *see also AAMA*, 244 F.3d at 575.

In terms of the substantial evidence requirement, the laws restricting distribution of video games to minors are typically justified on the basis of social science claims that minors who are exposed to depictions of violence in video

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games are more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior. Yet every court to have considered this evidence has found it wanting. The most recent example is the court in *Blagojevich*, which systematically reviewed and found unpersuasive the evidence of Illinois's two main expert witnesses, Dr. Craig Anderson and Dr. William Kronenberger. *Blagojevich*, 404 F. Supp. at 1059-67. The court concluded that "neither Dr. Anderson's testimony nor his research establish a solid causal link between violent video games exposure and aggressive thinking and behavior. [And] even if one were to accept the proposition that playing violent video games increases aggressive thoughts and behavior, there is no evidence that this effect is at all significant." *Id.* at 1063. In his testimony, Dr. Anderson had conceded that there was no evidence that more graphic violence is more harmful that cartoonish violence, that minors are more vulnerable to effects than adults, or that video games have greater effects than television, movies or other media. He also agreed that the vast majority of minors playing violent video games will grow up and suffer no ill effects. The Court was even less impressed by Dr. Kronenberger's work regarding brain activity, finding it "unpersuasive [and unable to] support the weight he attempts to put on them via his conclusions. *Id.* at 1067. Indeed, Dr. Kronenberger has repeatedly conceded that his research does not show that playing "violent" video games *causes* the brain patterns observed by his research team.

Blagojevich, 404 F. Supp. 2d at 1074. These conclusions are consistent with the other courts that have considered such evidence. *Schwarzenegger*, 401 F. Supp. 2d at 1046; *Granholm*, 404 F. Supp. 2d at 982.

State legislatures in considering such legislation routinely ignore social science research that contradicts and undermines the conclusions of Dr. Anderson and others. For example, the court in *Blagojevich* concluded that the failure of the Illinois Legislature to consider "any of the evidence that showed no relationship or a negative relationship between violent video game play and increases in aggressive thoughts and behavior," along with its failure to take into account research that is critical of the work of Dr. Anderson and others, "further undermine defendants' claim that the legislature 'made reasonable inferences' from the scientific literature based on 'substantial evidence.'" *Blagojevich*, 404 F. Supp. 2d at 1063; *Maleng*, 325 F. Supp. at 1188-89 ("[T]he Court finds that the Legislature's belief that video games cause violence . . . is not based on reasonable inferences drawn from substantial evidence.").

These laws are also constitutionally flawed because they ignore less speech-restrictive alternatives to furthering their purported goals, including parental controls, increased self-regulation, and increased awareness of the industry's voluntary rating system. *See Playboy*, 529 U.S. at 824 ("A court should not . . . presume parents, given full information, will fail to act."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality op.) (striking down

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advertising ban because of less restrictive alternatives such as an "educational campaign" or "counterspeech"). Indeed, the Federal Trade Commission has concluded that the video game industry is performing better in its ratings efforts than its peer retail industries – music and movies – that are not subject to state restrictions involving violence. FTC, *Report to Congress: Marketing Violent Entertainment to Children*, at 28-29 (July 2004) ("*FTC Report*"); *see also Blagojevich*, 404 F. Supp. 2d at 1075 (citing FTC report and noting that minors are more easily able to purchase other types of media rated for mature audiences than purchase M-rated video games).

Courts have also consistently found it problematic that violent video game legislation would single out video games from all other media containing violent images. Depictions of violence are found not only in video games, but in movies, books, magazines, music, and art, and on television and the Internet. *See AAMA*, 244 F.3d at 579 ("violent" video games "are a tiny fraction of the media violence to which modern American children are exposed," as well as "not very violent compared to what is available to children on television and in movie theaters today"); *Blagojevich*, 404 F. Supp. 2d at 1075 (finding no evidence demonstrating that video games are more harmful than any other media). Legislation that left those other media unaffected – even if it could otherwise be justified – would be constitutionally problematic because it would heighten concerns about whether the bill advances the purported interests at all. *See, e.g.*, *Florida Star v. B.J.F.*, 491

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U.S. 524, 540 (1989). Such laws cannot possibly materially advance their goals by preventing a 16-year-old from buying or renting the *Resident Evil IV* or *Tom Clancy's Rainbow Six 3* video games, when the same teen may lawfully buy or rent *Resident Evil* and Tom Clancy movies, and purchase Tom Clancy books.

Professor Kevin Saunders, effectively recognizing that the strict scrutiny standard cannot be met, has argued that sufficiently violent games (and other forms of expression) should be treated as falling in the class of works (heretofore limited to sexually explicit material) called "harmful to minors" or "obscenity as to minors." A ban on distribution to minors of a work that is "harmful to minors" triggers *no* First Amendment scrutiny. But the law provides no support for vastly extending that category beyond the realm of sexually explicit material to include violent content. To the contrary, the Supreme Court has made clear that the *sine qua non* of "obscenity" is graphic sexual depictions. *E.g., Cohen v. California*, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."); *Miller v. California*, 413 U.S. 15, 24 (1973) ("[W]e now confine the permissible scope of [obscenity] regulation to works which depict or describe sexual conduct."). And the lower federal courts have repeatedly refused to go further and treat violent materials as obscene as to minors. *E.g.*, *IDSA*, 329 F.3d at 958 ("Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults."); *AAMA*, 244 F.3d at 575-76

("The notion of forbidding . . . pictures of violence . . . is a novelty, whereas concern with pictures of graphic sexual conduct is the essence of the traditional concern with obscenity.").

Another legal failing of state "violent" video game laws is that they are unconstitutionally vague. The Constitution demands that statutes be set forth with "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Such laws typically restrict games that depict "violence" towards humans or human-like creatures. But in the world of video games, characters that appear to be human beings may actually be zombies, aliens, gods, or some other fanciful creature, and might transform from humans to other beings and vice versa over the course of the game. *Blagojevich*, 404 F. Supp. 2d at 1077 ("As a mechanism for regulating a fanciful medium, however, this definition [of "human-on-human violence"] leaves video game creators, manufacturers, and retailers guessing about whether their speech is subject to criminal sanctions."). Moreover, the laws penalize games where the player may intend to cause suffering or inflict pain. While such terms have a discernible meaning in the real world, they cannot be so easily applied in the virtual world of video games. For example, it is difficult if not impossible to measure whether a "high degree of pain" is being inflicted to a character that may, for example, possess superhuman characteristics, and at any rate is only an image on a video screen. *Blagojevich*, 404 F. Supp. 2d at 1077 n.8 ("It is likely, however,

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that the term 'serious physical harm' is also vague given the difficulty of determining what actions are harmful to characters that appear human, but can automatically recover from injuries, regrow limbs, and spring back to 'life.'") Indeed, it would be simply impossible for video game manufacturers and distributors to determine the "intent" of every possible *player* of a particular video game, such as whether a player will specifically intend abuse. These laws therefore subject video game makers and retailers to a gray zone of liability (and often criminal liability) that they have no way of navigating. And as a consequence, the laws create a chilling effect where manufacturers and retailers steer far away from any game that could remotely fall under the law's scope, further stifling protected speech.

Finally, it is worth noting that the proposed federal legislation restricting access to video games fares no better than the state regulations that have been struck down. The federal "Family Entertainment Protection Act" would impose federal penalties on the sale or rental of a video game rated "M – Mature" or "AO – Adults Only" by the Entertainment Software Rating Board ("ESRB") to minors under the age of 17. Like the state laws, the federal act would impose a content-based restriction on expression that is fully protected by the First Amendment. The fact that the Act would restrict games already rated "Mature" or "Adults Only" by the voluntary ratings industry does not make it constitutional. To the contrary, by codifying the ESRB's voluntary ratings, without any attendant definitions or

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standards, the Act would create another constitutional problem: it would violate due process and unlawfully delegate legislative authority to a private entity. *See, e.g.*, *Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wis. 1995) ("[A] private organization's rating system cannot be used to determine whether a movie receives constitutional protection."). For these reasons, similar laws, enacted shortly after the Motion Picture Association of America ("MPAA") implemented a private motion-picture rating system in 1968, were invalidated for attempting to incorporate the MPAA ratings into law. *See, e.g., Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1135 (E.D. Wis. 1970). The ESRB's dynamic standards – although sufficiently clear for a private, voluntary rating system – are not designed or intended for use as a bright-line delineation between legal and illegal content.[1]

The government may not cede the authority to decide which category of speech may be restricted – assuming it could be restricted at all – to a private entity unguided by legislative standards. The result is an impermissibly vague statutory scheme that violates the First and Fourteenth Amendments. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992) (stating that an

[1] In addition, because the ESRB's voluntary rating system does not focus solely on violent content, a law incorporating the ratings by reference would result in the suppression of a broad range of speech unrelated to the law's purpose of controlling distribution of violent material. For example, games may be rated "M" based on "strong language" or "mature sexual themes" that have no conceivable connection with "violence" or "crime." Thus, if these ratings are used to restrict access to video games, a great deal of expression will be restricted that is wholly unrelated to any purported interest in regulating minors' exposure to "violent" images.

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"impermissible risk of suppression of ideas" exists where "an ordinance . . . delegates overly broad discretion to the decisionmaker"); *cf. Interstate Circuit v. Dallas*, 390 U.S. 676, 678 (1968) (striking film board's standards for ultimately determining whether material was "suitable" or "not suitable" for children); *Engdahl*, 317 F. Supp. at 1136; *Specter*, 315 F. Supp. at 826; *Watkins*, 191 S.E.2d at 144.

For all of these reasons, I urge this subcommittee and Congress not to support the type of unconstitutional regulation that has been consistently struck down in courts around the country. Children and their parents, and not the government, should be making the decisions about what type of expression children should be exposed to. That is the freedom the First Amendment guarantees and that is the reason every such restriction on video games has been struck down.

Thank you.

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U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution,
Civil Rights and Property Rights
March 29, 2006
Hearing on "State Regulation of Violent Video Games & the First Amendment"

Written Statement of Karen Sternheimer, Ph.D., Sociologist, University of Southern California, and author of *It's Not the Media: The Truth About Pop Culture's Influence on Children (Westview Press, 2003) and Kids These Days: Facts and Fictions About Today's Youth (Rowman & Littlefield, forthcoming)*

Chairman Brownback and Ranking Member Feingold:

Thank you for the opportunity to submit written comments for the record. While I understand the concern many people feel about video games, it is vitally important to realize that America's children face much more serious threats than video games. Poverty and inadequate health care continue to be the number-one problem that young people face in America today.

It is important to maintain some perspective: since the explosion of the gaming industry in the past decade, youth violence has plummeted. During this time we have witnessed double-digit declines in juvenile arrests for violent offenses. Nationally, homicide arrest rates for minors declined nearly 65 percent from 1992 to 2002.

Additionally, dozens of studies have been done trying to assess the link between video games and actual violence. I have reviewed this body of research and found that most attempts at measuring aggression in a controlled setting are contrived and questionable.

For instance, one study sought to assess whether video game playing leads to aggression by allowing winners to fine their opponents fake money (the bigger the fine, the more aggression). Another allowed winners to blast their opponents with noise (although unbeknownst to the subjects, their opponent was a computer, so no eardrums were harmed). A 2000 study that received national media attention assessed aggression through college students' surveys and the speed at which subjects read "angry" words from a computer screen. Hardly comparable with premeditated murder, but these studies are often interpreted as evidence that violent video games can lead players to commit real violence.

Published reviews of the research on video games and violence have been mixed. A 2001 analysis of studies of video games and aggression published in the *Journal of Adolescent Health* concluded that it is "not possible to determine whether video game violence affects aggressive behavior." Yet critics often presume that video games cause "psychological harm" to minors, in spite of the fact that much of the research upon which claims like this are made was conducted with college students, not children. In fact, industry research suggests that the average player is 29, and that adults make up the vast majority of video game purchasers.

It is far easier to challenge simulated shooting than real shooting with real guns. Yes, some of the highly publicized school shooters did play video games. But many people do and never go on a rampage. It was the shooters' ability to get their hands on real guns—often purchased by adults—that we should worry about. In the years since that horrible day in Littleton, Colorado, is it really any more difficult to get an actual gun?

I urge this subcommittee and the Senate to use its authority to investigate the real threats facing children in America today. Poverty, healthcare, and educational opportunities are far more important for us to examine than the games people play.

Karen Sternheimer, Ph.D.

TESTIMONY OF REVEREND STEVE STRICKLAND TO CONSTITUTION SUBCOMMITTEE OF U.S. SENATE JUDICIARY COMMITTEE, 3/29/06

Mr. Chairman and Other Distinguished Members of this Committee:

My name is Steve Strickland. I am one of three brothers of Arnold Strickland, who was a Fayette, Alabama Police Officer, who was murdered by a teenager on June 7, 2003. I was asked to come and testify by Senator Brownback's office on how my brother's murder has affected me and our family, the two other families who also lost their loved ones, and our entire community. Thank you for giving me this opportunity to do so today.

The best way to start is to start on that Saturday morning, a morning that changed all of our families' lives. Arnold and I had plans for fishing that day. I was so looking forward to spending that time with him. We did not get to share as much time together as we would have liked because of my work as a minister. There was always something going on to keep us apart but not on that day. I was already on the water at daylight and waiting on him to get off work to come join me. It was going to be a fun day for the both of us. It was about 6:30 when that beautiful Saturday morning turned into one of the darkest days of my life.

My nephew Shane, one of Arnold's three sons, called and asked if I had seen Dad. I said "No," that I was waiting on his phone call to tell him how to get where I was. He was supposed to get off at six a.m. and should be here any minute. Shane said something had happened in Fayette and when he found out he would call me back. It was not 15 minutes when my phone rang again, and he said with tears in his voice, "You need to come home quick."

I knew at that moment I would never see my brother alive again. Our fishing days together were over. I sat there and wept bitterly because I loved my brother deeply. As I got to the house there were family members already there along with police officers. It was total shock and confusion as to what had happened and what was going on. Being a minister I deal with death on a regular basis, but I had not experienced such trauma as I did that day. In the days ahead, we learned that Arnold along with two other men, one being James Crump, a fellow officer and the other Ace Mealer who was the dispatcher that night were also murdered. A young teenage boy named Devin Moore was responsible for the brutal execution of the three men that morning.

As days passed and then weeks, months and now years, our family is still trying to put our lives back together. No Saturday will ever be the same for me. No holidays will we enjoy as much as when Arnold was there. But what hurts the most is to see his grandchildren and knowing how much he loved them. They will never get to see him again. They will only hear stories and see pictures of their granddad. How do you explain to a child that just last week granddad was here and now he is gone and then the parents get to try to explain when asked, How did he die and why did he die?

The total impact on our families behind these senseless killings will never be over. This is the reason I accepted your invitation to come and speak today – so that maybe other families will not have to answer those hard questions and go through what our families are still going through to this day, trying to sort it all out. That brings me to the point of why I am here.

"Video Games": What are they and how are they being used? The statement I made earlier about Arnold and the two others being executed was a very true statement. You see, they were not just shot; all three received a bullet to the head after they were on the floor. You have to ask the question what would bring a young teenage boy like Devin to this point.

Devin made a statement in a local newspaper one day that made no sense to me whatsoever, until it got in the hands of one of our attorneys, Jack Thompson, who knows all about what that statement meant: "Life is like a video game, everyone has to die sometime." As a minister I deal with a lot of different issues and try to stay up and become educated on them but Jack opened up a whole other world to me that I did not even know existed. This is the violent video game world -- a world that, as far as I am concerned, is straight from the pits of Hell.

As I gather more information on the games and the people who call themselves "gamers," I could see how someone like Devin, who at one minute did not put up any resistance when arrested for stealing a car or when being booked, to the next minute, getting my brother's gun from him in the police station shooting him and then killing two other men in a matter of less then two minutes. A game such as *Grand Theft Auto: Vice City* could and did teach him how to do this. As I watched this game being played on CBS's 60 Minutes, I could not believe my eyes as to how close in comparison this game was to the actual slaughter of my brother, along with James and Ace.

I had to ask myself the question: Why would someone put such games on the market and into the hands of teenagers? In *Grand Theft Auto: Vice City,* the people we put our faith and trust in to protect us from harm – the police officers – are the ones being targeted as the bad guys. Devin Moore practiced on this game hour after hour to kill our loved ones. It made him a more effective killer.

In this game, if you kill the police and other innocent people you win points. You get extra points for shots to their heads. When a society gets to the point to where law enforcement are the bad guys and the thugs and murderers are the good guys, our society will take a turn for the worse. Some have taken that turn. I do not believe most of us are ready for that. We have an opportunity to do something about this problem. Why don't we? I am a man of facts. I try to live my life by them. Jack Thompson and others have facts and experts to back up what these games are: they are cop-killing simulators and they will bring more deaths in the future. Our loved ones in Fayette are not the only ones to die at the hands of teens who trained on this game to kill.

Let me remind you if I may: It could be one of your family members next. I ask that we put all the true facts on the table about how dangerous all of these murder simulation video games are.

The primary motivation for what these video game companies do in making and marketing violent games to kids is this: **MONEY**. Why would these companies want to change things? One day, we will all stand before the Almighty GOD and give an account for what we have done and what we have accomplished, both good and bad on this Earth.

I ask all of you Senators that we take a good hard look at the impact these games have on our teenagers and hold everyone accountable for their part. These games in the wrong hands played long enough are detrimental to our families, our friends, and our entire society.

Thank you for allowing me to share our grief, as well as our hope for a safer America.

April 5, 2006

Senator Sam Brownback
303 Hart Senate Office Building
Washington, D.C. 20510-4904

Senator Russ Feingold
506 Hart Senate Office Building
Washington, D.C. 20510-4904

Re: U.S. Senate Committee on the Judiciary; Subcommittee on the Constitution, Civil Rights and Property Rights; Hearing on State Regulation of Violent Video Games & the First Amendment

Dear Senators Brownback and Feingold:

We respectfully request that this letter be included as part of the written record of the March 29, 2005 hearing on state regulation of violent video games and the First Amendment. Take-Two Interactive Software, Inc. and Rockstar Games, Inc. recognize that families and Members of Congress have legitimate concerns about what games, videos, and music their children purchase and consume or freely access on the Internet and other mediums. Our current media culture raises difficult issues that require family involvement and review. All video games are not always appropriate for all ages.

We take seriously our responsibility to help parents determine what is and is not appropriate for their children. That's why the industry created the Entertainment Software Ratings Board (ESRB) ratings so parents can evaluate what games and products are appropriate for their children. This label is a tool to help parents make the choice about when – and whether – their children should play a particular game. It allows parents to make decisions that are consistent with their personal family values.

