THE REPORT OF THE TASK FORCE ON VIOLENT INTERACTIVE VIDEO GAMES

December 2008

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
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TO THE MEMBERS OF THE GENERAL ASSEMBLY:

The Joint State Government Commission is pleased to present the report of the Task Force on Violent Interactive Video Games. The report is presented pursuant to 2007 House Resolution 94.

The report presents the findings of social science research on the effects of these games on our children; describes violence depicted in video games in the context of other media; states the constitutional restraints on legislation aimed at restricting sales of games; describes the voluntary rating system established by the industry to inform parents and ensure that only age-appropriate games are sold to children; and makes recommendations.

The Commission acknowledges with gratitude the work of the task force and the invaluable assistance of other persons in the preparation of this report, who are listed in the introduction.

Respectfully submitted,

David L. Hostetter

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Executive Director

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EXECUTIVE SUMMARY

This report is presented in response to 2007 House Resolution No. 94, which directed the Joint State Government Commission to do a study to investigate the effects of violent interactive video games (VIVGs) on the children of this Commonwealth, in the context of all other media forms they are exposed to, under the guidance of a task force of advisors. This report includes the findings and recommendations of the task force.

Depiction of Violence in Video Games

Some of the M-rated video games depict such violent and gruesome acts as chainsaw decapitations and impalements, running characters over with cars, disembowelment, and eye-gouging with glass shards. In first-person shooter games, the player takes the point of view of a character with a machine gun or similar weapon, and the game consists of killing other characters. Some games reward proficiency in killing with points or additional powers, such as more effective weaponry.

Western culture has frequently dwelt on violence from its origins in Homer's epic poetry and Greek drama down to such later media as the novel and the opera. Movies, popular music, and television all deal routinely with depictions of violent acts. If measures are taken to address the effects of violent media, it is important that no particular form of media is unfairly discriminated against.

Findings of Social Science

The most consistent finding of social research on VVGs is that there is a small but statistically significant correlation between habitual VVG play and certain indicia of aggression. The practical significance, if any, of this correlation is vigorously contested. Correlation is not the same as causation, but the two concepts are related. The correlation may represent a minor causative factor or the attraction of VVGs to children who are aggressive for other reasons.[1] At most, VVGs represent a minor factor in childhood aggression, and there is no substantial evidence linking them to real life violence. The evidence suggests that violent media are unlikely to affect "normal" children. Some researchers have voiced concern that some children may be vulnerable to ill effects, but there is no consensus about what children may be affected or what those ill effects might be. Because of the recent development of VVGs, the rapid evolution of the games,

[1] The relationship between correlation and causation is further discussed on pages 9-10 of this report.

and the methodological difficulties attending social research on media violence, the current state of the research leaves many questions unanswered.

Experts recommend that parents carefully monitor their children's use of all media, including VVGs. Accordingly, parents should be encouraged and assisted in monitoring and controlling the games their children play, and they should avail themselves of the ESRB ratings, parental controls, and other resources available to parents on the Web and elsewhere.

VVGs can have positive effects as well as negative ones. Most importantly, they can help children interact with their peers; this advantage is especially helpful to shy or unathletic children. The games can also help improve motor skills, problem solving, logical reasoning, and other important skills.

Constraints on Regulation

The federal courts that have considered the validity of statutes or ordinances attempting to impose criminal penalties on the sale of video games to children have invariably struck the laws down. Video games are protected by the First Amendment of the United States Constitution, and laws imposing restrictions on their sales must withstand "strict scrutiny," an exacting legal test that virtually guarantees invalidation. The courts have found that the social science research on the dangers age-inappropriate games pose for children is insufficient to support statutory restrictions on free expression and that the existence of an effective voluntary rating system makes penalties unnecessary.

Rating System

The primary responsibility for assuring that VVGs do not impair the development of the Commonwealth's children lies with parents. The video game industry has created a powerful tool to assist parents in this task in the form of the rating system developed by the Entertainment Software Rating Board (ESRB). The key to the rating system is the age ratings and content descriptors that appear on the packaging of nearly all video games sold by national distributors and most smaller retailers. Most retailers participate in a voluntary compliance system to prevent the sale of games to underage customers. The ESRB ratings have been highly effective in providing information to parents and other consumers about the age suitability and content of video games and supporting retailers in their enforcement of their store sales policies at brick and mortar locations, and to an increasing extent, on their Internet websites. However, there are instances where games that are accessible on the Internet are not submitted to ESRB for rating.

Recommendations

The General Assembly should consider devoting resources to the establishment of a publicly funded consumer education program on video and computer games.

The General Assembly must avoid enacting restrictive legislation similar to those that have been invalidated by the Federal courts.

The task force calls upon the academic community of this Commonwealth to pursue more scientifically based and objective research on the positive and negative effects of video games and other modern media on children and young adults.