After reviewing the written testimony of Patricia Vance, President of the ESRB, we are concerned that parts of Ms. Vance's testimony may be misconstrued. Specifically, her comments concerning the release of a third party modification to the video game Grand Theft Auto: San Andreas – commonly referred to as the "Hot Coffee" modification – may be misinterpreted as implying that the company failed to follow ESRB rules. Rockstar and Take-Two complied with all ESRB rules then in effect with respect to the submission of the game for a rating. We were the victims of the concerted efforts of highly educated and sophisticated third-party hackers. The ESRB never came to any other conclusion.

The Hot Coffee scenes were removed from game play by Rockstar in accordance with industry practice of "wrapping" the code to prevent consumers from accessing the content and were never intended to be seen. Prior to the Hot Coffee incident, the ESRB did not require game developers to disclose the existence of such wrapped and unplayable scenes. As Patricia Vance has publicly recognized previously, the ESRB was aware that game developers often left edited-

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out content on game disks in unplayable form. Only following the unprecedented Hot Coffee episode did the ESRB announce the adoption of new rating procedures requiring such disclosure. We have since complied with the ESRB's new rules.

During the ESRB's investigation and ultimate resolution of the matter, we cooperated fully with the ESRB. All of the actions taken by our company, at great cost, following the release of the Hot Coffee modification were voluntary and pursuant to an agreement with the ESRB.

Take-Two suffered tremendously as a result of the Hot Coffee incident. In contrast, consumers suffered no damage. The wrapped scenes were only accessible if a consumer chose to view them, sought out and obtained the Hot Coffee modification from the Internet, violated the Company's End-User License Agreement for the game, and altered the game's computer script. Playstation 2 users (the vast bulk of San Andreas purchasers), as well as Xbox console users, had to purchase, program, and install third-party hardware to view the Hot Coffee scenes.

We agree that the ESRB is and must be a strong and responsive organization. Our support is evidenced by our cooperation with the ESRB and our actions following the release of the Hot Coffee modification. However, any intimation that Take-Two or Rockstar were wrongdoers, and not victims, is unfair and inaccurate.

Thank you for your attention to this matter.

Sincerely,

Paul Eibeler
Take-Two Interactive Software, Inc.
622 Broadway, 6th Floor
New York, NY 10012

Written Testimony of Adam D. Thierer
Senior Fellow and Director,
Center for Digital Media Freedom, The Progress & Freedom Foundation
Before the U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
Hearing on "State Regulation of Violent Video Games & the First Amendment"
March 29, 2006

My name is Adam Thierer. I am a senior fellow with the Progress & Freedom Foundation (PFF), and I direct its Center for Digital Media Freedom (CDMF).[1] I would like to thank Chairman Brownback and Ranking Member Feingold for the opportunity to submit written comments as part of the record for today's hearing on "State Regulation of Violent Video Games & the First Amendment."

I recently conducted a comprehensive review of the many federal, state and local proposals that seek to regulate video games in some fashion. In particular, I took a close look at a new federal legislative proposal, S. 2126, the "Family Entertainment Protection Act" (FEPA). I found that the FEPA, like many other state and local proposals, is being driven by a number of myths or misperceptions that should not serve as the basis of government intervention and content controls. The general conclusions of my study are as follows:

- ✓ **The video game industry's ratings system is the most sophisticated, descriptive, and effective ratings system ever devised by any major media sector in America.**
- ✓ **The vast majority of video games sold each year *do not* contain intense violence or sexual themes.**
- ✓ **Just as every state law attempting to regulate video games so far has been struck down as unconstitutional, so too will the FEPA.**
- ✓ **The FEPA could derail the industry's voluntary ratings system and necessitate the adoption of a federally mandated regulatory regime / ratings system.**
- ✓ **No correlation between video games and aggressive behavior has been proven. Moreover, almost every social / cultural indicator of importance has been improving in recent years and decades even as media exposure and video game use among youth has increased.**

[1] The views expressed here are my own and may not reflect those of The Progress & Freedom Foundation, its Board, or its supporters.

- ✓ **Video games might have some beneficial effects—especially of a cathartic nature—that critics often overlook. And, contrary to what some critics claim, violent themes and images have been part of literature and media for centuries.**

In sum, I believe that the video game industry's self-regulatory system is working and should not be replaced by a government regulatory regime. The industry has created a comprehensive ratings and labeling system that offers parents and consumers extensive information about game content. While the enforcement of this scheme at the point-of-sale isn't perfect, it is improving and certainly represents a less-restrictive means of addressing this issue than would a convoluted and likely unconstitutional federal or state regulatory regime.

For the Committee's consideration, I have submitted the complete text of my recent study, "Fact and Fiction in the Debate Over Video Game Regulation." This report is also available at the Progress & Freedom Foundation's website, www.PFF.org.

I would be happy to respond to any questions that members of the Committee or their staff might have related to my findings. I can be contacted at athierer@pff.org.

Fact and Fiction in the Debate Over Video Game Regulation

by Adam Thierer

Playing games has become serious business. America's electronic gaming sector generated $10.5 billion in sales in 2005[2] and by the late 1990s it was already growing three times faster annually than the motion picture industry.[3] Consumers are playing games everywhere and doing so on multiple platforms.[4] While video gaming consoles (PlayStation, XBox, Nintendo) continue to be the dominate platform, consumers are also playing games on personal computers (PCs), the Internet, cell phones, and various hand-held devices.

The phenomenal growth of this sector has been driven, at least in part, by the aging of the first generation of electronic gamers. The average age of video game players today is 30 and those gamers have been playing games for an average of 12 years, according to surveys by Peter D. Hart Research Associates.[5] A surprising 19 percent of Americans over the age of 50 have played video games and 53 percent of current game players expect to be playing as much or more 10 years from now as they do today.[6] Thus, video games can no longer be considered merely the domain of children.

I am part of that thirty-something generation that grew up straddling the divide between the "Cops and Robbers" era and the "Pac-Man" generation. The rise of electronic gaming opened my generation's eyes to an exciting new universe of visual, interactive entertainment. We were invited into a world of fantasy, exploration and learning that allowed us to live out dreams and enjoy games in a way that our parents' generation never could have imagined.

I am almost 40 years old now and have two children of my own who will soon become part of the next generation of gamers. The world of interactive video entertainment they already have at their disposal makes Pac-Man-era games look absolutely primitive by comparison. And yet, in another decade, it would not be at all

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[2] "Video Game Set Sales Record in 2005," *CNN Money*, January 14, 2006, http://money.cnn.com/2006/01/13/technology/personaltech/gamesales/index.htm

[3] "A striking measure of the impact of the computer and video game software publishing industry on the U.S. economy was its 15 percent annual growth in sales between 1997 and 2000. In contrast, over the same period the U.S. economy grew only 6 percent per year and sales in the motion picture production, distribution, and allied services industry grew 4.6 percent per year." Robert Damuth, *Economic Impacts of the Demand for Playing Interactive Entertainment Software*, Entertainment Software Association, 2001, p. 5. Of course, it is important to realize that the video game industry numbers include both software (games) and hardware (consoles) sales whereas motion picture industry data is for box office receipts only.

[4] For a brief but comprehensive overview of the video game industry's phenomenal growth over the past few decades, see David Kushner, "PlayNation: Inside the Multibillion Dollar Fascination with Video Games," *The World Almanac and Books of Facts 2006* (New York: World Almanac Books, 2006), p. 9.

[5] "Essential Facts about the Computer and Video Game Industry: 2005 Sales, Demographics and Usage Data," Entertainment Software Association, 2005, pp. 2-3. http://www.theesa.com/files/2005EssentialFacts.pdf

[6] Ibid.

surprising if kids are asking their parents for the latest completely immersive virtual reality gaming system. (Think of it as the "holodeck" from Star Trek brought to your living room!)

Yet, while the games continue to grow increasingly sophisticated, the criticisms of them have remained largely the same ever since my generation traded in our cap guns for game controllers: Increased exposure to video games—and "excessively violent" games in particular—is bad for kids. Somehow, the virtual worlds we find in video games are perceived as significantly more dangerous than the imaginary worlds we once created in our back yards (which, at least in my case, included BB guns, bows-and-arrows, and sling shots!) Regardless, concerns about video game content, and "virtual violence" in particular, are now driving various efforts by federal, state and local policymakers to regulate children's access to video games.

For example, last December, Senators Hillary Clinton (D-NY), Joe Lieberman (D-CT), and Evan Bayh (D-IN) introduced S. 2126, the "Family Entertainment Protection Act" (FEPA) to limit the exposure of children to violent video games. The FEPA would create a federal enforcement regime for video games sales and require ongoing regulatory scrutiny of industry practices. Specifically, S. 2126 would:

- Make it a federal crime for any retailer to sale or rent to someone under the age of 17 any video game with a Mature ("M"), Adults-Only ("AO"), or Ratings Pending ("RP") rating, as specified under the industry's Entertainment Software Ratings Board (ESRB) voluntary ratings system;
- Require the Federal Trade Commission (FTC) to contract with a private organization to evaluate the ESRB's ratings system to determine if it remains "consistent and reliable over time" and to prevent "ratings slippage";
- Require the FTC to conduct annual secret audits of video game retailers to determine how often minors are able to purchase games rated M, AO or RP;
- Require the FTC to conduct an investigation into embedded or hidden game content that can be accessed by key-stroke combinations or passwords to determine if this effects the accuracy of the ESRB's voluntary ratings and whether this rises to the level of an "unfair or deceptive act" punishable by the FTC; and,
- Demand that the FTC's Bureau of Consumer Protection ensure that consumers can file complaints regarding supposedly misleading or deceptive ESRB's content-descriptions or labels on a video game and then submit an annual report to Congress tabulating these complaints.

While the FEPA proposes an ambitious new federal regulatory regime for the electronic software / video game industry, it's not the only threat the industry faces. Similar efforts have been underway at the state and local level for many years now. As of early 2006, the Electronic Software Association (ESA), the video game industry's trade association, was tracking over 75 state proposals to regulate some aspect of the video game industry.

This essay addresses several of the most common myths or misperceptions that are driving this push to regulate the electronic gaming sector. The general conclusions are as follows:

- ✓ **The industry's ratings system is the most sophisticated, descriptive, and effective ratings system ever devised by any major media sector in America.**
- ✓ **The vast majority of video games sold each year *do not* contain intense violence or sexual themes.**
- ✓ **Just as every state law attempting to regulate video games so far has been struck down as unconstitutional, so too will the FEPA.**
- ✓ **The FEPA could derail the industry's voluntary ratings system and necessitate the adoption of a federally mandated regulatory regime / ratings system.**
- ✓ **No correlation between video games and aggressive behavior has been proven. Moreover, almost every social / cultural indicator of importance has been improving in recent years and decades even as media exposure and video game use among youth has increased.**
- ✓ **Video games might have some beneficial effects—especially of a cathartic nature—that critics often overlook. And, contrary to what some critics claim, violent themes and images have been part of literature and media for centuries.**

Each of these issues is addressed in detail below.

Myth #1: The video game industry's voluntary ratings scheme fails to provide parents with enough information about the content of games. Or, even if it does provide adequate information, it is not enforced properly.

Reality: The industry's ratings system—the ESRB—is the most sophisticated, descriptive, and effective ratings system ever devised by any major media sector in America.

In a joint statement introducing the Family Entertainment Protection Act, Senators Clinton, Lieberman and Bayh argue that their legislation is needed because "young people are able to purchase these games with relative ease and parents are struggling to keep up with being informed about the content."[7] Both claims are

[7] "Senators Clinton, Lieberman and Bayh Introduce Federal Legislation to Protect Children From Inappropriate Video Games," U.S. Senate, December 16, 2005.

demonstrably false. To explain why, it is important to first understand the nature of the video game industry's voluntary ratings system.

In 1994, the video game industry established the Entertainment Software Ratings Board (ESRB), a self-regulatory labeling body. The ESRB ratings scheme is remarkably comprehensive. According to the ESRB, it rates over 1,000 games per year. Virtually every title produced by major game developers for retail sale today carries an ESRB rating and content descriptors. Generally speaking, the only games that do not carry ESRB ratings today are those developed by web amateurs that are freely traded or downloaded via the Internet.

The ESRB applies seven different rating symbols to the games it rates. These ratings are described in Table 1.

Table 1: ESRB Rating Symbols

"EC" - EARLY CHILDHOOD: Titles rated **EC** have content that may be suitable for ages 3 and older. Contains no material that parents would find inappropriate.

"E" – EVERYONE: Titles rated **E** have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.

"E10+" - EVERYONE 10+: Titles rated **E10+** have content that may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language, and/or minimal suggestive themes.

"T" - TEEN - Titles rated **T** have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood and/or infrequent use of strong language.

"M" – MATURE: Titles rated **M** have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content, and/or strong language.

"AO" - ADULTS ONLY: Titles rated **AO** have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.

"RP" - RATING PENDING - Titles listed as **RP** have been submitted to the ESRB and are awaiting final rating. (This symbol appears only in advertising prior to a game's release.)

Source: Entertainment Software Ratings Board

In addition to designating these ratings, the ESRB also has over 30 different content "descriptors" that it uses to give consumers highly detailed information about games. Thus, by simply glancing at the back of each game container, parents can quickly gauge the appropriateness of the title for their children. If parents want to do additional research in advance of a purchase, the ESRB's website (http://www.esrb.org/) allows parents to type in the name of any game and retrieve its rating and various content descriptors.

Table 2: ESRB Content Descriptors

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

Source: Entertainment Software Ratings Board

Is this self-regulatory system effective? There are many ways to evaluate it, but it is important to realize that there will always be a degree of subjectivity involved in this process. This is true of the initial assignment of the ratings as well as any attempt to evaluate the effectiveness of those ratings. For example, some critics might bicker about what constitutes "mild violence" versus "intense violence" for purposes of the ESRB

content descriptors.[8] Similarly, others might object to a video poker game being rated "T" for teenagers if they are opposed to any sort of simulated gambling. But these are examples of the sort of inherent challenges that all ratings systems face, and even a government-mandated ratings scheme would encounter similar disputes and difficulties.[9]

The important thing to keep in mind with the ESRB, however, is that it unquestionably offers more detailed information about the content it surveys than any other media ratings system in operation today. While the respective ratings systems used by the movie and television industry also offer consumers and parents valuable information about content, the video game industry's is far more descriptive. Relative to the motion picture and television ratings schemes, the ESRB offers more major ratings designations as well as the dozens of highly detailed content descriptors listed above. Thus, claims that "parents are struggling to keep up with being informed about the content" would only be true if parents made absolutely no effort to examine the box the game came in and read its rating and content descriptors. Again, these ratings and the relevant content descriptors appear on the carton for every game sold by retailers in the United States. And, as mentioned, the ESRB website offers parents the ability to search for any game title and immediately determine its rating and content descriptors. This is a significant achievement not to be taken lightly by policymakers who imagine they can improve upon this system.

Importantly, the ESRB also operates an Advertising Review Council (ARC) that promotes and monitors advertising and marketing practices in the gaming industry. The ARC monitors compliance with ESRB guidelines and places restrictions on how game developers may market ESRB-rated games. Among the "Principles for Responsible Advertising" the ARC enforces are:[10]

1. An advertisement should accurately reflect the nature and content of the product it represents and the rating issued (i.e., an advertisement should not mislead the consumer as to the product's true character).

2. An advertisement should not glamorize or exploit the ESRB rating of a product (e.g., an advertisement with a tag line that states: "banned by the ESRB" or "a ('T') rating has never been pushed this far," etc.).

3. All advertisements should be created with a sense of responsibility towards the public.

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[8] It is worth noting that a recent Hart Research poll revealed that parents found the ESRB ratings were "about right" 83 percent of the time, and that 5 percent of the time, parents thought ESRB had been "too strict." See Entertainment Software Ratings Board, "New Study Shows Parents Overwhelmingly Agree with Video Game Ratings," November 22, 2004, http://www.esrb.org/downloads/validity_study_11_22_04.pdf

[9] One need only follow the ongoing squabbles regarding the Federal Communications Commission's efforts to define "indecency" on broadcast television and radio to understand why that would be the case.

[10] Principles and Guidelines: Responsible Advertising Practices for the Interactive Entertainment Software Industry, Advertising Review Council of the ESRB, Second Edition, May 1, 2001, p. 5, http://www.esrb.org/downloads/principles_and_guidelines.pdf

4. No advertisement should contain any content that is likely to cause serious or widespread offense to the average consumer.

5. Companies must not specifically target advertising for entertainment software products rated "Teen," "Mature," or "Adults Only" to consumers for whom the product is not rated as appropriate.

In the event that a game publisher inappropriately labels or advertises a product, the ESRB can require corrective actions and impose a wide range of sanctions, including monetary fines when appropriate. An example of how this system works in action unfolded last summer when the ESRB conducted an investigation into the controversial best-selling game of 2004, "Grand Theft Auto: San Andreas." Following the revelation that the game contained hidden sexually-mature material that could be accessed using a downloadable patch for the game, the ESRB launched an investigation. (The game's publisher, Take-Two Interactive Software, Inc., claimed that the code was imbedded by a programmer without its knowledge).

Last July, the ESRB concluded its inquiry and decided to revoke the game's "M" rating and substitute an "AO" (Adults Only) rating. Take-Two Interactive was required by the ESRB to immediately advise retailers to cease all sales of the game until corrective actions could be taken. Take-Two also agreed to take the following ESRB-mandated corrective actions:

- Offer retailers the option of either re-stickering existing inventory with an AO (Adults Only 18+) rating, or exchanging all unsold inventory for new versions of the game that has the hidden content removed and the original M rating intact.
- Make a downloadable patch available to all consumers who have previously purchased the PC version of the game, which will make the modification that unlocks the material inoperable.