CHAPTER 1
INTRODUCTION

House Resolution No. 94 directed the Joint State Government Commission to investigate the effects of violent video games (VVGs)[2] on Pennsylvania's children. The Joint State Government Commission was authorized to establish a task force and a complete a report based on the findings and recommendations from the study.

The task force includes representatives of the industry and trade organizations, the Pennsylvania Office of the Attorney General, psychologists, the co-directors of the Pennsylvania Center for the First Amendment and other lawyers specializing in media law, the director of the Archdiocese of Philadelphia Family Life Office, and entertainment technology experts. The task force has held five in-person meetings at the commission's offices in Harrisburg.

The first meeting on November 28, 2007, was an organizational meeting at which the members of the task force members stated their initial views. The second meeting on February 15, 2008, was mostly devoted to a presentation by Patricia Vance, president of the Entertainment Software Rating Board (ESRB). The ESRB is a voluntary industry association that makes the ratings that appear on all video games sold by major retailers in the United States. The rating system is discussed in chapter 5.

The focus of the meeting on May 7, 2008, was a demonstration of selected VVGs by Andrew Paris, the task force member representing the Office of the Attorney General. This demonstration was done at the suggestion of several members of the task force. Following the demonstration, members of the task force voiced their reactions. Chapter 3 discusses of the content of VIVGs in the context of other media.

The meeting on July 11, 2008, addressed the findings of social science research. Here the task force relied heavily on Dr. Patrick M. Markey, who was the only social science researcher on the task force. The discussion of these findings is found in chapter 2.

[2] The resolution itself refers to "violent interactive video games" as the focus of the study. For several reasons, the label VVG (violent video games) proves more convenient in most contexts than VIVG (violent interactive video games). Most of the literature refers to VVGs and makes no distinction between VVGs and VIVGs, perhaps because the great majority of VVGs—especially the more controversial VVGs—are interactive. Therefore the label "VVG" will be adopted for this report.

The final meeting of the task force was held on September 19, 2008. At this meeting the task force directed commission staff to include the recommendations set forth in chapter 6 and gave other suggestions relating to the drafting of this report.

To help educate itself on the social science research on the topic of this report, the staff met with task force member Dr. Patrick Markey and with Dr. Mary Beth Oliver and Dr. S. Shyam Sundar from the Media Effects Research Lab at Penn State, to discuss the social science research on video game violence. The staff also held a teleconference with Drs. Lawrence Kutner and Cheryl K Olson, authors of *Grand Theft Childhood*: *The Surprising Truth about Violent Video Games and What Parents Can Do,* one of the most important books on its subject.

The commission would like to thank the members of the task force and the following individuals for their invaluable assistance in the preparation of this report: Dr. Lawrence Kutner, Dr. Mary Beth Oliver, Dr. Cheryl K. Olson, Dr. S. Shyam Sundar, and Ms. Patricia Vance.

CHAPTER 2
THE EFFECT OF VIDEO GAMES

Extent of Video Game Use

The use of video games is almost universal among children today. As of 2005, a survey of children age 8 to 18 found that 84% have video games in their homes, 49% have them in their bedrooms, and 55% own handheld video game players.[3] A more recent survey found that 97% of American teens aged 12-17 play video games, including 99% of boys and 94% of girls. About half of them play a video game on any given day.[4]

Video game industry sales are growing rapidly at a time when many other economic sectors are struggling. Total computer and video game sales in the United States were $9.5 billion in 2007, up from $ 7.4 billion in 2006, a 28% increase. In July 2008, sales of video games and hardware were $1.19 billion, also up 28 percent from July 2007. The Entertainment Software Association (ESA) estimates that 65 percent of American households play computer and video games, 41 percent plan to buy one or more games this year, and 38 percent have a video game console.[5]

Children devote considerable amounts of time to playing video games. The field study by Kutner and Olson reports that of the sample of 1,254 children, only 17 (1.4%) had never played video games, and 63 others (5.0%) had not played in the six months before the survey. Among game players (not counting the 80 just mentioned) many boys played six or seven days a week (33%) or only on weekends (37%), while the largest share of girls (43%) played only on weekends and only 11% played six or seven days per week.[6] In the Pew/Internet study, 66% of boys and 37% of girls reported playing video games at least three

[3] Center on Media and Child Health, "Video Games" http://www.cmch.tv/mentors_parents/video_games.asp (visited June 25, 2008), citing a study by the Kaiser Family Foundation.

[4] Amanda Lenhart, Sr., Joseph Kahne, Ellen Middaugh, Alexandra Rankin Macgill, Chris Evans, and Jessica Vitak, "Teens, Video Games, and Civics" (Washington, D.C.: Pew Internet & American Life Project, September 16, 2008), 8, 9.

[5] Adrian McCoy, "Economy in Trouble? Not for Video Games" *Pittsburgh Post-Gazette*, August 24, 2008, available at http://www.theesa.com/ (visited August 27, 2008).

[6] Lawrence Kutner and Cheryl K. Olson, *Grand Theft Childhood: The Surprising Truth about Violent Video Games and What Parents Can Do* (New York: Simon & Schuster, 2008), 89-90.

times a week. Boys tend to play longer than girls; 34% reported having played two hours or more the day before, as against 17% of girls.[7]

Social Research Methodology

Social science researchers have performed a number of studies on the relationship between violent media and aggression, but as VVGs are a comparatively recent invention, only a handful of studies have explored the link between the games and aggressive behavior in children.[8] As of 2001, a leading expert found that only nine published studies were directly relevant to establishing a link between violent video games and aggressive behavior.[9] A very recent analysis of the effect of VVGs on children observes that "despite the worrisome conclusions that appear in the popular press, there are very few studies involving current violent video games and real children."[10]

General Types of Social Research Studies. Social science research is conducted in two broad modes: field studies and laboratory studies. Field studies typically select samples of people with varying characteristics to determine how the variances in the population characteristics correspond to differences in the matter to be studied. For instance, a researcher may select various groups of junior high school students and use a questionnaire to determine video game usage (how many video games they play, how many are M-rated, how much time they spend per week playing them) and aggression or antisocial behavior (how often do they argue with teachers or other students, how many fights they have been in, have they stolen any property). The results can then be used to tally whether or not those who play more video games or those who play violent M-rated games are more likely to report having engaged in aggressive behavior as defined by the study. A longitudinal study is a type of field study commonly used to assess the effects of a possible causative factor, where a selected group of subjects is studied over a long period of time. A classic medical example is the studies of tobacco use, where matched groups of smokers and non-smokers were followed up throughout their lifetimes to compare longevity and rates of death from such causes as cancer and heart disease.

Laboratory studies are conducted in a more controlled environment and typically have subjects perform activities beyond answering a questionnaire. Devices like a noise blast test (further described below) are used in lab

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[7] Lehnert, "Teens, Video Games, and Civics," 9.

[8] This subchapter draws on discussions with Patrick Markey (conference call with commission staff, May 22, 2008), Lawrence Kutner and Cheryl Olson (conference call with commission staff, August 22, 2008); and Mary Beth Oliver and S. Shyam Sundar meeting with commission staff, June 22, 2008). For a helpful discussion of this topic, see Kutner and Olson, *Grand Theft Childhoo*d, 65-84.

[9] Jonathan L. Freedman, "Evaluating the Research on Violent Video Games," available at http://culturalpolicy.uchicago.edu/conf2001/papers/freedman.html , 2.

[10] Lawrence Kutner and Cheryl K. Olson, *Grand Theft Childhood: The Surprising Truth about Violent Video Games and What Parents Can Do* (New York: Simon & Schuster, 2008), 79.

experiments because professional ethical rules prohibit the use of actual violence on experimental subjects. However the laboratory substitutes may not be a significant measure of how likely a subject is to commit an act of actual violence.[11]

Field studies and laboratory studies have complementary strengths and weaknesses. Field studies are better at measuring the factors that affect the way people behave in real life, but, except for longitudinal studies, they are not as helpful as lab studies in establishing causality. If a field study shows a correlation between habitual use of video games and aggressive thoughts and behavior, it is not clear whether the correlation points to a video game as a cause for aggression, whether aggressive people are attracted to violent video games, or whether both the use of video games and the aggression are caused by one or more third factors. Use of field studies is rare in video games. The reasons may be that such games are too recent for there to be a lifetime effect and because the games change so rapidly that the games sold today may not be comparable to earlier games. Laboratory studies are more useful to investigate causation. However, laboratory studies present more artificial situations than field studies.

Methodological Difficulties. Researchers differ on how definitive social science can be, at least regarding the link between video violence and real aggression and violence. "Scientific research is like solving a jigsaw puzzle in which you don't know if you have all the pieces, the pieces that you do have can fit together in many different ways, and you're not sure what the finished picture will look like."[12] Jonathan L. Freedman, another prominent researcher in the field, claims that "Only experimental research can provide a definitive answer to the question whether violent video games cause aggression. Yet, as with many issues of public concern, it is impossible to conduct the perfect experiment."[13] Freedman's article goes on to list three major difficulties attendant on research directed at this topic: isolation of a single variable, demand factors, and the validity of measures of aggression, all of which will be discussed below. While Freedman himself believes that these difficulties can be overcome, a critical reader may wonder whether they can be obviated completely. Dr. Patrick Markey, the social science researcher on the task force that guided this study, cautioned that no single study can prove any conclusion, and that valid conclusions can only be drawn when a number of studies show a consistent pattern. Statistical studies can provide a useful framework for collecting and evaluating empirical evidence, although the limitations of such studies must be kept in mind.