To ensure the continued credibility and reliability of its ratings system, the ESRB also decided to, according to a press release, "require all game publishers to submit any pertinent content shipped in final product even if is not intended to ever be accessed during game play, or remove it from the final disc. Furthermore, the ESRB calls on the computer and video game industry to proactively protect their games from illegal modifications by third parties, particularly when they serve to undermine the accuracy of the rating."[11] In that same press release announcing the penalties against Take-Two Interactive, Patricia Vance, president of the ESRB, noted that "The integrity of the ESRB rating system rests upon its accuracy and reliability, and we will continue to do whatever is necessary to protect the public's trust in it."[12] (Incidentally, Take-Two was also sued by its own shareholders over the incident. The class-action lawsuit claims that that a

[11] "ESRB Concludes Investigation into Grand Theft Auto: San Andreas; Revokes M (Mature) Rating," Entertainment Software Ratings Board, July 20th, 2005, http://www.esrb.org/about_updates.asp#7-20-05
[12] Ibid.

failure to properly disclose information about hidden sexual material in "Grand Theft Auto" hurt the company's stock values.)[13]

Although some politicians were quick to jump on the "Grand Theft Auto" episode as a supposed example of why government intervention was needed, the truth is just the opposite. This "Grand Theft Auto" episode proves that the video game industry's self-regulatory scheme is a success, not a failure. When the integrity of the ratings system was threatened by one developer's mistake, immediate corrective action was taken. Moreover, the ESRB adjusted its policies to better police such hidden code issues in the future. Finally, the "Grand Theft Auto" episode was the only incident of this sort to date. Would a government-run ratings system work as rapidly or effectively? It seems unlikely.

But not all critics complain about the ESRB's ratings. Some instead focus on how the ratings system is enforced at the point-of-sale. Again, Senators Clinton, Lieberman and Bayh claim that federal legislation like FEPA is needed to "put teeth in the enforcement of video game ratings" because "young people are able to purchase these games with relative ease."[14]

It is true that a potential weakness of the video game industry's self-regulatory system is that depends on the cooperation of retail outlets. Retailers are responsible for enforcing the systems age-based ratings scheme. This is an objection that proves too much though. Almost all age-verification schemes, including those mandated by governments (like alcohol and tobacco restrictions), require private enforcement.

To ensure that the system is enforced properly, the ESRB provides a variety of materials to retailers as part of its "Ok to Play?" educational campaign. The materials include an ESRB employee training manual and quiz about the ratings system. The ESRB also provides stores with posters about the industry's ratings system that can be displayed in the store. According to the ESRB, the "Ok to Play?" signage is displayed at 17 top national retailers who account for approximately 90 percent of all game sales. Prominent retailers involved in the effort include WalMart, Best Buy, Target, Toys R Us, and EB Games among others. These retailers, which are responsible for a significant portion of all video game sales, have enormous reputational incentives to abide by the ESRB ratings system. Importantly, the in-store signage used by these and other game retailers is also reproduced as consumer advertising in various magazines, newspapers, websites, and so on.

While this enforcement process will never be fool-proof, it is showing signs of steady improvement. The Federal Trade Commission (FTC) occasionally surveys the marketing and advertising practices of major media sectors (movies, music and video games) in a report entitled *Marketing Violent Entertainment to Children.* In the fourth

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[13] "More Legal Woes for 'Grand Theft Auto' Maker," *CNET News.com*, February 15, 2006, http://news.com.com/More+legal+woes+for+Grand+Theft+Auto+maker/2100-1043_3-6040302.html?tag=nefd.top

[14] "Senators Clinton, Lieberman and Bayh Introduce Federal Legislation to Protect Children From Inappropriate Video Games," U.S. Senate, December 16, 2005.

such report, issued to Congress in July 2004, the FTC concluded that "As the Commission has recognized in its prior reports, the electronic game industry has adopted numerous standards that limit children's exposure to ads for Mature-rated products and require the disclosure of rating information in most forms of advertising. The industry is actively enforcing those standards and penalizing those companies found to be in noncompliance."[15] On the other hand, the agency found that some companies "continue to place advertisements in television and print media with substantial youth audiences."[16]

Rooting out all such marketing of M-rated games to younger audiences will likely be impossible, however. Some traditional television and print media outlets are clearly targeted toward younger audiences, making efforts to prevent marketing to children somewhat easier. But young people often read or view media content across a wide variety of sources and platforms meaning that it will be impossible to perfectly restrict all viewing of M-rated advertising. If a 10-year old sees an ad for an M-rated video game in *Sports Illustrated* or *Car and Driver*, for example, does that constitute a failure of the system? Moreover, in light of the more fluid nature of media today—with Internet websites, e-mail, blogs, etc.,—it will become even more difficult to shield children from all game advertising. While the ESRB created the Advertising Review Council to address such concerns through its "Principles for Responsible Advertising," it is important that policymaker realize that the system will never be fool-proof. And if government sought to impose formal restrictions on game advertising to address this issue, it would encounter many of the same difficulties and also potentially violate the First Amendment in the process.

The FTC's latest report also deals with the sale of M-rated games to youngsters. The agency concluded that:

> The industry, with the exception of some retailers, continues in nearly all instances to include in its advertising rating information that would be helpful for parents. Retailers, while doing a better job in restricting sales to children of Mature-rated products, still routinely make such sales to most buyers. These sales should diminish substantially, however, if promised industry improvements in adopting and enforcing restrictive sales policies are put into place by the end of this year.[17]

The FTC's conclusion that retailers "routinely" are willing to sell M-rated games to minors is based on its "mystery shopper" surveys in which 13-to 16-year-olds are recruited to make an attempt to purchase such games without a parent being present. The number of teenagers who were able to purchase M-rated games as part of the mystery shopper surveys has fallen steadily since the FTC began such surveys in 2000 (85%) but

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[15] *Marketing Violent Entertainment to Children: A Forth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Washington, D.C.: Federal Trade Commission, July 2004), p. 28. (Previous installments of the FTC's *Marketing Violent Entertainment* report can be found at: http://www.ftc.gov/bcp/conline/edcams/ratings/reports.htm).

[16] *Ibid.*

[17] *Ibid.*

was still very high in 2004 (69%).[18] This explains why some policymakers feel the industry's voluntary ratings enforcement scheme is a failure and propose federal regulation as a remedy.

But the industry's system is still very new and is just beginning to reach a critical mass in terms of public / retailer awareness. The ESRB continues to work with retailers to improve the effectiveness of the system with the hope of making its ratings system as commonplace as the Motion Picture Association of America's (MPAA) ratings. But even the MPAA's widely recognized ratings system still isn't perfectly enforced by cinemas even though it has existed for more than three decades. The FTC's mystery shopper survey for movie-goers found that 36 percent of teens where able to purchase tickets for R-rated movies without a parent present.[19]

Importantly, too much should not be read into these FTC "mystery shopper" surveys for another reason: How often do 13-16 year olds really go into stores and buy games on their own? And even if kids are going in to stores and buying games on their own, where are they getting the money to do so? The retail price of a new video game ranges between $40-$50. Some of the most popular new titles can cost almost $60. Thus, given the significant cost of the games, it is likely that an adult will be present when most games are purchased. Market surveys confirm that this is the case. According to Hart Research surveys, the average age of a video game purchaser is 37 and 92 percent of the time parents are present when games are purchased or rented.[20]

Critics might argue that some kids can get access to their parents' credit cards or somehow get money from them to buy games on their own from an online vendor, for example. But this is clearly a matter of personal responsibility that parents must deal with in other many contexts as well. In a free society, government should not use a *potential* lack of parental responsibility as an excuse for regulatory intervention. That is especially the case when the intervention would affect freedom of speech or artistic expression.

Finally, parents also have another line of defense once video games are brought into their homes. Major game consoles developers (Sony, Microsoft and Nintendo) are all including sophisticated parental controls in their new gaming systems.[21] These console controls allow parents to enter the ESRB rating level that they believe is acceptable for their children. Once they do so, no game rated above that level can be played on the console. (All ESRB-rated games contain embedded "flags," or a string of code in the software, that allow the consoles to automatically recognize the game's rating). Thus, a parent could set the rating threshold on their child's video game console to "T" for "Teen" and then no games rated Mature (M) or Adults Only (AO) could be played on the

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[18] *Ibid.*, p. B-3.
[19] *Ibid.*
[20] "Essential Facts about the Computer and Video Game Industry: 2005 Sales, Demographics and Usage Data," Entertainment Software Association, 2005, p. 3, 7. http://www.theesa.com/files/2005EssentialFacts.pdf
[21] Tim Surette, "PS3 to Include Parental Controls," *Gamespot News,* November 28, 2005, http://www.gamespot.com/news/6140451.html

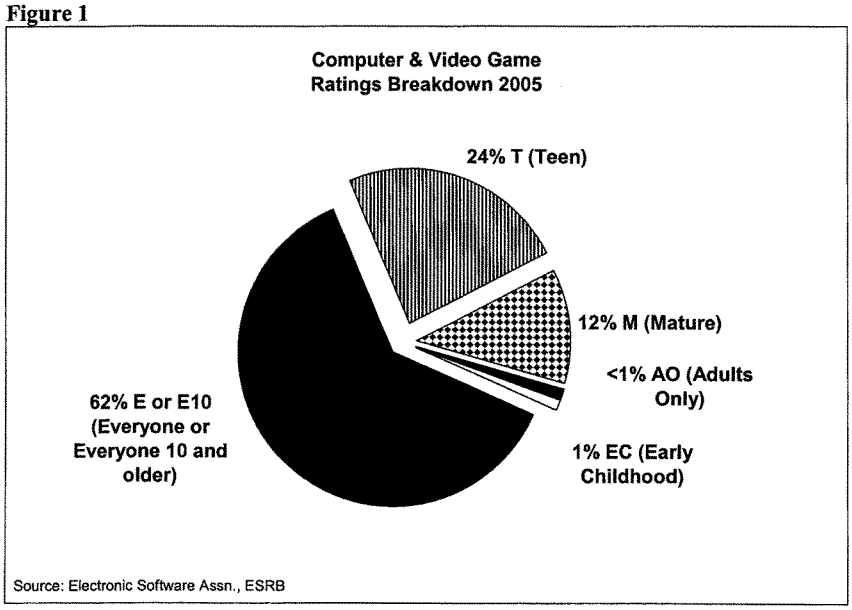
console unless the parent first entered a password. New handheld gaming systems, such as Sony's PlayStation Portable, also contain similar parental controls.

Myth #2: The majority of video games contain excessively violent material, and many contain sexually explicit themes or images.

Reality: The vast majority of video games sold each year *do not* contain intense violence or sexual themes.

If the speeches of some lawmakers were any guide, the public would be led to believe that most video games are filled with explicit violence or sexual themes. This isn't the case. In fact, as Figure 1 illustrates, less than 13 percent of all video and PC games reviewed by the ESRB in 2005 were rated "Mature" (M) or "Adults Only" (AO). (Less than 1 percent were rated Adults Only). Thus, over 87 percent of all games sold in 2004 were rated either "Early Childhood" (EC), "Everyone" (E), "Everyone 10 and older" (E10+), or "Teen" (T).

Figure 1



Similar results are seen when reviewing the top-selling video games sold over the last five years. The Progress & Freedom Foundation compiled the ratings for the top 20 video games and PC titles between 2001-2005 and, as Table 3 shows, found that over 80 percent of the most popular games were rated either "E" or "T". Moreover, if one removes the various *Grand Theft Auto* and *Halo* titles (there have been multiple best-

selling versions of each game) from the annual Top 20 lists, the percentage of "M" rated games would fall significantly.

Table 3: Ratings Breakdown for Top 20 Video & PC Games (2001-2005)

	"E"	"T"	"M"
Top 20 Video Games (2001-2005)	58%	21%	21%
Top 20 PC Games (2001-2005)	30%	55%	15%
All Video and PC Games (2001-2005)	44%	38%	18%

Thus, policymakers cannot build the case for video game industry regulation on the contention that most games made today contain extreme violence or sexuality. While it is true that games rated "T" can include some violent content, it is typically not the sort of violence that would rise to a level of serious concern for most parents. (i.e., lightsaber fights in "Star Wars" games or boxing games).

Finally, some of the criticisms aimed at those games which do contain gore or graphic violence ignore the potential positive aspects of those games. Many news reports or congressional hearings focusing on violence in video games simply show a few looped sequences of blood or gore from a handful of games. No other context or information is provided about the nature or content of those games. Consider popular games such as *Resident Evil, Half-Life,* and *Metal Gear Solid.* It is true that these titles contain violent action, gunplay, and plenty of zombies, aliens or just plain bad guys. But it is also true that these games present the player with elaborate worlds to explore, mysteries to solve and puzzles to crack. They are enormously challenging and thought-provoking, especially when compared with much of the "passive" media content and "couch-potato fare" of the past. Many of these games even require the use of a "player guides" or "walkthrough manuals" to conquer various tasks or "levels." Thus, as will be discussed at greater length in the conclusion, there may be positive (even educational) aspects associated with these cognitively challenging games. Regardless, the simplistic criticisms and generalizations some critics make about "violent" games often seemed based on an ignorance of what those games are really all about. Indeed, one wonders if any of the critics have bothered sitting down and playing some of these games on their own or with their children.[22]

Myth #3: Proposals to restrict the sale or rental of "violent" video games to children can easily pass constitutional muster in the courts.

Reality: Every state law attempting to regulate video games in this fashion so far has been struck down as a violation of the First Amendment. The FEPA would likely be rejected as unconstitutional also.

Several state or local governments have already enacted legislation or ordinances dealing with the sale of video games to minors. And, as the Congressional Research

[22] "Video games are most threatening to adults who have seen images of them but never tried to play them." Gerald Jones, *Killing Monsters: Why Children Need Fantasy, Super-Heroes, and Make-Believe Violence* (New York: Basic Books, 2002), p. 173.

Service recently noted in a report to Congress, "every lower federal court that has ruled on such a statute has found it unconstitutional, or issued a preliminary injunction after finding that the law was likely to be found unconstitutional."[23]

The first major decision, *American Amusement Machine Association v. Kendrick*, was handed down by the United States Court of Appeals for the Seventh Circuit in March 2001.[24] The case dealt with coin-operated "arcade" games. The city of Indianapolis had passed an ordinance prohibiting anyone who operated more than five arcade games on their premises from allowing an unaccompanied minor to play games that would be considered "harmful to minors." The ordinance also demanded that such games have warning signs on them and be partitioned or concealed from other games. Under the ordinance, "harmful to minors" was defined as game content "that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen years, lacks serious literary, artistic, political or scientific value as a whole for persons under" that age, and contains either "graphic violence" or "strong sexual content."

In a unanimous 3-0 decision, the court struck down the Indianapolis ordinance as unconstitutional. Judge Richard A. Posner's opinion for the court was a blistering tour-de-force that included a review of violence in literature throughout history. "Self-defense, protection of others, dread of the 'undead,' fighting against overwhelming odds—these are all age-old themes of literature, and ones particularly appealing to the young," he noted. "To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it," Posner argued. "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."

Posner also addressed an argument many critics make about the interactive nature of video game making them different from previous forms of entertainment media.

> [T]his point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.

Video games can also possess these qualities, Posner concluded. Moreover, Posner found the city's professed benefits to children of blocking their access to games to

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[23] Henry Cohen, "Constitutionality of Proposals to Prohibit the Sale or Rental to Minors of Video Games with Violent or Sexual Content or 'Strong Language,'" Congressional Research Service, U.S. Library of Congress, January 12, 2006, p. i.

[24] *American Amusement Machine Association, et al. v. Kendrick, et al.*, 244 F.3d 572 (7th Cir. 2001), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=7th&navby=case&no=003643

be "entirely conjectural." Indeed, Posner addressed the ambiguous studies that some pointed to as proof of a link between violent video games and youth aggression:

> The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the interactive character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments. It is highly unlikely that they are more harmful, because 'passive' entertainment aspires to be interactive too and often succeeds. When Dirty Harry or some other avenging hero kills off a string of villains, the audience is expected to identify with him, to revel in his success, to feel their own finger on the trigger. It is conceivable that pushing a button or manipulating a toggle stick engenders an even deeper surge of aggressive joy, but of that there is no evidence at all.

Judge Posner's unanimous Seventh Circuit decision would be followed two years later by an Eight Circuit Court of Appeals decision in *Interactive Digital Software Association v. St. Louis County*.[25] The decision held as unconstitutional a St. Louis county ordinance which sought to make it illegal for any person knowingly to sell, rent, or make available graphically violent video games to minors, or to "permit the free play of" graphically violent video games by minors, without a parent or guardian's consent.

Writing for the unanimous 3-0 court, Judge Morris S. Arnold began by making it clear that video game creators and users *did* have unambiguous First Amendment rights at stake. Judge Arnold pointed out that the Supreme Court had read the First Amendment broadly enough to "shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[26] Thus, Arnold held that "If the first amendment is versatile enough to [shield that speech from regulation] we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to a similar protection. The mere fact that they appear in a novel medium is of no legal consequence."

The court also found that the County's contention that there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health was "simply unsupported in the record." Borrowing from a recent Supreme Court decision, the 8th Circuit concluded that "Where first amendment rights are at stake, 'the Government must present more than anecdote and supposition.'"[27]

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[25] *Interactive Digital Software Association, et. al. v. St. Louis County, et. al.*, 329 F.3d 954 (8 Cir. 2003), http://caselaw.lp.findlaw.com/data2/circs/8th/023010p.pdf

[26] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995).

[27] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000).

The trend continued in *Video Software Dealers Association v. Maleng*.[28] In this U.S. District Court decision, Judge Robert Lasnik struck down a State of Washington bill that prohibited the rental or sale of computer and video games containing depictions of violence against law enforcement officers to anyone under 17 years of age. Judge Lasnik held that video game content was protected by the First Amendment and that "depictions [of violence] have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation." He also criticized the vague nature of the enactment since it "failed to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so they he many act accordingly." Finally, Lasnik held that, "the current state of research cannot support [the measure] because there has been no showing that exposure to video games that 'trivialize violence against law enforcement officers' is likely to lead to actual violence against such officers. Most of the studies on which defendants rely have nothing to do with video games, and none of them is designed to test the effects of such games on the player's attitudes or behavior toward law enforcement officers. ... [N]either causation nor an increase in real-life aggression is proven by these studies."

The themes developed in these three cases have been echoed in three recent decisions in Michigan (*ESA v. Granhom*), Illinois (*ESA v. Blagojevich*) and California (*VSDA v. Schwarzenegger*), all of which blocked the enactment of laws seeking to regulate video games. The themes running through all six of these decisions can be summarized as follows:

- ✓ video games are speech and are protected by the First Amendment;
- ✓ any attempt to regulate video games will be subjected to "strict scrutiny" (the highest degree of First Amendment scrutiny) by the courts;
- ✓ the criminal penalties contained in these legislative measures would likely have a "chilling effect" on video game expression; and
- ✓ the ambiguity of various terms found in these measures (especially "harm to minors") result in them being unconstitutionally vague;
- ✓ the link between video games and aggressive behavior, or other forms of "harm to minors," has not been proven scientifically.