Much of social science research involves the analysis of statistical correlations. A statistical correlation provides information about the strength and direction of the relationship between two random variables. If there is a

[11] Kutner and Olson, *Grand Theft Childhood*, 74.
[12] Kutner and Olson, *Grand Theft Childhood*, 57.
[13] Freedman, "Evaluating the Research," 2.

statistically significant positive correlation between two variables, three causal relationships are possible. If we take the relationship between hours playing VVGs and some measure of aggression (assuming for this argument that the measure is valid), the possibilities are: 1) higher video game usage causes a higher incidence of aggression; 2) the trait aggression of the subject causes him or her to play more VVGs; or 3) a third factor, such as masculinity[14] causes both increased VVG play and higher aggression. A causal factor always correlates positively with the variable caused. As mentioned previously, laboratory studies are useful to establish causation. If randomly selected groups of people show different performances on a lab test of aggression, and other factors are controlled for, it may be inferred that the different experiences between violent and nonviolent video games caused the difference.

One difficulty in studying the link between video games and aggression is the lack of a generally accepted definition of "aggression." An accepted definition of "aggression" is "behavior intended to harm another who is motivated to avoid that harm." "Aggression" must be carefully distinguished from "violence," which is defined as "extreme forms of aggression, such as physical assault and murder." "Violent media" is defined as "those that depict intentional attempts by individuals to inflict harm on others."[15] While these are representative definitions, the research has been criticized for using unclear and inconsistent definitions of those terms, especially between different researchers[16].

Ideally, scientific research should measure the factor under study in isolation. For example, a trial to determine the effectiveness of a certain drug in treating a given medical condition should be designed so that the only difference between the group receiving the drug and the control group should be that the former receives the drug and the latter does not. Such possible confounding factors as demographic differences between the two groups of patients and the color and taste of the pill should be minimized or eliminated if possible.[17] In the video game context, it may be difficult to isolate violent content as a factor from other factors that may influence thinking and behavior. It would seem impossible to produce two video games of professional quality that differ only in substituting nonviolent for violent content. Studying responses to *Grand Theft Auto IV*, a violent game that is one of the most highly rated for artistic quality in the history of the medium, by comparing it to a nonviolent game that is as close as possible

[14] Christopher J. Ferguson, Stephanie M. Rueda, Amanda M. Cruz, Diana E. Ferguson, Stacey Fritz, and Shawn M. Smith, "Violent Video Games and Aggression: Causal Relationship or Byproduct of Family Violence and Intrinsic Violence Motivation" *Criminal Justice and Behavior* 35 (2008): 311-32.

[15] Craig A. Anderson and Brad J. Bushman, "Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature," *Psychological Science* 12 (2001): 354. Given the definitions of "aggression" and "violence," it would seem a better term would be "aggressive media."

[16] Kutner and Olson, *Grand Theft Childhood*, 59, 73.

[17] Freedman, "Evaluating the Research," 4-6.

to it would almost certainly introduce at least one confounding factor, namely, the difference between an artistically successful game and one that is decidedly less so. A nonviolent game would have to include a host of other changes to be as compelling as a violent counterpart, such as different music, voice actors, setting, and color scheme. The Anderson-Dill study compared two well-known commercially marketed games, namely *Wolfenstein 3D* as the violent game and *Myst* as the nonviolent game. These two were selected because they matched well in physiological arousal, and player ratings of difficulty, enjoyment, frustration, and action speed; male gamers rated *Wolfenstein 3D* as more exciting.[18] Freedman criticizes this comparison because *Myst* is not really a game, but is rather a puzzle with no action at all.[19]

Demand factors can obscure the real significance of a laboratory study. "Those who design experimental research know that there is always the possibility, indeed probability that elements of the procedure will give the impression that a particular response is expected or desired or allowed, and that this will effect how the subjects behave."[20] A classic example of a demand factor is the placebo effect, where the physician's expectation that the patient will improve on a particular drug may cause the drug to appear to have a better therapeutic effect than it really does. In the case of video game studies, Freedman observes that there has been little attempt to deny that the experimenters have chosen the games, possibly leading the subjects to infer that the games are approved and that more aggressive responses are expected than the subjects would otherwise show.[21]

A serious issue in laboratory studies is the method of measuring aggression since established ethical constraints strictly limit actual aggression and prohibit violence. Aggression has been measured by asking the subject what they are thinking about after a session with a violent video game, but this ignores the difference between thinking about aggression and thinking aggressive thoughts; thoughts rejecting aggression can be counted as confirming aggression if the researchers are not careful about this point. Sometimes physical markers for aggression are used. In one well-known experiment, psychology students were divided by random selection into two groups, one to play violent games and the other to play non-violent video games. Then they were asked to do a task against another subject. The "winner" was then apparently given the opportunity to blast the loser with white noise and given the chance to select the decibel level and duration of the blast. This design is called the Taylor Competitive Reaction Time Test (TCRTT). In fact, the "winners" were randomly selected by computer and the noise blasts did not take place, but the noise levels and durations selected by

[18] Anderson and Dill, "Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life" *Journal of Personality and Social Psychology* 78 (2000): 783.

[19] Freedman, "Evaluating the Research," 5; Kutner and Olson, *Grand Theft Childhood*, 72.

[20] Freedman, "Evaluating the Research," 6.

[21] Ibid., 7.

the "winner" were recorded. It was found that the students who played violent video games blasted the "losers" for a slightly longer duration than those who played nonviolent games.[22] It can be doubted whether differences on this test bear any relation to differences in the tendency of a subject to engage in physical violence against another. The TCRTT was originally designed to test competitiveness rather than aggression, and its use has been criticized because there is no standardized way of using it to measure aggression. For instance, should loudness, duration, or some standard combination of both be used?

Another problem with social research as applied to real life is the selection of the research subjects. For many studies, the research subjects are high school or college students. In high school, selection of subjects for study may depend upon how receptive the school, the students, and their parents are to participating in the study, and the students and parents who consent to be studied may not represent those who do not.[23] College students frequently participate voluntarily in studies in return for extra academic credit, but they have a low incidence of aggressive behavior and a very low incidence of violent behavior. Students who self-select in this way may not be representative of all students, let alone of all members of their age cohort. In addition to that problem, the game playing experience of a lab study subject may not be comparable to that of an ordinary game player, because the subject does not select the game to be played and the time the subject is permitted to play is too short for the subject to experience involvement in the game.

Research Findings

There are varying points of view on whether VVGs encourage children and young adults to engage in violent or aggressive behavior. The controversy includes that characteristic feature of current American discourse, namely, a debate over whether "the debate is over," or at least whether the debate should be over.[24] Judging from the studies that continue to be published on both sides, the debate continues.

An important point to bear in mind about the research on this issue is that there has not been very much of it with respect to video games, although a large body of research exists on the effects of violent media in general. "To date, violent video games have not been studied as extensively as violent television or movies. The number of studies investigating the impact of such games on youth aggression is small, there have been none on serious violence, and none has been

[22] Anderson and Dill, "Video Games and Aggressive Thoughts," 786 (2000).

[23] Kutner and Olson, *Grand Theft Childhood*, 67.

[24] See Craig A. Anderson, "Violent Video Games: Myths, Facts, and Unanswered Questions," *Psychological Science Agenda* vol. 16, no. 5 (Oct. 2003) http://www.apa.org/science/psa/sb-anderson.html (studies find effects with "considerable consistency"); Kutner and Olson, *Grand Theft Childhood*, 58-59 (different researchers come to very different conclusions).

longitudinal."[25] Lawrence Kutner and Cheryl Olson estimate that there are about 300 studies on the effects of violent media, at most 35 of these focus on video games, and there are "very few studies involving current violent video games and real children."[26]

Many social science researchers have demonstrated a correlational link of about r =.17 between video game play and aggressive behavior.[27] This level of correlation is considered small but statistically significant. The strength of the correlation is measured by the correlation coefficient, symbolized by the "r." According to a widely accepted interpretive scheme formulated for the behavioral sciences by noted researcher Jacob Cohen, an r of 0.1-0.3 is considered weak, between 0.3 and 0.5 is moderate and from 0.5 to 1.0 is strong.[28] A correlation is "statistically significant" if it is highly unlikely to be explained by chance. The practical significance of a correlation cannot be determined on statistical grounds alone.

Pessimistic Studies. Critics of media violence claim that such media are having a deleterious effect on our nation's young people. A joint statement issued in 2000 by six national medical associations set forth these concerns:

> The effect of entertainment violence on children is complex and variable. Some children will be affected more than others. But while duration, intensity, and extent of the impact may vary, there are several measurable negative effects of children's exposure to violent entertainment.
>
> - Children who see a lot of violence are more likely to view violence as an effective way of settling conflicts. Children exposed to violence are more likely to assume that acts of violence are acceptable behavior.
>
> - Viewing violence can lead to emotional desensitization towards violence in real life. It can decrease the likelihood that one will take action on behalf of a victim when violence occurs.
>
> - Entertainment violence feeds a perception that the world is a violent and mean place. Viewing violence increases fear of becoming a victim of violence, with a resultant increase in self-protective behaviors and a mistrust of others.

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[25] U.S. Department of Health and Welfare, *Youth Violence: A Report of the Surgeon General*, Chapter 4: Risk Factors for Youth Violence (2001) http://www.surgeongeneral.gov/library/youthviolence/chapter4/sec1.html .

[26] Kutner and Olson, *Grand Theft Childhood*, 78, 79 (79 quoted).

[27] Craig A. Anderson, "An Update on the Effects of Playing Violent Video Games," *Journal of Adolescence* 27 (2004): 113-22.

[28] Anderson and Bushman, "Meta-Analytic Review," 356.