Finally, it is also worth pointing out that most of these decisions were very strongly worded and showed no signs of the sort of indecisive or apologetic reasoning often seen in many other First Amendment decisions. For many of the same reasons, it is likely that the FEPA would also be ruled unconstitutional if enacted. The FEPA raises many other troubling legal and practical issues as well, which are discussed next.

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[28] *Video Software Dealers Association, et. al. v. Maleng, et. al.*, 325 F. Supp.2d 1180 (Western Dist. Wash. 2004).

Myth #4: Regulatory proposals like the FEPA would not impose a burdensome regulatory regime but instead merely build on the industry's voluntary ratings system.

Reality: The FEPA could derail the industry's voluntary ratings scheme and necessitate the adoption of a federally mandated regulatory regime / ratings system. Moreover, it is unconstitutional for government to enshrine a private ratings scheme into law.

The irony of proposals like the FEPA is that its supporters castigate the video game industry for not doing enough to protect children, but then they propose co-opting the industry's voluntary ratings system for their own ends. Again, the FEPA would make it illegal for any retailer to sell a video game rated M, AO or RP to a minor. Apparently, therefore, the lawmakers supporting the FEPA are willing to accept the industry's voluntary ratings system, but believe that, as the bill states, "there is a need to enact legislation to ensure that the ratings system is meaningful."

In their attempt to make the industry's voluntary ratings system "meaningful," however, lawmakers could instead make it far less meaningful. Worse yet, they might kill it entirely. After all, why would game developers continue to voluntarily rate their content if the threat of fines or prosecution looms overhead? Fearing such liability, there is a real risk that many in the industry would likely stop rating games altogether since there would be no penalty for refusing to label content. If this were to occur, parents and all game consumers would lose valuable information about the age appropriateness and content of the games that they are thinking of buying.

Of course, if enough game developers respond to the FEPA by abandoning voluntary ratings, lawmakers would likely allege "market failure" and propose a mandatory federal rating / labeling scheme to take its place. Government would be forced to: (a) enact its own ratings scheme or enshrine the ESRB's system into law, (b) mandate that all game makers label their games using those new ratings, and, (c) impose legal penalties on game developers / retailers who fail to enforce the system in accordance with the new rules.

If this scenario unfolds, lawmakers will be making content-based determinations that would likely run afoul of the First Amendment. But even if the industry's system remained in place as the basis of a new federal enforcement regime, as is envisioned in the FEPA, it would be unconstitutional for government to enshrine a private ratings scheme into law or use it as a trigger for legal liability. This is what several courts have held in past years after some state and local governments attempted to enact laws or ordinances based upon the MPAA's voluntary movie ratings system.

For example, in *Borger v. Bisciglia* a U.S. District Court held that "[A] private organization's ratings system cannot be used to determine whether a movie receives

constitutional protection."[29] Similarly, in *Swope v. Lubbers*, the court held that "[t]he standards by which the movie industry rates its films do not correspond to the... criteria for determining whether an item merits constitutional protection or not."[30] Roughly a dozen court cases have come to largely the same conclusion: Government cannot co-opt a voluntary, private ratings system for its own ends.[31]

There are two other provisions of the FEPA that raise serious constitutional concerns. The first is the requirement that the FTC contract with a private organization to evaluate the ESRB's ratings system to determine if it remains "consistent and reliable over time" and to prevent "ratings slippage." For such an evaluation to take place, however, it would likely require that someone in government define a baseline to determine whether "slippage" had occurred over time. The First Amendment concerns here are obvious since government would be dictating acceptable speech standards.

Less obvious, but nonetheless just as real, are the potential implications of the FEPA's requirement that the FTC conduct an investigation into embedded or hidden game content that can be accessed by key-stroke combinations or passwords to determine if this effects the accuracy of the ESRB's voluntary ratings and whether this rises to the level of an "unfair or deceptive act" punishable by the agency. Practically every game produced today has some hidden content embedded within it. Indeed, such hidden content is one of the real attractions of some games to many players. But this hidden content would rarely have any impact on the initial ratings assignment by the ESRB. Nonetheless, as mentioned, the ESRB now requires that game developers divulge hidden content when games are rated. But government oversight of the hidden code or content features of video games could have a serious chilling effect on that speech. Thus, some of the extra content that consumers enjoy most might be self-censored or eliminated entirely if game developers fear legal liability or other regulatory repercussions.

Myth #5: There is a direct correlation between the rise of violent video games and the decline of various social / cultural indicators.

Reality: No such correlation has been proven. Indeed, almost every social / cultural indicator of importance has been improving in recent years and decades even as media exposure and video game use among youth has increased.

It has already been shown that the vast majority of video games do not contain excessively violent or sexually explicit themes. Still, many industry critics claim that

[29] *Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D;. Wis. 1995).
[30] *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983).
[31] *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968); *Drive in Theaters v. Huskey*, 305 F. Supp. 1232 (W.D.N.C. 1969); *Engdahl v. City of Kenosha* 317 F. Supp. 1133 (E.D. Wis. 1970); *Motion Picture Association of America v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970); *State v. Watkins*, 191 S.E. 2d 135 (S.C. 1972); *Watkins v. South Carolina*, 413 U.S. 905 (1973); *Potter v. State*, 509 P.2d 933, (Okla. Ct. Crim. App. 1973); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3d Cir. 1988); *Gascoe, Ltd. v. Newtown Township*, 699 F. Supp. 1092 (E.D. Pa. 1988).

increased exposure to video games has created a generation of degenerate or dangerous youth. For example, in their book *Stop Teaching Our Kids to Kill*, Lt. Col. Dave Grossman and Gloria DeGaetano rhetorically ask: "Are our children, socially marginalized and psychologically weakened, the indicator group for the level of violence in our society? Are they the canaries in our coal mines? Unfortunately, the answer is yes."[32] Like other critics, Grossman and DeGaetano then go on to claim that scholarly literature and experiments have established a clear link between violently themed video games and aggressive behavior in children.

In reality, however, no such link has been clearly established in the "scientific" literature on this subject. The literature is ambiguous at best and perhaps even leans against the "causal hypothesis" that media violence leads to aggressive behavior. Psychologist Jonathan L. Freedman conducted the most comprehensive review of all the major literature on this subject for his book *Media Violence and Its Effect on Aggression: Assessing the Scientific Evidence.* He concluded that "the results do not support the view that exposure to media violence causes children or anyone else to become aggressive or to commit crimes; nor does it support the idea that it causes people to be less sensitive to real violence."[33] Freedman collected and reviewed all the laboratory experiments, field experiments, longitudinal studies, and other studies employing mixed methodologies. He concluded that "not one type of research provided the kind of supportive evidence that is ordinarily required to support a hypothesis. Not one found 90 percent supportive or 80 percent supportive or 70 percent supportive or even 50 percent. In fact, regardless of the method used, fewer than half the studies found results that supported the [causal] hypothesis—sometimes considerably fewer than half."[34]

While these findings relate to television and movie violence, they would seem to have some bearing on the debate over video game violence. Indeed, the FTC's first report on the marketing practices of entertainment companies noted that early research relating to video games was generally inconclusive. "[M]ost researchers are reluctant to make definitive judgments at this point in time about the impact of violent electronic games on youth because of the limited amount of empirical analysis that has so far taken place. Although some surveys of the literature lean toward seeing a detrimental effect from playing violent video games, others are more skeptical. As additional research becomes available, these technical assessments may change."[35] In other words, contrary to claims made by some critics, no clear link between video games and real-world aggression or violence has been established.

It *is* possible, however, to at least analyze the claim that there is a correlation between general exposure to video games and declining cultural indicators. Data is

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[32] Dave Grossman and Gloria DeGaetano, *Stop Teaching Our Kids to Kill* (New York: Crown Publishers, 1999), p. 17.

[33] Jonathan L. Freedman, *Media Violence and Its Effect on Aggression: Assessing the Scientific Evidence* (Toronto: University of Toronto Press, 2002), pp. x-xi.

[34] *Ibid.*, pp. 200-201.

[35] *Marketing Entertainment Violence to Children*, Federal Trade Commission (2000), Appendix A, p. 13, http://www.ftc.gov/reports/violence/appendicesviorpt.pdf.

readily available on many cultural indicators of concern and can be plotted against increasing childhood exposure to media and video games.

When undertaking such an analysis, however, it is vitally important to recall that one of the first rules of statistical analysis is that correlation does not necessarily equal causation. While some cultural / social indicators have indeed worsened in the post World War II period, that does not necessarily prove that exposure to "indecent" or "excessively violent" media programming are the root causes. "[B]ecause two phenomena are both disturbing and coincident in time does not make them causally connected," notes Dr. Stuart Fischoff of the Media Psychology lab at Californian State University in Los Angeles.[36]

What is most interesting about some of the claims made by proponents of the causal hypothesis, however, is that they choose to ignore certain variables, or randomly end their surveys for other data sets in the early 1990s. It may be the case that they have not bothered to update their research since that time. Alternatively, these critics could be choosing to intentionally ignore the stunning reversal of many of these social indicators over the past few decades since it does not fit their thesis about media causing social harms. Consider, for example, the reversal of various cultural trends over the past decade:

- Juvenile murder, rape, robbery and assault are all down significantly over the past decade. Overall, aggregate violent crime by juveniles fell 43 percent from 1995-2004.[37] (Figure 2)

- There are fewer murders at school today and fewer students report carrying weapons to school or anywhere else than at any point in the past decade.[38] (Figures 3 & 4)

- Alcohol and drug abuse among high school seniors has generally been falling and is currently at a 20-year low.[39] (Figure 5)

- Teen birth rates have hit a 20-year low in 2002 and fewer teens are having sex today than they were 15 years ago.[40] (Figure 6 &7)

- High school dropout rates continue to fall steadily, as they have for the past 30 years.[41] (Figure 8)

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[36] Quoted in Jones, *Killing Monsters*, p. 28.
[37] Federal Bureau of Investigation, *Crime in the United States,* various years, available at http://www.fbi.gov/ucr/ucr.htm#cius
[38] National Center for Education Statistics, *Indicators of School Crime and Safety, 2004*, available at http://nces.ed.gov/pubs2005/2005002.pdf
[39] The University of Michigan, *The Monitoring the Future Study*, various years, available at http://monitoringthefuture.org/
[40] Center for Disease Control, *Teenagers in the United States: Sexual Activity, Contraceptive Use, and Childbearing, 2002*, available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_024.pdf
[41] U.S. Census Bureau, *Current Population Survey*, available at http://www.census.gov/population/socdemo/school/tabA-5.pdf

- Teenage suicide rates rose steadily until the mid-1990s and then began a dramatic decline.[42] (Figure 9)

- The divorce rate has fallen steadily since 1990, from 5 divorces per 1,000 citizens to 3.9 in 2004.[43] (Figure 10)

These results do not conclusively rule out a link between exposure to games and violent acts or promiscuous sexual behavior. But they should at least call into question the "world-is-going-to-hell" sort of generalizations made by proponents of increased media regulation who all too often make casual inferences about the relationship between media exposure and various social indicators.

Such a causal relationship is even more dubious today since all Americans, especially youngsters, are surrounded by a much wider variety of media than ever before. Even though television viewing has gone down slightly in recent years, it has been due to the rise of other media substitutes that command the attention of children, including the Internet, cell phones and video games. Overall, therefore, it appears that children are "consuming" as much, if not more, media than ever before. A 2000 Annenberg Public Policy Center survey on *Media in the Home* found that children spend almost 6½ hours using media each day.[44] And the Kaiser Family Foundation's *Generation M* study also found youngsters spend about 6½ hours consuming media but that because they are "masters of multitasking" they actually manage to pack 8½ hours of media exposure into that 6½ hours of time.[45] Despite this, all the cultural indicators of concern commonly mentioned by media or video game industry critics have seen encouraging reversals from past decades. One would think that if gaming was really leading to increased aggression among youth it would start showing up in some of these indicators.

This suggests that the relationship between media usage and cultural / social indicators is far more complicated than many previously thought. At a minimum, it suggests that there are likely many other factors that effect child development beyond media usage or exposure to video games.[46] As the Federal Trade Commission concluded

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[42] Center for Disease Control, U.S. Center for National Health Statistics, *National Vital Statistics Report*, various years, available at http://www.cdc.gov/nchs/fastats/suicide.htm

[43] Center for Disease Control, U.S. Center for National Health Statistics, *National Vital Statistics Report*, various years, available at http://www.cdc.gov/nchs/data/nvss/divorce90_04.pdf

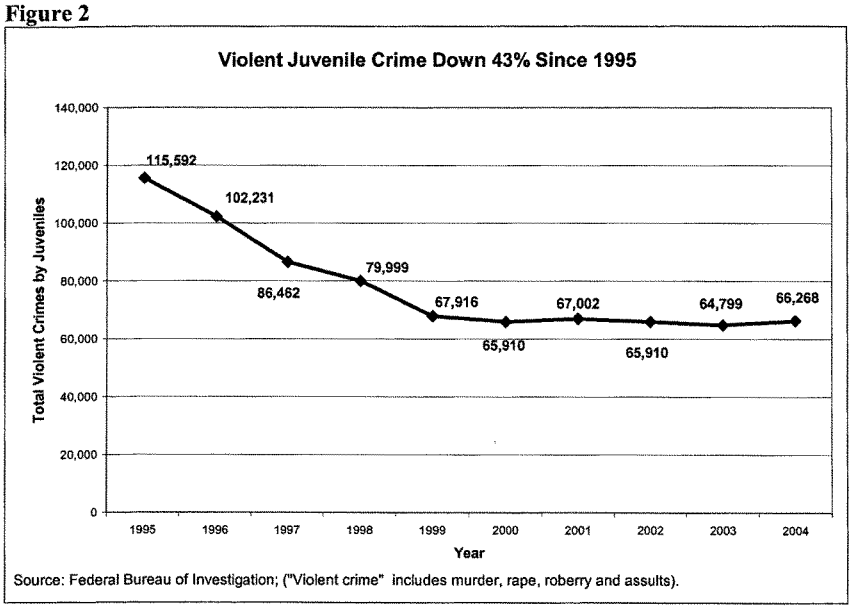
[44] *Media in the Home, 2000,* Annenberg Public Policy Center, June 26, 2000, http://www.annenbergpublicpolicycenter.org/02_reports_releases/report_2000.htm

[45] *Generation M: Media in the Lives of 8-18 Year-Olds*, Kaiser Family Foundation, March 2005, p. 6, http://www.kff.org/entmedia/entmedia030905pkg.cfm

[46] For a broader discussion of these issues, see Karen Sternheimer, *It's Not the Media: The Truth about Pop Culture's Influence on Children* (Boulder, Colorado: Westview Press, 2003). Sternheimer argues that "the claim that video games create the *desire* to actually kill a live human is not supported by the evidence. If this were the case we would see far more of the millions of video game users becoming violent instead of an extreme minority." Sternheimer, *It's Not the Media*, p. 110. Even the Children's Media Policy Coalition, a collection of groups and associations that favor more government regulation of "excessively violent" media, has noted that "no reputable scientist has ever suggested that media violence is the only cause of even the most important cause of aggressive behavior. To the contrary, the general

in a 2000 review of the literature on this issue: "Most researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes, and violence."[47]

Figure 2



consensus is that is requires a convergence of many personal and environmental factors to elicit serious aggressive behavior." "Reply Comments of the Children's Media Policy Coalition," *In the Matter of Violent Television Programming and Its Impact on Children*, Federal Communications Commission, MB Docket No. 04-261, 2004, p. 9.

[47] *Marketing Entertainment Violence to Children*, Federal Trade Commission (2000), Appendix A, p. 1, http://www.ftc.gov/reports/violence/appendicesviorpt.pdf. Later in that same study, the FTC elaborated on this point: "Another important area of apparent agreement among diverse groups of observers is an increasing recognition that the media-aggression relationship is a complex one that involves a number of mediating influences. Broader research into the causes of youth violence has identified interacting risk factors, such as genetic, psychological, familial, and socioeconomic characteristics. Severe antisocial aggressive behavior appears to occur most often when more than one of these factors is present. The typical profile of a violent youth is one who comes from a troubled home, has poor cognitive skills, and exhibits psychological disorders such as anxiety, depression, and attention deficit hyperactivity. This configuration of risk factors makes attempts to isolate the independent effect of media violence difficult, because media violence can operate through many of the risk factors described above." *Ibid.*, pp. 9-10.

Figure 3

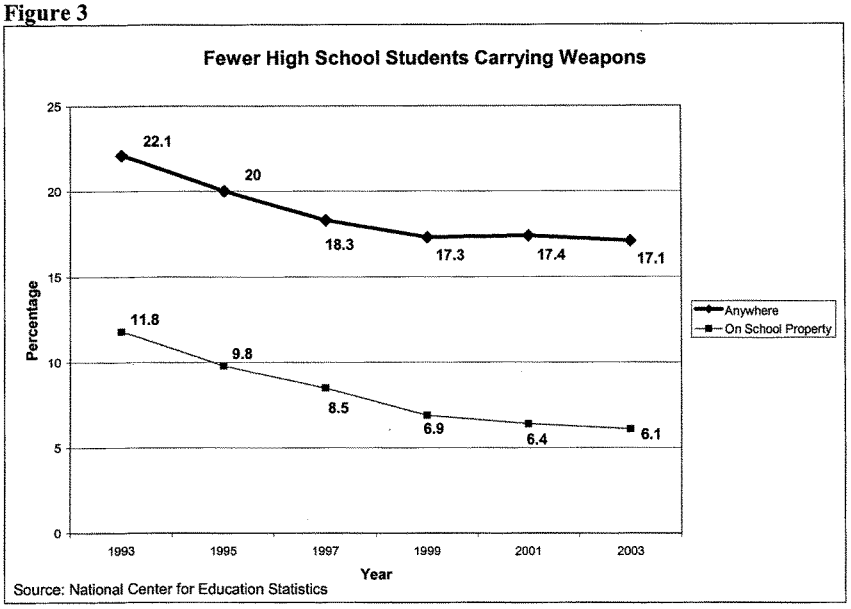


Figure 4

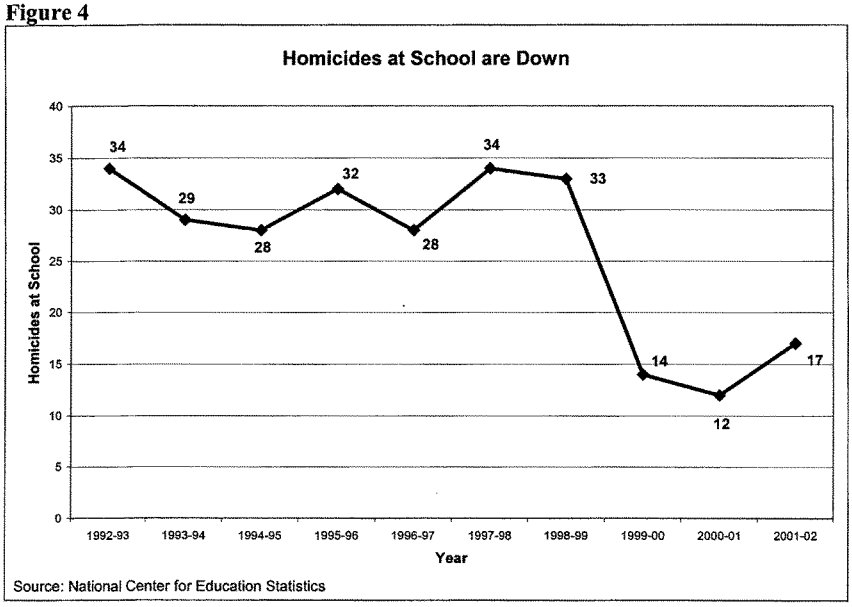
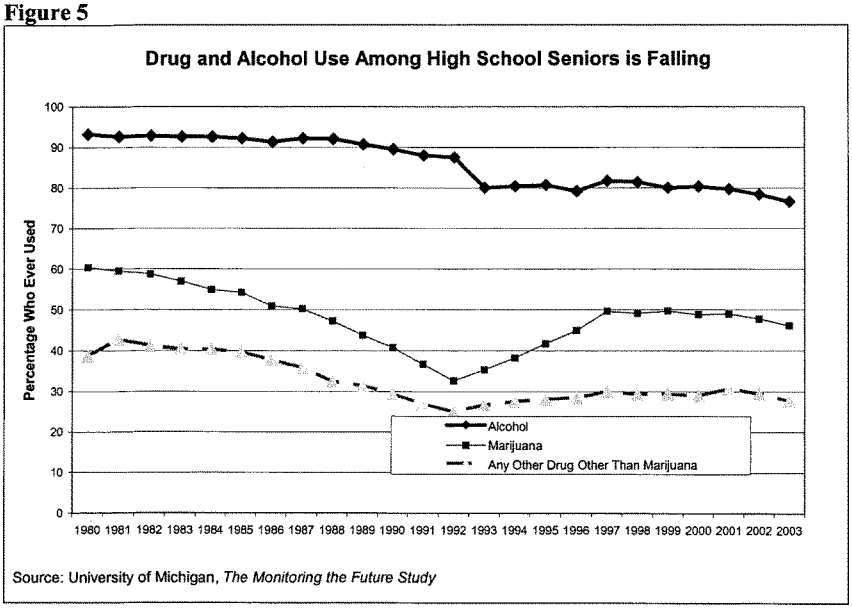


Figure 5



Source: University of Michigan, *The Monitoring the Future Study*

Figure 6

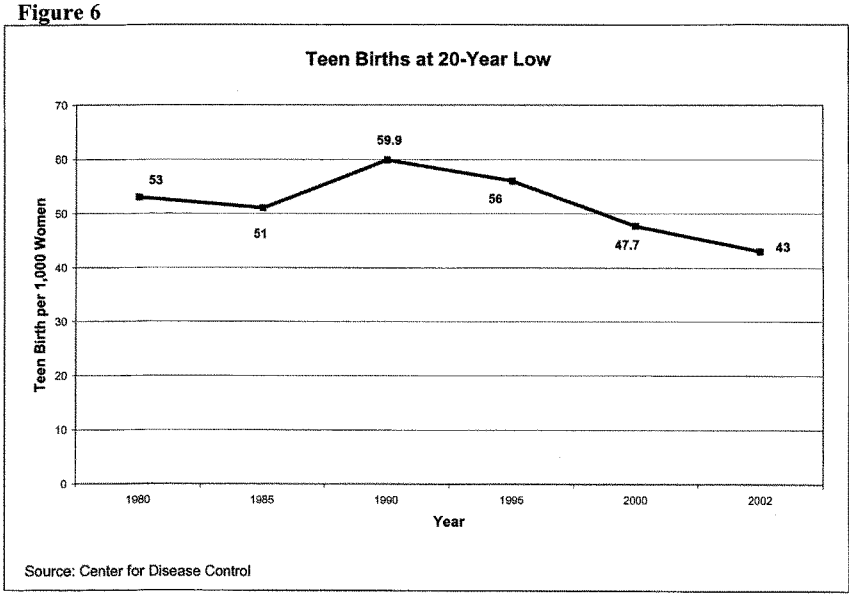


Figure 7

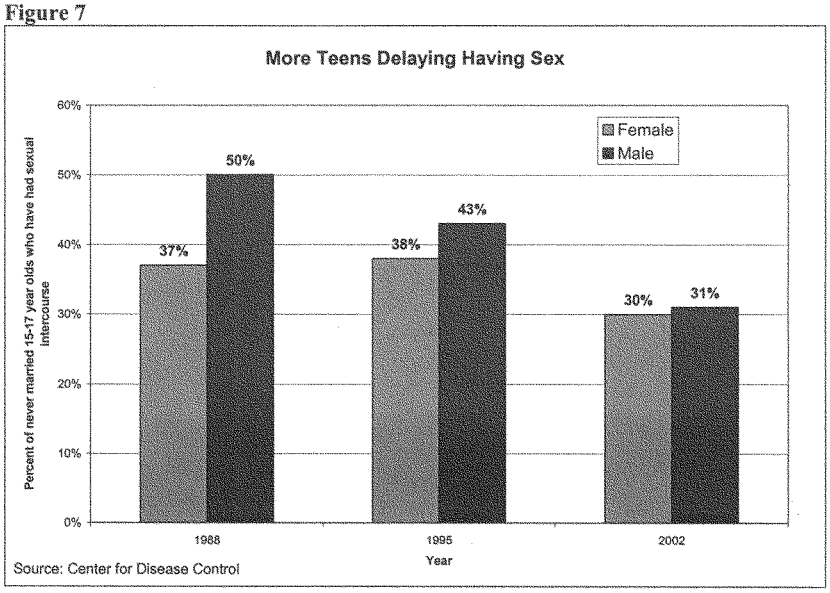


Figure 8

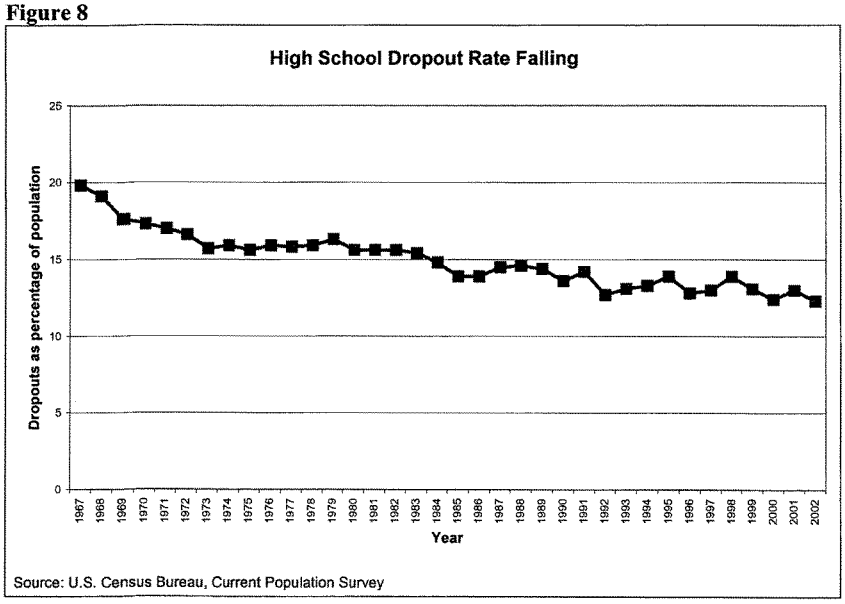


Figure 9

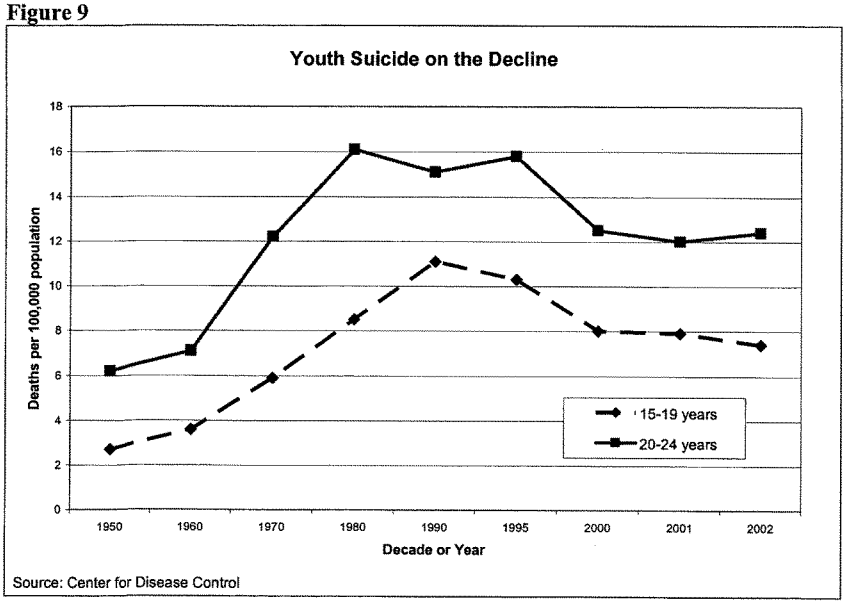
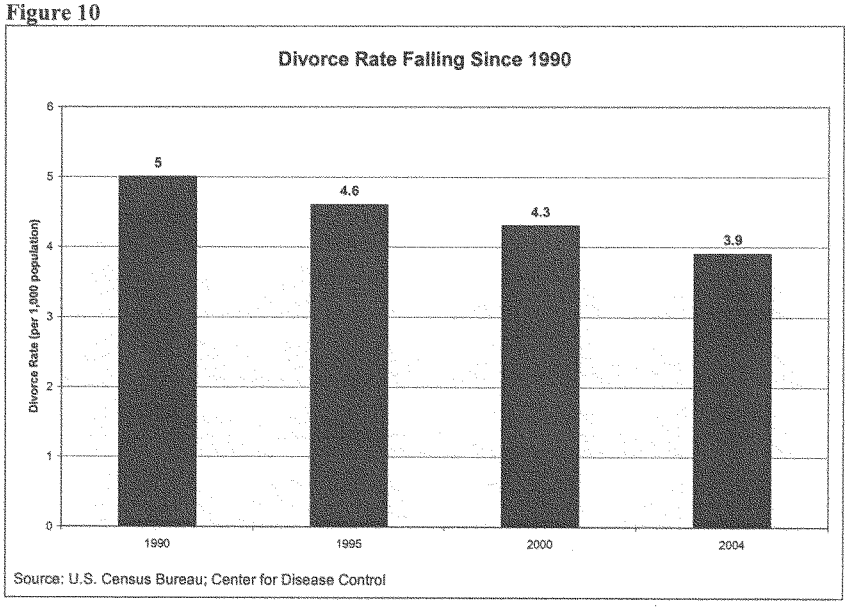


Figure 10



Myth #6: Video games have no social benefits or educational value and they reflect a new, inordinate societal preoccupation with violent entertainment.

Reality: Video games might have beneficial effects—especially of a cathartic nature—that critics often overlook. Regardless, violent themes and images have been part of literature and media for centuries.

The notion that video games reflect a new, inordinate societal preoccupation with violent entertainment is a myth. In his new book *Savage Pastimes: A Cultural History of Violent Entertainment*, Harold Schechter meticulously documents the prevalence of violent fare throughout the history of art and entertainment. Schechter notes that even "the supposedly halcyon days of the 1950s" were replete with violent fare, much of it aimed at children. "[T]he fact is that—contrary to popular belief—there was a shockingly high level of sadistic violence and gore in some of the most popular commercial entertainments of the 1950s."[48] Mickey Spillane's best-selling "Mike Hammer" novels were a prime example.[49] "Even the most vehement critics of contemporary popular culture would be hard-pressed to find anything in today's mainstream mass entertainment as alarming as the gore-drenched, gun-worshipping fantasies that Spillane and his

[48] Harold Schechter, *Savage Pastimes: A Cultural History of Violent Entertainment* (New York: St. Martin's Press, 2005), p. 137.

[49] Between 1895 and 1955, seven of the top fifteen best-selling books published in the United States were Mickey Spillane novels. Noted in *ibid.*

publisher dished out for the delectation of millions of ordinary American readers in the supposedly halcyon days of the 1950s," argues Schechter.[50] He also recounts the extraordinary gore of "pulp" comics during that decade, which were often replete with macabre, masochistic scenes.

Schechter also notes the top-rated television program of 1954, Disney's *Davy Crockett* series, "contained a staggering amount of graphic violence," including scalpings, stabbings, "brainings," hatchet and tomahawk blows, and so on. The series finale takes place at the Alamo and contained, in Schechter's opinion, a "level of carnage [that] remains unsurpassed in the history of televised children's entertainment."[51] (Incidentally, the show aired Wednesday nights at 7:30 to target the elementary school crowd.)

Perhaps it is the case then, as Judge Posner suggested in the *Kendrick* case, that nothing much has really changed throughout the history art and entertainment. Many people—including many children—clearly have a desire to see depictions of violence. They might even imagine themselves to be role-playing or living out fantasies in the imaginary worlds created by authors, television and radio programmers and entertainers, and even video game developers. One need only read the works of Shakespeare to realize that this instinct is deeply ingrained in the human psyche. How many knives have been plunged into how many backs during the countless renditions of Shakespeare's most revered works on stages over the past five centuries? And some of his plays—*King Lear, Macbeth,* and *Titus Andronicus*, in particular—contain scenes of extreme violence, murder and even mutilation. Yet, the works of Shakespeare are probably available in almost every library and school in America.

Could it be the case, then, that violent entertainment—including violent video games—actually might have some beneficial effects? From the Bible to *Beowulf* to Batman, depictions of violence have been used not only to teach lessons, but also to allow people—including children—to engage in sort of escapism that can have a therapeutic effect on the human psyche. It was probably Aristotle who first suggested that violently themed entertainment might have such a cathartic effect on humans. Aristotle used the term *katharsis* when discussing the importance of Greek tragedies, which often contained violent overtones and action. He suggested that these tragedies helped the audience, "through pity and fear effecting the proper purgation of these emotions."[52] Aristotle spoke highly of tragedies that used provocative or titillating storytelling to its fullest effect:

> Tragedy is an imitation not only of a complete action, but of events inspiring fear or pity. Such an effect is best produced when the events come on us by surprise; and the effect is heightened when, at the same time, they follow as cause and effect. The tragic wonder will then be greater than if they happened of themselves

[50] *Ibid.*, p. 139.
[51] *Ibid.* pp. 24-5.
[52] Aristotle's *Poetics*, (translated by S. H. Butcher), Part VI, http://classics.mit.edu/Aristotle/poetics.1.1.html

> or by accident; for even coincidences are most striking when they have an air of design. We may instance the statue of Mitys at Argos, which fell upon his murderer while he was a spectator at a festival, and killed him. Such events seem not to be due to mere chance. Plots, therefore, constructed on these principles are necessarily the best.[53]

Again, what Aristotle believed was important about such tales was precisely that they help give rise to a heightened sense of "tragic wonder" that helped us purge away or balance out similar passions brewing in the human psyche.[54] One might just as easily apply this thinking to many of the most popular video games children play today, including those with violent overtones. That's exactly what Gerald Jones does in his book *Killing Monsters: Why Children Need Fantasy, Super Heroes, and Make-Believe Violence*:

> One of the functions of stories and games is to help children rehearse for what they'll be in later life. Anthropologists and psychologists who study play, however, have shown that there are many other functions as well—one of which is to enable children to pretend to be just what they know they'll *never* be. Exploring, in a safe and controlled context, what is impossible or too dangerous or forbidden to them is a crucial tool in accepting the limits of reality. Playing with rage is a valuable way to reduce its power. Being evil and destructive in imagination is a vital compensation for the wildness we all have to surrender on our way to being good people.[55]

This echoes Judge Posner's opinion in the *Kendrick* case that "To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."

Steven Johnson's provocatively titled book *Everything Bad is Good For You: How Today's Popular Culture is Actually Making Us Smarter*, makes another argument in favor of looking at video games in a new light. Johnson argues that video games are growing increasing sophisticated and offer players a "cognitive workout" that is far more stimulating, rewarding and even educational than much of the media content they were force-fed in the past.[56] Specifically, Johnson notes, modern games—including those with violent content—require children to analyze complex social networks, mange resources, track subtle narrative intertwinings, and recognize long-term patterns.[57] Similar arguments are made by James Paul Gee, a Professor of Reading at the University of

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[53] *Ibid*, Part IX.

[54] For a broader discussion of the catharsis debate from Plato and Aristotle on down to the modern "media effects" psychologists and social scientists, see Marjorie Heins, *Not in Front of the Children: 'Indecency,' Censorship and the Innocence of Youth* (New York: Hill and Wang, 2001), p. 228-253.

[55] Jones, *Killing Monsters*, p. 11

[56] Steven Johnson, *Everything Bad is Good For You: How Today's Popular Culture is Actually Making Us Smarter* (New York: Riverhead Books, 2005), p. 166.

[57] Steven Johnson, "Watching TV Makes You Smarter," *The New York Times Magazine*, April 24, 2005, p. 59.

Wisconsin's School of Education, in his new book *What Video Games Have to Teach Us About Learning and Literacy.*[58]

Such thinking will undoubtedly remain controversial—perhaps even outlandish—to some. But the history of art and entertainment has always been filled with its share of controversies in terms of its impact on culture and society. Indeed, one generation's trash often becomes a subsequent generation's treasure. Sculptures, paintings and works of literature widely condemned in one period were often praised—even consider mainstream—in the next.[59]

So too for video games. "The opposition to gaming springs largely from the neophobia that has pitted the old against the entertainment of the young for centuries," noted *The Economist* magazine last summer. Video games are likely to remain the target of scorn by many critics today simply out of a misplaced fear of the new and unknown.[60] This modern form of artistic expression offers society a decidedly different way of enjoying visual entertainment, and one that many fear could have a corrupting influence on our youth. In another generation or two, however—after the first few generations of gamers have grown—it is likely that society will grow far more comfortable with video games. In the short term, the challenge is to ensure that government doesn't act on its worst tendencies in seeking to stifle history's latest form of interactive story-telling.