- Viewing violence may lead to real life violence. Children exposed to violent programming at a young age have a higher tendency for violent and aggressive behavior later in life than children who are not so exposed.[29]

The statement concedes, as do other pessimists, that media violence is almost certainly not the most important contributor to aggressive or violent behavior in children; other factors, specifically including "family breakdown, peer influences, [and] the availability of weapons" also contribute.[30] The experience of real life violence in the home, in the form of spouse or child abuse is considered a much more powerful predictor of children's violent behavior than media exposure. And video games are only one of the violent media children are exposed to. Lawrence Kutner maintains that the position of the American Psychological Association is not backed by actual social science research, but represents a biased and methodologically flawed review of studies done by other researchers.[31]

A meta-analysis done by Craig A. Anderson of 32 studies of violent video games found a positive correlation between exposure to video games and aggressive behavior, aggressive cognition, aggressive affect, and physiological arousal, in each case of roughly an r of 0.2. There was a negative correlation between game exposure and helping behavior, again of about r= 0.2. This study attempted to divide the studies between those that followed best practices on nine specified criteria and those that failed to follow those practices. For all five outcome variables, the best practices studies showed higher correlations than the other studies.[32]

There are a number of studies that have found a statistically significant but small correlation between frequent VVG play and aggressive behavior. Such a correlation is consistent with, but does not prove, the possibility that VVG play causes the behavior. Given this possibility, pessimists argue that their concern over VVGs is justified. Mary Beth Oliver and S. Shyam Sundar, co-directors of the Media Effects Research Laboratory of the Department of Communications of Pennsylvania State University supplied several examples. Without narrating the studies in detail, the following statements from the abstracts of these articles give a flavor of their findings:

- "Those who played the game in the blood-on condition had more physically aggressive intentions, and when players were

[29] American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychological Association, American Medical Association, American Academy of Family Physicians, and American Psychiatric Association; Joint Statement on the Impact of Entertainment Violence on Children, July 26, 2000, available at http://www.aap.org/advocacy/releases/jstmtevc.htm

[30] Ibid.

[31] Prof. Lawrence Kutner, conference call, August 22, 2008.

[32] Craig A. Anderson, "An Update on the Effects."

more involved in the game, they reported greater hostility and physically aggressive intentions."[33]

- "Adolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly at school."[34]

- "In the current study, violent images elicited reduced P300 amplitudes among violent, as opposed to nonviolent video game players. Additionally, this reduced brain response predicted increased aggressive behavior in a later task. Moreover, these effects held after controlling for individual differences in trait aggressiveness. These data are the first to link media violence exposure and aggressive behavior to brain processes hypothetically associated with desensitization."[35]

- "Participants reported their media habits and then played one of eight violent or nonviolent video games for 20 min [sic]. Next, participants watched a 10-min [sic] videotape containing scenes of real-life violence while heart rate (HR) and galvanic skin response (GSR) were monitored. Participants who previously played a violent video game had lower HR and GSR while viewing filmed real violence, demonstrating a physiological desensitization to violence."[36]

- "Playing the violent video game *Doom* led participants to associate themselves with aggressive traits and actions on the Implicit Association Test. In addition, self-reported prior exposure to violent video games predicted automatic aggressive self-concept, above and beyond self-reported

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[33] Kirstie M. Farrar, Marina Krcmar, and Kristine L. Nowak, "Contextual Features of Violent Video Games, Mental Models, and Aggression," *Journal of Communications* 56 (2006): 387.

[34] Douglas A. Gentile, Paul J. Lynch, Jennifer Ruh Linder, and David A. Walsh, "The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance," *Journal of Adolescence* 27 (2004): 5. See also Maria von Salisch, Caroline Oppl, and Astrid Kristen, "What Attracts Children?" in Peter Vorderer and Jennings Bryant, *Playing Video Games: Motives, Responses, and Consequences* (Mahwah, N.J.: Lawrence Erlbaum Assocs., 2006), 158-60 (finding relationship between time playing video games and aggressive behavior observed by teachers in primary school children).

[35] Bruce D. Bartholow, Brad J. Bushman, and Marc A. Sestir, "Chronic Violent Video Game Exposure and Desensitization to Violence: Behavioral and Event-Related Brain Potential Data," *Journal of Experimental Social Psychology* 42 (2006): 532.

[36] Nicholas L. Carnegey, Craig A. Anderson, and Brad J. Bushman, "The Effect of Video Game Violence on Physiological Desensitization to Real-Life Violence," *Journal of Experimental Social Psychology* 43 (2007): 489.