Conclusion

Video games are now part of the fabric of American society. They are a growing force in our multi-media landscape and our broader economy. Clearly, however, the increasing popularity of electronic gaming concerns many, especially those of older generations, who did not grow up with the same sort of interactive electronic images dancing across their television or computer screens.

Proposals to regulate video games, however, are being driven by a variety of myths and hypothetical fears that should not serve as the basis of government intervention and content controls. Self-regulation is working. The industry has created a comprehensive ratings and labeling system that offers parents and consumers extensive information about game content. While the enforcement of this scheme at the point-of-sale isn't perfect, it is improving and certainly represents a less-restrictive means of addressing this issue than would a convoluted and likely unconstitutional federal regulatory regime.

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[58] James Paul Gee, *What Video Games Have to Teach Us About Learning and Literacy* (New York: Palgrave, 2003).

[59] As *The Economist* magazine editorialized in the summer of 2005: "Novels were once considerd too low-brow for university literature courses, but eventually the disapproving professors retired. Waltz music and dancing were condemned in the 19th century; all that was thought to be 'intoxicating' and 'depraved', and the music was outlawed in some places. Today it is hard to imagine what the fuss was about. And rock and roll was thought to encourage violence, promiscuity and Satanism; but today even grannies listen buy Coldplay albums." "Breeding Evil?" *The Economist*, August 6, 2005, p. 9.

[60] "Video games are most threatening to adults who have seen images of them but never tried to play them." Jones, *Killing Monsters*, p. 173.

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Oral Testimony of Patricia E. Vance
President, Entertainment Software Rating Board (ESRB)

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

Hearing on State Regulation of Violent Video Games & the First Amendment
March 29, 2006 2:00pm

Thank you, Chairman Brownback, Ranking Member Feingold and the entire subcommittee for the invitation to appear today. I would like to take this opportunity to provide greater insight into how ESRB ratings currently empower parents to make informed decisions about the games their children play. I request that my statements, both oral and written, along with instructive appendices, be made a part of the hearing record. (PAUSE)

[SLIDE – ESRB LOGO] Virtually every computer and video game sold in the U.S. today carries an ESRB rating, and nearly all major retailers choose to only stock games that have been rated by our organization. This voluntary commitment from the video game industry and the retail community ensures that consumers have accurate and reliable information to help them decide which games are appropriate for themselves, their children and other family members. Today, the vast majority of parents use and trust ESRB ratings in helping them make those decisions.

[SLIDE – YELLOW BAR] The two-part ESRB rating system now consists of 6 age-based categories, appearing on the front and

back of each game package, and 32 different content descriptors that appear on the back, prominently displayed next to the rating category, which indicate elements in a game that may have triggered a rating or may be of concern to parents.

ESRB ratings are based on the consensus of adult raters who have no ties to the game industry and work on a part-time basis. One of ESRB's key responsibilities is to ensure that these raters review all pertinent game content, including the most extreme, no matter how hard it may be to find when playing the game. Many of today's games can take over 50 hours to play all the way through, so it's critical that companies fully disclose to the ESRB, in detail, exactly what's in the game, across a broad range of categories including but not limited to violence, sex, language, use of a controlled substance, and gambling.

If a company doesn't fully disclose all of the game's content to the ESRB, recent enhancements to our enforcement system allow for the imposition of fines up to one million dollars. The power to impose substantial penalties, which may include the suspension of rating services and corrective actions that can result in a full product recall, serve as a tremendous disincentive for any company entertaining the notion of withholding pertinent content from the ESRB. As the FTC has previously noted, the ESRB enforcement system is unique in its scope and severity among entertainment rating systems.

[SLIDE – RATING CATEGORY BREAKDOWN] While games that are rated for mature audiences tend to get a disproportionately high amount of media attention, the reality is that, by far, the largest number of titles rated by the ESRB, year in and year out, receive a rating of E for Everyone, and only about 12% of games receive an M rating for players 17 and older. Furthermore, last year not one Mature-rated game made it onto the Top 10 seller list.

These facts bely the common misperception that all games are created and intended for children. The fact is that the average age of a gamer today is 30, so it isn't surprising that video games, just like movies and TV shows, are created for all ages. The ratings help parents discern which games are right for their children, and which ones are not, and increasingly parents have come to rely on them.

[SLIDE – STATISTICS & A&U CHART] A recent study by Peter Hart Research found that 83% of parents with children who play games are aware of the ESRB ratings, and 74% use them regularly when buying games. While that's pretty good, we continue to put significant resources into aggressive educational initiatives to remind and encourage parents to use the ratings every time they buy a game

Moreover, for the ratings to be reliable, they must meet parents' expectations, and to that end the ESRB commissions separate research annually to test the level of agreement with our rating assignments among parents in ten different markets across the U.S. In the study, parents view excerpts from a large number of randomly selected games across all ESRB rating categories. The research results show that parents agree with ESRB ratings 82% of the time, or find them "too strict" another 5% of the time. Given the broad diversity of values, tastes and opinions in our country, this is a very high level of agreement, and it is a testament to the effectiveness of the system we use to assign ratings.

Some would argue that the ratings don't work because they don't place restrictions on what kids can buy. To address that point, it's worth mentioning that the FTC has reported that adults are involved in the purchase of a video game 83% of the time. Similar studies conducted by the industry have found that a parent or adult is involved 92% of the time. Simply put, parents are the gatekeepers, as well they should be, when it comes to which games come into their home.

[SLIDE – ESRB LOGO] I'd like to close today by saying simply that nobody takes these issues more seriously than we do. ESRB values immensely the trust that millions of parents have placed in our ratings, and we fiercely intend to preserve that trust. The vast majority of parents can and do make sensible choices about the

games their children play, and our ratings consistently play a critical role in making those choices.

Thank you, and I look forward to answering any questions that you may have.

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Summary of Testimony by ESRB President Patricia E. Vance
President, Entertainment Software Rating Board (ESRB)

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

Hearing on State Regulation of Violent Video Games & the First Amendment
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- Like books, films and TV shows, games are created for a diverse audience of all ages and interests. In fact, the average age of a gamer today is 30 years old.

- The Entertainment Software Rating Board (ESRB) provides reliable information about the age-appropriateness and content of the games parents buy, and the Federal Trade Commission reports that adults are involved in the purchase of games more than eight out of ten times.

- The ratings are visible, helpful, and credible. Recent Peter Hart research found that trust in and use of the ESRB ratings have never been higher. 83% of parents of children who play video games are aware of the ESRB ratings, and 94% of them say the ratings are "very" or "somewhat" helpful in making purchasing decisions. 82% of the time parents say they agree with the ratings ESRB assigns, and another 5% say that ESRB ratings are "too strict."

- ESRB conducts aggressive education and outreach efforts to raise parental awareness and use of our ratings, from PSAs in leading consumer magazines to radio spots in the Hispanic community, to partnerships with government officials and groups like the National PTA, to name a few

- The process for rating games is meticulous and thorough. Publishers are legally obligated to fully disclose all of a game's pertinent (including the most extreme) content to the ESRB, all of which is viewed by no fewer than three specially trained, part-time adult raters with no ties to the video game industry

- ESRB backs up our ratings with a stringent enforcement system, which has been lauded by the FTC as "the most comprehensive of the three {entertainment} industry systems." We are the ONLY entertainment industry, which can and has self-imposed fines and forced products to be pulled from the market if industry members violate our rules and regulations. Recently, we were empowered to impose fines of up to $1 million on publishers who fail to fully disclose all pertinent content to the ESRB.

- ESRB has worked with retailers representing 90% of U.S. game sales to post rating signage in their stores and to encourage them to create effective carding systems to prevent the sale of Mature or Adult Only games to minors.

- ESRB is committed to maintaining a credible and reliable system parents can trust. That is our mission, and it is a responsibility we take very seriously.

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Written Testimony of Patricia E. Vance
President, Entertainment Software Rating Board (ESRB)

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

Hearing on State Regulation of Violent Video Games & the First Amendment
March 29, 2006 2:00pm

Before I begin, I would like to respectfully thank Chairman Brownback and Ranking Member Feingold for the opportunity to appear today to present an overview of the ESRB rating system. The issues being discussed in today's hearing are critically important, especially to parents, to whom I believe our self-regulatory system offers a valuable, reliable and credible tool to make the right video game choices for their families. I ask consent that my full statement, along with instructive appendices, be made a part of the hearing record.

Background

The ESRB was created in 1994 to provide consumers, particularly parents, with the information they need to make informed computer and video game purchase decisions. The ESRB rating system was developed after consulting a wide range of child development and academic experts, analyzing other rating systems, and conducting nationwide research among parents. Through these efforts, ESRB found that what parents really wanted from a video game rating system were both age-based categories and, equally if not more importantly, objective and detailed information about what is in the game. Those surveyed agreed that a rating system should inform and suggest, not prohibit, and that the rating system should not attempt to quantify objectionable incidents, but instead should reflect the overall content and objective of the game.

Since its inception, the rating system has been periodically enhanced, revised and updated to not only ensure that we continue providing the best possible service to those who rely on the ratings, but also to keep pace with what is a rapidly evolving medium and industry. Today, we remain extremely proud of the ESRB rating system and the information it provides. We have assigned over 12,000 ratings in our history, and average over a thousand a year. Millions of parents rely on ESRB ratings to choose games they deem appropriate for their children and families, and we value greatly the trust they have placed in our ratings.

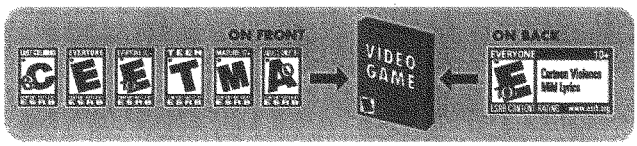
It is important to note that according to the U.S. Federal Trade Commission, 83% of the time adults are involved the purchase of games. It therefore stands to reason that a mission-critical ESRB activity is raising awareness and use of the rating system among parents, especially as the variety of game genres continue to expand to meet the demands of an aging game consumer. (The average age of a gamer today is 30.)

The ESRB Rating System

Although voluntary, the rating system has been universally adopted by the game industry, and virtually all computer and video games sold in the U.S. today carry an ESRB rating. Based on the aforementioned research conducted in 1994, the ESRB rating system was created with two equally important parts:

- **rating symbols**, easily identifiable on the front of game packaging that suggest the most appropriate age group for each game, and
- **content descriptors**, found on the back, clearly stating why a game received a particular rating or indicating content that may be of interest or concern.

Here's an illustration of the two parts:



Rating Categories and Definitions

EARLY CHILDHOOD
Titles rated EC (Early Childhood) have content that may be suitable for ages 3 and older. Contains no material that parents would find inappropriate.

EVERYONE
Titles rated E (Everyone) have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.

EVERYONE 10+
Titles rated E10+ (Everyone 10 and older) have content that may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language, and/or minimal suggestive themes.

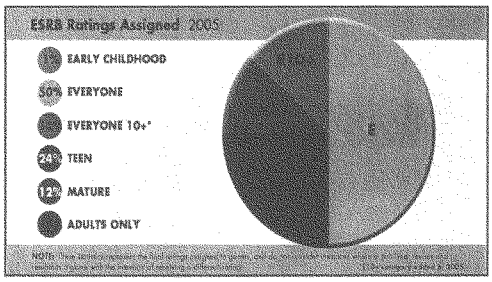
TEEN
Titles rated T (Teen) have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling and/or infrequent use of strong language.

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

ADULTS ONLY
Titles rated AO (Adults Only) have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.

Content Descriptors
Over 30 different content descriptors are currently employed by the ESRB rating system. They span various categories of concern to parents, including but not limited to violence, language, suggestive or sexual content, gambling and use of controlled substances.

Rating Category Breakdown
Though violent games tend to get a disproportionately high amount of attention, the reality is that the vast majority of games rated by ESRB are appropriate for younger players. As a point of reference, of the 1,133 ratings assigned by the ESRB in 2005, 50% were rated E (Everyone), 12% were rated E10+ (Everyone ages 10 and up)[1], and 24% were rated T (Teen). Games rated M (Mature) represented 12% of rating assignments, with the EC (Early Childhood) and AO (Adults Only) categories comprising the remainder.



Despite the media's singular focus on M (Mature) games, the percentage of M (Mature) rating assignments did not increase in 2005. It is also important to note that in 2005 not one M (Mature) rated game made it onto the Top 10 bestseller list. That being said, with the average age of gamer increasing every year, it is reasonable to expect that the number of games targeting a more mature market to stay at least at the same level, if not increase, in the coming years.

Game Raters
ESRB game raters are recruited from one of the most culturally diverse populations in the world – New York City. The raters are all adults and are not required to be gamers themselves; a gamer-only rating system would likely bias rating assignments as they would surely bring a different sensibility to content than the pool of raters we have always used. Typically, our raters have some experience with children, and have no ties to the entertainment software industry. They are specially trained by ESRB to rate computer and video games and work on a part-time basis, attending no more than one 2-3 hour rating session per week. The ESRB strives to recruit raters who are demographically diverse by age (must be at least 18), martial status, gender, race, education and cultural background to reflect the U.S. population overall.

Rating Process
Prior to a game being released to the public, game publishers submit a detailed written questionnaire to the ESRB, often with supplements (such as lyric sheets, scripts, etc.), specifying exactly what pertinent content will be in the final version of the game. Along

[1] The E10+ rating category was introduced in March 2005.

with the written submission materials, publishers must provide a videotape capturing all pertinent content, including the most extreme instances, across all relevant categories including but not limited to violence, language, sexual or suggestive, controlled substances and gambling. Pertinent content that is not programmed to be playable but will exist in the final game's code base must also be disclosed (as of July 2005).

Once the submission is checked by ESRB for completeness, which may also involve ESRB staff members playing a beta version of the game, the video footage is reviewed by at least three or more raters. Upon independently reviewing the video, the raters recommend appropriate rating categories and content descriptors for the content in each scene reviewed and the game overall. Raters consider many elements in their assignments including context, realism, frequency, the reward system, the degree of player control and overall intensity, among others.

The ESRB checks the raters' assignments for majority consensus, conducts a parity examination where appropriate to maintain consistency and trust in the ratings, and issues an official certificate with the rating assignment to the game publisher. If consensus is not reached in the first rating session, additional sessions will be conducted until a clear majority consensus can be identified. Once issued, the publisher is then able to either accept the rating as final or revise the game's content and resubmit the game to the ESRB, at which time the process starts anew. Publishers also have the ability to appeal an ESRB rating assignment to an Appeals Board, which is made up of publishers, retailers and other professionals.

Pertinent Content

As stated above, pertinent content spans various categories including violence, profanity, sexual or suggestive content, depiction and/or use of controlled substances, gambling, etc. The following chart explains what types of content are considered pertinent from a ratings standpoint:

Destruction Explosions and physical damage, including audio and visual elements of destruction	**Rewards/Penalties** Rewards, punishment, and penalties for certain player behavior, such as ending the game if the player attacks civilians	**Violence** All elements of damage design, including blood effects, gore, death animations, post-mortem damage effects, and screams
Failure What happens when the player dies, crashes, or goes out-of-bounds	**Profanity** Any profanity and how often it occurs, whether it is spoken, gestured, or written in text	**Soundtrack/Lyrics** Soundtracks that contain profanity or adult themes, including edits or "bleeps," and lyric sheets
Controlled Substances Use, implied use, or reference to drugs, alcohol or tobacco, even in the background	**Gambling** Gambling, including instructional lessons or mere reference	**Sexuality** Sexually oriented and suggestive themes or dialogue, character models and dress, nudity, and explicit sexual activities/references
Perspectives Different game perspectives, such as first person, third person, top-down, etc.	**Sound Effects** Sound effects, including those associated with pain, death, explosions, weapons, sexual activity, and bodily functions	**Weapons** Depictions of weapons and the different effects they produce

ESRB Enforcement System

As the game industry's self-regulatory body, the ESRB is responsible for the enforcement of its rating system. The ESRB enforcement system has been praised by the U.S. Federal Trade Commission and several government leaders for its efficacy and comprehensiveness, [2] and sets it apart from other entertainment media rating systems in its scope and severity. Companies who do not comply with ESRB guidelines are subject to a wide range of ESRB sanctions, including fines, corrective actions, and other penalties. In fact, a complete review of the ESRB enforcement system was recently completed, with the expert counsel and support of prominent attorneys, Eric Holder, Jr. and Joseph DiGenova, resulting in a new class of violations for an "egregious" failure to disclose pertinent content, carrying a fine up to $1,000,000, among other enhancements. A letter from both Mr. DiGenova and Mr. Holder is attached for the consideration of this Subcommittee.[3]

Ratings

Every publisher of a game rated by the ESRB is legally bound to disclose all pertinent content when submitting the game for an ESRB rating, including, as of July 2005, content that is programmed to be inaccessible but will remain "locked out" in the final code of the game. To ensure that all pertinent content was fully disclosed during the rating process, after a game is publicly released, ESRB testers review randomly and hand-selected final product. In the event that material that would have affected the assignment of a rating or content descriptor is found to have not been previously disclosed, the ESRB is empowered to impose corrective actions and a wide range of sanctions, including points, monetary fines up to $1 million for the most egregious offenses, and even suspension of rating services. Corrective actions can include pulling advertising until ratings information can be corrected, re-stickering packaging with correct ratings information, recalling the product, and other steps the publisher must take so the consumer has accurate information.

Last summer, a widely publicized incident involving the game *Grand Theft Auto: San Andreas* showed how effective and forceful an enforcement system we have at our disposal. After ESRB confirmed that the game's publisher, Rockstar Games, had not disclosed sexually explicit content that was "locked out" in the code of the game but could be accessed if players downloaded from the Internet a modification (dubbed "Hot Coffee") created by a hacker, severe measures were taken by the ESRB, and immediate corrective actions were demanded of Rockstar. ESRB revoked the game's initial M (Mature) rating and re-rated it AO (Adults Only). Additionally, ESRB required the publisher to advise retailers to immediately cease sales of the game until all inventory in the retail channel could either be re-stickered with the AO rating, or existing copies could be exchanged for new versions without the locked-out content, maintaining the original M rating. Further, the publisher agreed to make available on the Internet a patch for parents to download which would make the modification inoperable on the PC version of the game. I submit that there is no other industry self-regulatory system willing or capable of imposing such sweeping sanctions on its own members, which in this particular case resulted in the removal of a top-selling product from the market, a major loss of sales and a drop in shareholder value.

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[2] See Appendix A, excerpts from FTC reports to Congress and statements by government officials.