> aggression. Results suggest that playing violent video games can lead to the automatic learning of aggressive self-views."[37]

The last article is typical in stating that social scientists have firmly established a link between violent media, including VVGs, and aggression:

> There is a growing consensus within the social sciences that exposure to violent media increases aggression. After half a century of research, the empirical evidence regarding the negative effects of violent television, movies, and video games is overwhelming. Trait aggression, as well as self-reported, peer-reported, and teacher-reported aggressive behavior correlates with exposure to violent television shows and video games. Experimental studies demonstrate that watching violent television and movie scenes and playing violent video games increases aggressive behavior like delivering electric shocks and blasts of noise to another person, increases hostile expectations for others' behavior, and reduces helping behavior.[38]

In general, pessimists are more confident than optimists that their view predominates among social scientists or that their view represents established scientific fact.[39]

Media pessimists argue that the correlation between game play and aggressive behavior is larger or only slightly smaller than several that are generally acknowledged to be of great practical significance.[40] Optimists

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[37] Eric Uhlmann and Jane Swanson, "Exposure to Violent Video Games Increases Automatic Aggressiveness," *Journal of Adolescence* 27 (2004): 41.

[38] Ibid., 41, 42 (references omitted).

[39] Craig A. Anderson and Brad J. Bushman, Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Psychological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature," *Psychological Science* 12 (2001): 353-58; Farrar et al., "Contextual Features," 388; Douglas A. Gentile, Paul J. Lynch, Jennifer Ruh Linder, and David A. Walsh, "The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance," *Journal of Adolescence* 27 (2004): 7; Brad E. Sheese and William G. Graziano, "Deciding to Defect: The Effects of Video-Game Violence on Cooperative Behavior," *Psychological Science* 16 (2005): 354. Ron Tamborini, Matthew S. Eastin, Paul Skaski, Kenneth Lachlan, Thomas A. Fediuk, and Robert Brady, "Violent Virtual Video Games and Hostile Thoughts," *Journal of Broadcasting & Electronic Media* 48 (2004): 336-37. Other studies observe that the evidence is mixed or that a causal link between VVGs and aggression has not been established. René Weber, Ute Ritterfeld, and Klaus Mathiak, "Does Playing Violent Video Games Induce Aggression? Empirical Evidence of a Functional Magnetic Resonance Imaging Study," *Media Psychology* 8 (2006): 41.

[40] Brad J. Bushman and Craig A. Anderson, "Media Violence and the American Public: Scientific Facts versus Media Misinformation," *American Psychologist* 56 (2001): 481. His examples are condom use and sexually transmitted HIV ($r = -.2$), passive smoking and lung cancer at work (.15); exposure to lead and IQ scores in children (-.13); nicotine patch and smoking cessation (.14); calcium intake and bone mass (.12); homework and academic achievement (.10); exposure

emphasize that the correlations are to aggressive rather than violent behavior, and that the correlation to violent behavior would be much lower.

Pessimists point to several distinctions between video games and more established media, such as radio, movies, and television. Video games are interactive in ways that the other media are not. They require the active participation of the user, and they permit the user to affect the course of the fictional action. Interactivity does not necessarily contribute to making a game more violent, however, because the game player can modify the game to make it less violent than it is in the hands of another player.

At the same time, video games are charged with reinforcing the most damaging aspects of other media. Like them, violent video games greatly exaggerate the prevalence of violence as compared to real life. Some games depict violence as having no emotional or legal consequences. Conventionally, victims of violence in video games do not feel pain and leave no grieving family or friends, and in many games the victims physically disappear soon after the fatal injury. Because of this, some have argued that habitual VVG play can desensitize gamers to real life violence.[41] Optimists admit that frequent exposure to VVGs and other violent media desensitizes kids and adults to media violence, but not to violence actually experienced in real life.

Optimistic Studies. Those who are more sanguine about video games maintain that no causal link has been proven between violent interactive video games and real life violence or other harmful, long-term effects. The small correlations that most studies find between media violence and aggression or violent behavior do not prove that the former causes the latter two phenomena. The causation may work in reverse: aggressive people may be more drawn to violent entertainment.[42] Further, the "effect sizes" detected in such video game studies are essentially the same as for other media to which people are exposed.

Optimists liken the current concern over VVGs to similar alarmist claims that have accompanied the introduction of all new media, such as mass-produced books, radio, movies, comic books, and television.[43] In each case, alarmists predicted that the new media would rend the fabric of society by encouraging rampant violence and illicit sex. When the incidence of these things failed to change much in response to one medium, those inclined to moral panic then voiced similar concerns about the newest medium to come along. It is therefore not surprising that this pattern seems to be repeating itself, with VVGs now playing the role of bogeyman. Alarm focused on VVGs skyrocketed in the late 1990s in response to the massacre at Columbine High School in Littleton,

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to asbestos and laryngeal cancer (.10); and self-examination and extent of breast cancer (-0.07). The numerical correlations are estimated from Figure 2 of the article, a bar graph.

[41] Joint Statement, supra; Carnegey et al., "Effect on physiological desensitization," 495.

[42] Kutner and Olson, *Grand Theft Childhood*, 103.

[43] Kutner and Olson, *Grand Theft Childhood*, 29-56.