[3] See Appendix B, March 27, 2006 letter from Eric Holder, Jr. and Joseph DiGenova

It is true that opportunistic activists with their own agendas capitalized on the issue by casting "Hot Coffee" as evidence of a broken rating system and turning it into a political football. However, the facts make it abundantly clear that the actions taken by ESRB are strong evidence of an extremely capable self-regulatory body. In 30 days, the ESRB had thoroughly investigated a complex and unprecedented situation affecting one of the most popular video games ever released, had assessed the implications and scope of the content and its availability, changed its policies regarding disclosure requirements for locked-out content, and imposed prudent corrective actions on the publisher that effectively removed a top-selling product from the marketplace, all of which served to prevent further damage to consumers. These actions were taken with the interest of consumers and their trust in the ratings as our highest priority. Contrary to what some may say, there exists no rating system, nor could there ever be, that would have discovered this content prior to the game's release. The only course of action was to respond quickly and effectively, and revise policies as necessary to ensure that a similar situation does not arise again in the future. That is precisely what ESRB did.

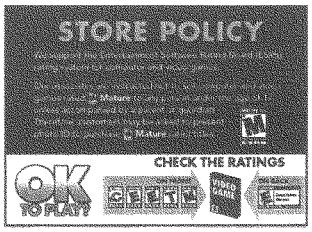
Advertising & Marketing
ESRB self-regulatory activities span advertising and marketing practices, as well. Publishers of games carrying an ESRB rating are also legally bound to follow the industry-adopted "Principles and Guidelines for Responsible Advertising Practices" along with an "Advertising Code of Conduct." The ESRB's Advertising Review Council (ARC) is responsible for the oversight, compliance, and enforcement of all industry-adopted advertising and marketing guidelines. Specific marketing rules codified in the "Code of Conduct" address everything from the required size of rating icons on game boxes to guidelines for cross-sells and cross-promotions. The rules also address inappropriate target marketing; M (Mature) rated products cannot be advertised in media vehicles that have a strong following among minors (i.e., TV – no higher than 35% under 17 audience composition is permitted; Print – no higher than 45% or more under 17 readership composition is permitted).

Guidelines require that game advertisements accurately reflect the nature and content of the product and assigned rating; should not glamorize or exploit the ESRB rating; should be created with a sense of responsibility towards the public; should not contain any content that is likely to cause serious or widespread offense to the average consumer; and must not specifically target consumers for whom the product is not rated as appropriate.

ARC diligently monitors compliance with its marketing guidelines, and actively enforces them, as confirmed repeatedly in the Federal Trade Commission's Report to Congress on the Marketing of Violent Entertainment to Children[4].

Retailer Support
Most retailers in the U.S. voluntarily refuse to stock games that do not carry an ESRB rating. While the ESRB does not have the authority to stop the sale of M (Mature) rated games to minors, we do work closely with retailers and game centers to display information that explains to consumers how the rating system works and, where appropriate, support their store policy pertaining to the sale or rental of Mature-rated games to minors without parental consent. Many major retailers currently implement

[4] Federal Trade Commission, Report to Congress on the Marketing of Violent Entertainment to Children, 2001-2004



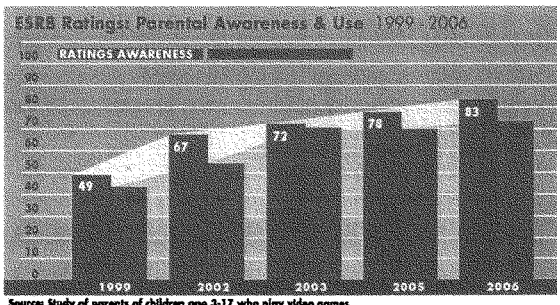
their own store policies requiring age verification for the sale of games rated M (Mature), and ESRB encourages and supports these efforts.

In fact, in November 2005, the ESRB Retail Council (ERC) was established to improve ratings education and enforcement of store policy restricting the sale of M-rated games. The first meeting of this group was convened in January 2006. Members of the ERC include Wal-Mart, Best Buy, Target, Gamestop/EB Games, Toys R Us, Circuit City, Blockbuster, and Movie Gallery/Hollywood Video.

Consumer Research

In order to ensure that the ratings assigned by ESRB reflect the standards and meet the expectations of average American consumers, we conduct consumer research on an annual basis in ten different markets across the U.S. This research has consistently shown that parents overwhelmingly agree with the ratings that we apply. Peter D. Hart Research Associates, a nationally renowned independent opinion research firm, tests randomly selected video games rated during the prior 12 months with parents of children between the ages of 6 and 17. Parents are shown clips of actual game footage and then asked what rating they would apply. They are then asked to compare their own rating to the one actually assigned by the ESRB and whether they agree with it.

Last year, this research found that parents agreed, or even thought our ratings were too strict, 87% of the time. Parents described the actual ratings as "about right" in 82% of all instances and "too strict" 5% of the time. Ratings issued by watchdog groups like the National Institute on Media and the Family also support the reliability and accuracy of ESRB ratings. In fact, a recent review of NIMF's own age recommendations showed overwhelming agreement with those assigned by ESRB. In a pluralistic society like ours, which encourages and embraces diversity among its citizens, no rating system could ever achieve 100% popular consensus. However, it is clear that ESRB ratings are well within the American mainstream, and that's exactly where we strive to remain.



Source: Study of parents of children age 3-17 who play video games conducted by Peter D. Hart Research Associates and commissioned by ESRB

That said, ratings are only effective if they are being used, and so ESRB also commissions annual research of ratings awareness and use. In our most recent study conducted earlier this month (March 2006), we found that 83% of parents surveyed were aware of the ESRB ratings (up from 78% in 2005) and 74% use them regularly when choosing games for their families (up from 70% in 2005). Awareness of content descriptors also continues to grow, and is now at 65% (up from 61% in 2005). Fifty-three percent (53%)of parents "never" allow their children to play M-rated games and 41% "sometimes" do. Parents of kids under the age of 13 are almost twice as likely to

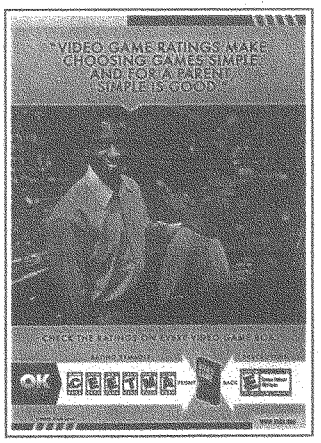
"never" allow their children to play an M-rated game. Fully 91% of respondents indicated that they trust the ESRB ratings, saying their trust has either stayed "about the same" (76%) or increased (15%) during the past year. Other opinion polls conducted by Hart Research show that parents not only agree with specific ESRB ratings, but that 90 percent of them say the ESRB rating system provides the kind of information they need.

Supporting the Hart research is a survey released by the Henry J. Kaiser Family Foundation in 2004, which found that among all entertainment rating systems (TV, movies, music, and games), parents found the ESRB ratings to be the most useful, with 91% finding them "somewhat (38%)" to "very useful" (53%).

Consumer Education & Outreach

As noted earlier, a study conducted by the Federal Trade Commission in September 2000 reported that adults are involved in the purchase of games 83% of the time. The ESA has found in similar research that adults make or are involved in 92% of all game purchases. Regardless of the data source, it is clear that parents are either involved in or ultimately making the decision about what games their kids are playing an overwhelming majority of the time.

Keeping in mind the significant role parents play in making purchase decisions, the ESRB launched a multi-channel consumer marketing campaign in October 2003 featuring the slogan *"Ok To Play? – Check The Ratings."* The campaign, which is primarily composed of a public service announcements (PSA pictured at right) and a retail partnership program, encourages parents to use both components of the rating system (rating symbols and content descriptors) to determine if a game is appropriate for their family.



The campaign generates over a billion consumer impressions annually. Over 20 publications have run the print PSA ads, including publications like *Good Housekeeping, TV Guide, Family Circle, Oprah, Better Homes and Gardens, Ser Padres, Healthy Kids en Espanol, NY Post, Ladies' Home Journal, Entertainment Weekly, Redbook, Parents, Working Mother,* and *Disney Adventures*, among others. More than a dozen top game enthusiast publications support the campaign as well.

Because more than half of all games sold each year in the U.S. are sold during the holiday season, the ESRB also conducts an annual Holiday Outreach initiative that includes satellite and radio media tours, print and radio PSAs, targeted outreach to parents through print and online outlets, and audio news releases. Last year's campaign generated approximately 150 million impressions during the holiday season alone.

Partnerships

Retail
A critical part of our consumer awareness campaign is its unique retail partnership program. The overall goal of our retailer partnerships is to ensure that consumers are educated about and reminded to check the ratings when they are shopping for computer and video games. Rather than send posters or stand-alone brochures to stores that consumers may not notice, we have succeeded in getting signage displayed in stores representing the 17 top national retail accounts representing 90% of game sales, many of which have incorporated ratings education into their in-store display fixtures. ESRB has also provided many of these retailers with materials for sales associates to learn about the rating system, and has facilitated the training of 30,000 store associates through an online training module.

National PTA
The ESRB has recently been working closely with the National PTA, whose president, Anna Weselak, called the ESRB ratings "an extremely useful and informative tool" while strongly encouraging parents to use it when choosing games for their families. ESRB is working with the NPTA to develop parent education materials that would be distributed to all state and local PTA chapters.

State and Local Governments
ESRB has established partnerships with various state and local governments, working with leaders and officials to promote and educate parents about the ratings. County Executive Andy Spano (Westchester County, NY), Assemblyman Ed Chavez (D-CA), Puerto Rico Secretary of Consumer Affairs Alejandro Garcia and others have teamed up with ESRB to implement PSA campaigns, educational brochures and other projects aimed at raising awareness and use of the ratings.

Closing Statement

I hope this testimony has provided you with a clearer and broader understanding of the ESRB's self-regulatory role and responsibilities. As a relatively new and quickly evolving medium, there are many misperceptions about video games in general, and I'm grateful to have had the opportunity to explain what we do and how we do it. We take great pride in our work and the service we provide to parents and other consumers of computer and video games. I look forward to having a constructive dialogue with members of the committee and answering any questions that you may have.

Thank you.

UNITED STATES SENATE

SENATE JUDICIARY COMMITTEE

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS

"WHAT'S IN A GAME? STATE REGULATION OF VIOLENT VIDEO GAMES AND THE FIRST AMENDMENT"

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WEDNESDAY, MARCH 29, 2006

I would like to thank Senator Brownback and Senator Feingold for the opportunity to testify here today. The purpose of my testimony is to describe the status of the current social science research concerning the effects of violent video games on those who play them. My remarks about the state of the research on video games are based on accepted principles in social psychology, communication and sociology, my understanding and use of the various standard research methods, my time spent in contact with game players and game developers and my experience as an active researcher of video games.

Background

I am currently an Assistant Professor at the University of Illinois at Urbana-Champaign in the Department of Speech Communication. My department is ranked in the top six nationally according to the National Communication Association Annual Survey, and number two in my research area of technology and communication. I teach courses in video games, virtual communities and the social impacts of new technology.

I have published several articles and book chapters on the topic of video game uses, effects, industrial practices, economics and social history. My work has used a wide range of research methods including content analysis, field and lab-based experimentation, interviews, industrial organization modeling and others. My papers have appeared in my field's top journals, including the *Journal of Communication,* the *Journal of Broadcasting and Electronic Media*, *Information, Communication & Society*, *Journal of Computer Mediated Communication*, *Communication Monographs,* the *International Journal on Media Management*, and in the game-specific journals *Games & Culture* and *Simulation and Gaming*. I regularly present on gaming research issues at the major communication and Internet research conferences, the game-specific research conferences, and at the Games Developer Conference.

With my co-author, I am the only person in the world to have published a field-based, i.e. non-laboratory and real-life, study of video game effects that tests the exposure of violent game imagery for longer than 75 minutes (Williams & Skoric, 2005). As someone who

has completed a test with this method, I am in a relatively strong position to understand and comment on long-term effects in gaming. Yet, as this statement will illustrate, I have simply uncovered more that we have yet to learn about this medium before I or anyone else can make strong claims.

This document will outline my view that the research on video games and violence has not yet met the basic conditions for strong causal claims about the long-term effects of video games.

The research on the effects of video games is generally concerned with the potential for creating violent adolescents because of the harm they might conceivably inflict on others, and so touches on a number of cultural and social tensions (Williams, 2006, in press). It is my position that the research to date has not fulfilled sufficient conditions to establish a causal connection between exposure to violent video games and a general increase in aggression among minors or adults. In layman's terms, the work so far is suggestive, but not enough to support such strong claims.

The Media Violence Issue and Causality

There is a long history of studies on the effects of media violence, chiefly focused on television's effects. I believe that this research generally points to the susceptibility of children to experience effects at a greater rate than adults when watching television (Paik & Comstock, 1994). These effects are most likely to materialize in the acquisition of scripts about violence, emotional desensitization and in potentially aggressive behaviors. I have also found that some games can isolate players and potentially make them more lonely. This should signpost that I have found and published negative effects from gaming and am not interested in defending them for their own sake.

Like other social scientists who have studied video games, I agree that theoretically-driven models are the best way to test for effects and to advance understanding and that media is only one of several variables in the mix of risk factors for children. And I agree that experiments, cross-sectional studies, longitudinal studies and meta analyses are all important tools for advancing understanding. I have no issue with the standard measures used in the research, and have used many of them myself (e.g. scales, word-completion tasks, etc.). Our chief goal is to understand causation: what causes what. In this case, the hypothesis worth testing is that the use and observation of violent video games causes violent behaviors, feelings, beliefs and cognitions.

In assessing the state of the research concerning video games, it is important to keep in mind how causality works in the social sciences. Here, I reference a model that I know every responsible social scientist takes to heart. Causality is an extraordinarily difficult condition to prove (Popper, 1959). All of us who practice the social sciences hope to reach that level, but we are usually conservative in our claims because of the very difficult conditions which we much satisfy. Based on the generally accepted work of John Stuart Mill some 150 years ago, we all accept these three conditions for proving causality:

1) Concomitant variation, i.e. correlation, or "when one thing moves, the other also moves."
2) Time-order control, i.e. one thing must precede the other.
3) Elimination of plausible alternative hypotheses, i.e. every other reasonable explanation must be ruled out.

When these three conditions have all been met, we typically accept statements about causality. It is clear to me that the literature concerning video games to date satisfies the first two conditions. It is equally clear to me that the literature to date does *not* satisfy the third condition. There are a range of plausible, and some even likely, explanations for other causal models to be at work in the realm of video game violence.

Methods and Examples of Violent Video Game Research

There are three major methods appropriate for the study of video games and aggression: experimental designs, cross-sectional designs and longitudinal designs. Some video game researchers have also used meta-analyses guided by theoretical models to draw conclusions. Each type of method has a different set of strengths and weaknesses that address different portions of Mill's three conditions for causality. In reviewing the research, it is my opinion that the use of each method to date falls short of the three conditions.

Experimental Evidence

Experiments are the social scientist's best tool for establishing causality because, when they are designed well, they automatically address the first two conditions that Mill gave us. A well-run experiment can measure correlations through standard survey measures and observational data and can firmly establish time order because the experimenter controls the procedure. Experiments can also rule out the problem of a testing effect because the presence of a control group allows the examination of whether simply being tested causes an effect. Experiments can rarely address all possible alternative explanations, but they remain our best tool short of controlled longitudinal designs.

There have been a number of experimental studies attempting to measure the aggression effects of violent video games. The main shortcomings of these experiments are threefold.

First, they measure events that may not occur outside of a lab. Many critics decry the artificial setting of the laboratory, but I think that a control group at least partially addresses this when done well. Additionally, most well-trained researchers are careful to make the lab settings at least resemble a home environment. A more apparent problem is that experiments typically have people play alone when the majority of game play is a social experience. This presents a significant challenge to the validity of these experimental studies to date (Sherry, 2001), and the most prominent names in aggression research have noted that the research still needs to take social experience into account, but has yet to do so (Anderson et al., 2003). The prior literature on arcades, home settings and the opinion and survey data over the past 25 years shows that game players have played with other game players almost whenever possible (Williams, 2006, in press).

Thus, if experimenters measure people playing solo, it is not clear how useful any findings might be.

The second problem is one advanced by a plausible alternative hypothesis: namely, that the effects observed were not a result of playing the game, but were simply the result of being excited. In other words, it is possible that what was measured in a particular experiment was the result of excitement, not aggression. Critics can easily suggest that the same effects would occur if the subjects were running or playing Frisbee. Much of the early game research was subject to this flaw.

Professor Craig Anderson, who has done much of the research in this area, sought to address this weakness by including a second video game as a control condition (Anderson & Dill, 2000). But this study – which is the most cited in the research[1] – failed to account for the potential effects of excitement. In their study, Anderson & Dill attempted to use violent and non-violent video games that were as equivalent as possible, except for level of violence. But the researchers picked two games – the hyperkinetic violent game *Wolfenstein 3D* and the soothing game *Myst* – which cannot be considered equivalent. On their face, these two games are radically different in terms of excitement. *Wolfenstein 3D* is an exciting, fast-paced, twitch-based shooter game in which the player is hunter and hunted and usually feels intense fear and tension throughout play. In contrast, *Myst* is a deliberate, slow-paced cerebral puzzle and logic game set in an ethereal, beautiful locale with no motion. These two games would not be described by any game player or game researcher as equivalent in terms of action. They are, even to the untrained eye, the equivalent of heavy metal and classical music. The researchers' claim to have tested for equivalence by use of a pre-test raises significant validity problems, as the games are vastly different to even the most casual observer. This is no small point. Many researchers outside of the field of communication appear to be unfamiliar with gamers, game culture and game content, a fact that, as this example demonstrates, can affect the strength of their conclusions.

The third problem with the experimental research to date relates to the duration of effects. Let us ignore the preceding issues and assume for the moment that every test to date had occurred with perfect control and validity, and that the evidence showed that there was aggressive behavior after and because of violent game play. One question is whether these effects persist. Would the same players be aggressive an hour later, a week later or five years later? The typical stimulus time for a game experiment is 10 to 30 minutes, often interrupted by questions. Two studies of the same game offer a test of this hypothesis. Both Ballard & Weist (1995) and Hoffman (1995) ran studies of the aggression effects of *Mortal Kombat* on the same type of subjects. Ballard and Weist tested for 10 minutes and concluded that there was an aggression effect. Hoffman kept testing for 75 minutes. She found that the effect had dissipated almost entirely by the end

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[1] This is based on use of the ISI Web of Knowledge, which tracks how many times a paper in a given topic area is cited. Based on the topic "video game" this paper is the most cited paper on effects, with 70 citations. The second-most cited, and therefore next-most influential study, is the Anderson and Bushman 2001 study discussed on the next page.

of the play session. This comparison lends strength to the explanation that the effects are either short-term only, or are simply excitation and not true aggression, which is a possibility raised by Sherry in his meta analysis (2001).

This idea of duration is an important one. It is where I find myself most confused by the frequently-made strong claims about long-term causal effects of video games. Since there are no truly long-term studies of game-based aggression, how can we take the short-term findings and make claims about what will happen in X weeks, months or years? What data are these claims based on?

The reason, as all of us know, is that if you want to make long-term claims, you need long-term studies. And unlike the television literature, these do not exist for games. A longitudinal design follows a group of people over a longer time period than a lab experiment will allow. The reason to do this is to provide a more realistic real-world exposure and to allow for long-term conclusions. If we truly want to know effects over a day, week, month or several years, then that is how long we must observe and measure. 30 minute studies cannot suffice to make lifespan-long claims. And given the two *Mortal Kombat* studies mentioned above, we have strong reasons to be suspicious of long-term claims of more than 30 minutes, let alone many years.

Longitudinal Designs

The television research has the benefit of having a well-known, truly longitudinal design, albeit one without a control condition (Huesmann, 1999). This research, although hotly disputed by some for a lack of rigor and unwarranted claims (Moeller, 2005), is generally accepted by most communication and psychology researchers. The central claims are that exposure to large amounts of televised violence causes short-term and probably long-term increases in aggressive behaviors, thoughts and cognitions.

The problem is that we do not have this kind of data for video game play. According to one well-respected game effects researcher in his meta analysis, longitudinal designs are "conspicuously absent" (Sherry, 2001) (p. 426). The longest published study to date is my own (Williams & Skoric, 2005), which followed gamers playing a violent game for one month. The average exposure time was 56 hours, which offers a much more powerful possible causal model than the typical 10 to 30 minute studies which preceded it (Hoffman's study, i.e. the one where the effects nearly disappeared, was the previous longest exposure time at 75 minutes). The study also had the benefit of being conducted in people's homes (i.e., not in a lab) and, unlike most long-term research, maintained a control group for the duration of the study. The data in my study revealed no statistically significant effects on aggression.

I will make a few observations about this study as it compares to prior studies. Given that no effects materialized after 56 hours of play, it lends credibility to the hypothesis that the short-term studies are either flawed in their settings or are subject to the excitement explanation. Nevertheless, my single study does *not* disprove that games cause violence. One month isn't a very long design, at least compared to the Huesmann work, although

my own has the important advantage of a control group. Then again, I don't make claims for what will happen after my study's time window, whereas many researchers do this regularly.

I would also add that my own study, like the others before it, was a study of only one game. I will not make the case that studying one game proves what all games do. Games are simply more varied and complex than prior broadcast media and the same rules of generalizability do not apply. The research community lacks even a basic typology of content and play variables to aid such a claim. It is an error to collapse multiple games into one variable and expect a coherent result. Nevertheless, reporters have pressed me to state that my findings prove that "games" don't cause violence, but that strength of claim is not warranted by my data. One game and one month is not sufficient to make that claim. 10- and 30-minutes studies are even less able to support such claims.

Unbeknownst to most effects researchers, there actually *are* a handful of long-term game effects papers out there. Indeed, there have been three very in-depth studies of arcades and youth habits, and all of them concluded that games were not having negative impacts on children's aggression (Garner, 1991; Meadows, 1985; Ofstein, 1991). Actually, the studies all concluded that the social milieu of the arcade provided strong peer-based sanctions *against* physical violence and aggressive behaviors. Why? One of the basic appeals of video games for youth is that they are meritocratic: they are a safe play space independent of social status, physical strength, etc. (Herz, 1997). Indeed, many were havens from physical violence. This is an example of why social context, typically missing in lab experiments, is so important. Additionally, there are two now-dated studies of games, families and homes (Mitchell, 1985; Murphy, 1984), and these also concluded that games did not lead to aggression. In all five studies, the researchers took pains to note that the likelihood of aggressive behavior was inevitably related to parenting variables rather than the amount of game play. Murphy and Mitchell also noted that game play typically lead to more active family time because it tended to cut into television viewing, a finding I have also found in my own statistically-based work (Williams, 2004).

Cross-sectional Studies

There have been a number of cross-sectional studies on games and aggression, games and grades, truancy, etc. Many of these have been offered as proof of game effects, yet this is inappropriate. As every statistics student learns, correlation is not the same as causation. Showing that two things are related is very different than proving that one thing causes another. For example, the number of churches and liquor stores are nearly always correlated, but it would be incorrect to then state that going to church leads to drinking or vice-versa. Such thinking obfuscates the possibility that there is some actual third variable that drives both (population). Likewise, correlational video game studies have been offered as "proof" of the harmful effects of games since the early 1980s by showing relationships between games and poor grades, aggressive behavior, truancy, etc. Yet it is equally likely that students with poor grades and aggressive behavior are more likely to

play (likely due to a lack of parental involvement and oversight) and that there is no causal relationship.

These studies are certainly important for theory-building and for establishing the need for future research. They are also useful for ruling out some alternative explanations. But since correlations are only one of the three conditions needed for causal proof, these studies provide necessary, but not sufficient evidence of a causal relationship. Thus, a cross-sectional survey can be used as an inexpensive tool to pave the way for a more involved and expensive experiment or longitudinal design. But they simply do not prove cause and should not take up space in any discussion of causal effects.

Meta-analyses

Meta-analyses are tests which use previous studies as individual data points to look at big-picture outcomes. They are important and useful tools for making sense of a large body of research, but they must be based on solid studies. Given the criticisms laid out in this document, it is my opinion that the source studies used in video game meta-analyses are not safe to use. Still, across the various studies to date, more playing time has lead to *less* aggression (Sherry, 2001). Taken together, the effects picture is anything but clear right now.

Theoretical Models

Lastly, and along the same lines of examining the plausible alternative hypotheses, I would like to review the "General Aggression Model", which guides the bulk of the research in this area. The "GAM" posits that media can affect people in several ways. The model was developed for testing the effects of watching violent television, but it is not clear that it can be used on an entirely different medium without significant modification. The two basic problems are the use of behavioral modeling and the level of active cognition that the model assumes.

By behavioral modeling, I am referring to the foundational work by Bandura (1994), in which children watching a violent act repeat that act after exposure, i.e. the children observe the behavior and then copy it. For anyone with a child, this kind of mimicry is common sense, and it is not a large leap to worry that a child watching TV will imitate an undesired behavior. Children "model" behaviors and then consider trying them.

The problem with exporting this approach to video games is that it is not clear exactly what is being "modeled." With television, the experience is generally assumed to be passive. The viewer on the couch is observing the characters on the screen and is not thinking very actively. They have the potential to model the televised characters. Yet in video games it is far more complex; there are several possible objects that might be modeled, rather than assuming passive observation. First, the player's character on the screen might be mimicked, even though *it is not clear that this is truly mimicry if the player is the one directing the action.* Secondly, the computer-directed characters might be the things observed and modeled. These are sometimes aggressive and sometimes not.

Third, the other player-controlled characters might be being modeled. These are sometimes working against the player aggressively and sometimes are helping the player. Fourth, the other people present live in the room might be modeled for behaviors. This might include other players, other viewers or parents. Any one of these figures might be a source of modeled behavior, and they might cause effects in different directions. For example, seeing a fellow player on a couch become aggressive might help the first player become even more aggressive than they would as compared to TV. Or, seeing a parent disapprove of some action might make the player less likely to internalize the behavior or even to classify it as an unacceptable real-life choice.

There are a wide range of possibilities here and some might lead to better or worse outcomes. The point is that the work to date either wholly ignores these possible sources of modeling by having players play games by themselves (the problem noted above by Sherry), or simply collapses all of these potentially different effects into one source. In social science, we say that the model is not nuanced enough to account for the actual variables that exist in real-life settings. I would note here that it is equally possible that effects are not present or are even worse than some think. The problem is that we simply don't know and it is thus inappropriate to make strong claims in the face of this potential issue.

Secondly, there is an issue with the level of "active cognitions" that occur during game play. Our generally accepted models of cognition include one route for very active thinking ("central processing") and another for relatively inattentive thinking ("peripheral processing") (Chaiken, Liberman, & Eagly, 1989; Petty & Cacioppo, 1981). The television research has always assumed a fairly inactive viewer, who is thought to use this more inattentive peripheral mode of thinking. Yet the assumption has shifted with video games to move the viewer into the more active, centrally processing group. It is not clear that this is the case, and it is even less clear when a game player might be more active or more passive. Mood management theory (Zillmann, 1988) suggests that this level of attention might vary between gamers, games or even play session. One hypothesis I have been considering is the extent to which a truly active cognitive state might either lead to especially stronger or weaker aggression effects. Consider the youth playing a violent shooter game. Is that youth actively considering the violent content? If so, is he/she going to be thinking "yes, this is exactly how I want to behave" or is he/she going to be thinking "this is a game and this is not how I behave when the game is turned off."

This latter possibility is the one found by Holm Sorensen and Jessen (2000), who, when studying very young children, found that they were highly aware of the non-real nature of the games and made separate rule sets for behaviors inside and out of play—much like children do in nearly every other form of play. Yet this kind of filtering is not included in the current approaches to video game research. Similarly, if the player is in a more passive mode, are they more or less likely to acquire these negative scripts? This is a hypothesis that has not been incorporated into the research and might make a tremendous difference. Given this possibility, I do not accept the simple statement that game players are more likely to become violent because they are playing the game rather than watching

it. I find the medium more complicated than that and would need to see this hypothesis systematically tested before accepting such a claim. I find it worrisome that some researchers accept the claim without proof.

On Consensus

I would like to end by referring to the statements made by the APA and other groups (California Psychiatric Association, NAACP, Girl Scouts, etc.) in the various state cases. It is clear that they are all drawing their conclusions and talking points from the same body of research that I have taken issue with here. They repeat the correlational/causal errors and the untested concept of interactivity as a strengthener of effects. They conflate the television research with game research, and they are clearly unaware of the arousal confound in the game research. These are all good organizations (many of which I personally support), clearly trying to do the right thing, but they are uninformed and should not be involved in the policy process until they are aware of the scientific disputes. Meanwhile, other academic organizations take wholly different stands. For example, I attended the Digital Games Research Association (DiGRA) conference last year in Vancouver and the violence issue was, as always, at hand. The difference is that that association, comprised of people who do *only* games-related research, was virulently opposed to the APA statement.

A more appropriate attitude can be found in communication research circles. I am a member of the International Communication Association, the premier international body in mass communication research. This community has recently formed a games research interest group and is being lead by our field's senior scholars, including people convinced of the link between television violence and aggression. A recent event serves to show what kind of consensus there is about game effects: there was a proposal for a debate on the video game aggression issue for this year's conference in June. I was invited to take the "games do not cause aggression" approach, but declined because—even including my own long-term study—I think that the evidence does not support any strong position yet. Yet the notable outcome was that no one (out of 50 social scientists doing games-related work in communication) volunteered to take the "games cause aggression" position. Everyone who expressed an interest in the session wanted to take some more nuanced approach because they did not feel that the data warrants strong claims on either side.

This leads me to ask, Why are some people so *certain* then? The answer, I think, lies in how we as a society react to new technologies. The history of communication shows quite clearly that the advent of every major medium has been greeted with utopian dreams of democracy, but also with tales and visions of woe and social disorder (Czitrom, 1982; Neuman, 1991). The reactions themselves even follow a set pattern in every case (Wartella & Reeves, 1985). This pattern has been consistent and has maintained itself dating from the telegraph (Standage, 1999), and persisting through nickelodeons (Gabler, 1999), the telephone (Fischer, 1992), newspapers, (Ray, 1999), movies (Lowery & DeFluer, 1995), radio (Douglas, 1999), television (Schiffer, 1991), and now with both video games and the Internet. As generations age, we tend to fear the things that are new and not understood. Typically, this lets us avoid thinking about thornier issues that are personally uncomfortable to us (Glassner, 1999). In particular, we

do not want to confront the reality that millions of children suffer real harm through sexual and physical abuse every year (data from the U.S. Department of Health and Human Services, 2003), and that this harm comes from within families, not outside them. About four children die every day from abuse and neglect from known people—not strangers, and not from video games.

In this sense, video games are simply the latest in a long series of contested media, an old wine in a new bottle fulfilling the same social function.

Lastly, I have reviewed the materials used by the state legislatures in Illinois and California, and I'm struck by the fact that they've excluded several major articles and points of view. It appears that they have only included the papers that they might interpret to support the law. That is politics, not science. In science we look specifically for the points of disagreement because we want to learn more, even if it upends our starting position. If 10 papers say black and 10 papers say white, there's usually a good reason why, and finding it is how we advance understanding. But if we ignore the papers that don't support our presumptions, we are only working with half of the facts. This is a poor way to conduct a review and a dangerous way to set policy, especially if it's a policy that purports to be based on a comprehensive review of the science to date.

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SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

Testimony Submitted to the
Subcommittee on the Constitution, Civil Rights, and Property Rights
of the U.S. Senate Judiciary Committee
March 29, 2006

Thank you Chairman Brownback, Ranking Member Feingold, and Honorable Senators.

I appreciate the invitation to be a part of this important national discussion on the effects of violent video games on our children.

Throughout the United States, municipalities are attempting to respond to the public outrage over the extremely violent video games that minors can easily purchase without their parent's knowledge. A recent Federal Trade Commission study shows that nearly 70 percent of 13 to16 year olds are able to successfully purchase Mature, or M-rated video games. Games with this rating are designed specifically for adults. The content in games such as Grand Theft Auto, Postal and Manhunt enable the user to kill, burn, and maim law enforcement officers, racial minorities, members of the clergy, and even sexually assault women.

While it may seem commonsense to prohibit sales of such gruesome games to children, we proceeded cautiously in California because of our respect for the First Amendment. I have said many times, and I will say it again, I support the video game industry's creativity and right to produce, manufacture, and sell these extremely, ultra-violent video games, but I believe such sales should be limited to adults only.

The California State Legislature considered extensive research which clearly demonstrates the harmful effects violent interactive video games have on minors. Some have asked, "why didn't you pursue other mediums such as movies, music, and books?" As a child psychologist, I have the benefit of looking at this issue from an informed perspective. There are certain tools that assist in successfully learning a behavior. Building a reward system for a child and providing instant gratification or feedback is the most successful way to reinforce behavior. In the case of these ultra-violent video games, children are rewarded for negative behavior with more points, newer screens and gaining access to advanced levels.

The interactive nature of video games is vastly different than passively listening to music, watching a movie, or reading a book. The child, in this case, becomes a part of the action and interaction of the game. This immersion results in a more powerful experience and potentially dangerous learned behavior. In fact, it is the same technology that our military and police use to train for real life battle and law enforcement situations. Our children do not need to such tactical training at such a young age.

Then there is the practical argument. Parents can read a book, watch a movie, or listen to a CD to determine if it is appropriate for their child. However, these video games can contain up to 800 hours of footage. The most

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atrocious content is often reserved for the highest levels and is revealed after hours and hours of mastery. Unfortunately, I don't know many parents that have this kind of time.

Assembly Bill 1179 would impose a civil penalty of up to a $1,000 to any person who sells or rents a defined violent video game to a minor under the age of 18. The act is carefully tailored to include only those video games that appeal to the deviant or morbid interests of minors, are deemed to be patently offensive to minors by community standards, AND lack any series literary, artistic, political, or scientific value for minors, OR those that are especially heinous, cruel or deprave. This is exceedingly narrow category of violent video games.

We purposefully used defining terms in the Act that have withstood constitutional scrutiny in the past. Existing precedent fully supports States' efforts to protect the health and welfare of minors. Just as the technology of video games improves at astonishing rates, so does the body of research demonstrating the harmful effects these violent interactive games have on minors. Thousands of studies have now been produced by the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychological Association, American Medical Association, American Academy of Family Physicians, and the American Psychiatric Association.

These studies demonstrate that playing ultra-violent video games can cause automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior, desensitization, poor school performance, and reduced activity in the frontal lobes of the brain.

It is through these various studies that we achieved the State's compelling interest to protect children, as we have done with alcohol, tobacco, firearms, driver's licenses, and pornography.

We considered the Entertainment Software Ratings Board, or ESRB, rating system and found it to be simply unacceptable. Not only did we have the FTC study showing children can easily purchase M-rated video games, but we also had students in our own districts conduct projects were they were able to purchase such games and then there was the "Hot Coffee" incident last summer.

The makers of Grand Theft Auto: San Andreas allowed graphically sexual scenes to be hidden inside their game, and then with the right code, gamers could unlock this virtual pornography. It was at the time of the Hot Coffee scandal – which included an initial denial from Rockstar and Take Two Interactive – that many in my legislative body gave up on the ESRB rating system. The rating system failed our parents. This game, like many others, deserved an Adults-Only or AO rating. It didn't receive such a rating because the ESRB, which has an obvious conflict of interest being fully funded by the video game industry, knew that many stores simply would not carry an AO rated game. In fact, the largest retailers in the country such as Wal-Mart, Target, and Best Buy refuse to sell AO rated games.

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We also considered precedent. Yes, many bills on video games have been struck down by the courts; some because they were tailored only at protecting law enforcement officers and others because they were too broadly worded. Our legislation, however, was narrowly tailored and demonstrated the state's compelling interests.

In addition, we considered precedent set by the U.S. Supreme Court. In *Ginsberg v. State of New York (1968)*, the Court said, "even where there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults...."

The Court has made ruling after ruling firmly establishing, as they did in *Bellotti v. Baird (1979)* that "the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."

And finally, just last year, the Supreme Court ruled in the child death penalty case, *Roper v. Simmons (2005)*, that children are different in the eyes of the law because of brain development.

Our legislation was not a rush to judgment. It was not an endeavor we took lightly. Instead, we took the proper steps to differentiate between minors and adults with respect to purchasing extremely violent video games that the Legislature had determined to be harmful to children.

Nonetheless, this law is now held up in the courts due to a lawsuit by the video game industry. Governor Arnold Schwarzenegger, Attorney General Bill Lockyer, and I are all confident that the California law will inevitably be ruled Constitutional. We expect a ruling from the U.S. District Court in the coming months.

Again, thank you for this opportunity and thank you for considering federal legislation in this area. Our children deserve such protection and our parents need a little help as they raise their children.

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