Colorado, and other school shootings by children, some of whom were avid VVG players. The public understandably failed to put incidents like those in broader perspective, yet even at the height of the school shooting series, public school was a much safer environment for kids than either the home or the street. Murder of a child in a public school shooting is an extremely rare event.[44]

Grand Theft Childhood. The centerpiece of *Grand Theft Childhood*,[45] Lawrence Kutner and Cheryl K. Olson's book-length treatment of the effects of video games on children, is a field study of 1,250 middle school children.[46] About half of these children lived in central Pennsylvania, and the other half lived in South Carolina (86). There was little difference between the results between the two geographic areas. The study compared the incidence of several problem behaviors between middle school students who reported frequent play of M-rated games and those who did not report frequent play of such games. It found that M-rated game play was associated with higher incidences of several problem behaviors:

> Compared to other boys who regularly played video games, boys reporting frequent play of at least one M-rated title (M-gamers) were much more likely to get into physical fights, to hit or beat up someone, to damage property for fun, or to steal something from a store. They were also much more likely to report poor school grades, to get into trouble with a teacher or principal and to report being threatened or injured with a weapon such as a gun, knife, or club. The odds of boys' involvement in all these behaviors increased with each additional M-rated title on their 'frequently played' game list.… (99-100)
>
> Many of these relationships between problem behaviors and M-rated game play were even stronger among girls. This probably reflects the fact that M-rated games were played by a minority of girls but the majority of boys. M-gamer girls were significantly more likely to have hit someone or been in a fight, damaged property for fun, gotten poor grades, skipped school, been in trouble with a teacher or principal, and been suspended from school. (100)

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[44] Ibid., 86; conference call with Kutner and Olson, August 22, 2008. From 2001 through 2004, a total of 27 murders at school were reported to the FBI. FBI, Crime in Schools and Colleges: A Study of Offenders and Arrestees Reported via National Incident-Based Reporting System Data (Quantico, Va.: 2007), 15 http://www.fbi.gov/ucr/schoolviolence/2007/schoolviolence.pdf .

[45] Page references in this section to *Grand Theft Childhood* are in the text.

[46] Some of the statements in this section were supplied by authors Lawrence Kutner and Cheryl Olson in a conference call with Commission staff and task force members that took place on August 22, 2008.

Again, these findings did not prove that M-game play caused aggressive behavior because it is possible that students with high trait aggression were attracted to these games or that both aggressive behavior and frequent play of M-games were manifestations of some third factor or a combination of other factors. This question can only be addressed by a longitudinal study (100-01). It should be remembered that aggressive behavior is common in middle school children and is not a reliable indicator of later aggressiveness. Given the rapid development of video games as well as the inherent limitations of social research in giving a definitive conclusion regarding causality, it is unlikely research will be able to determine with certainty the causal pattern among the possible alternatives.[47] A strong link between video game play and serious crime is belied by the fact that violent crime committed by young people has declined even as the use of video games in the same population has soared (59-61).

The studies that form the basis of *Grand Theft Childhood* provided evidence for several conclusions while leaving many other questions unanswered. Video game play is now the norm among boys, and is rapidly increasing among girls as well (89). Boys who do not play video games risk becoming socially isolated (90). Contrary to the widespread picture of teenagers playing games alone, for many kids game play is a social activity, especially where the game is M-rated (93). For boys especially, prowess in game play is a healthy way of establishing status in the peer group (131). The link between game play and problem behavior is better established for girls than for boys, but this may be because game play is less normative for girls. In other words, a majority of boys play video games and a minority of girls do, so the pattern of behavior for game players will likely fit the norm for boys better than the norm for girls for that reason alone (99-101). Surprisingly, boys who did not play video games were more likely than boys who played M-rated games to get into fights, steal from a store, or have problems in school, but this category was too small for statistically valid inferences to be drawn (102). *Grand Theft Auto* is the most popular game series for boys and the second most popular for girls, next to *The Sims* (92). Simple first-person shooter games like *Manhunt* and *Postal* were absent from the favorite games lists of both boys and girls, probably because they lack interesting characters and gameplay. The research does not support any firm conclusion about whether interactivity affects whatever link exists between video game play and real life aggressiveness or violence.[48]

The way violence is presented in the game may influence whether there is a danger that children will learn aggressive behavior. This risk is increased when some or all of the following factors are present:

- the perpetrator is attractive
- the violence is seen as justified

[47] Lawrence Kutner, conference call with commission staff, August 22, 2008.

[48] Kutner and Olson, *Grand Theft Childhood*, 98-104; Lawrence Kutner and Cheryl Olson, conference call with commission staff, August 22, 2008.

- the violence is seen as realistic, involving a real-life weapon
- the violence is rewarded, or at least not punished
- the violence has little or no harmful consequences
- the violence is seen as funny (120).[49]

Kutner and Olson conclude that it is unlikely that video games by themselves incline a normal child toward violence. They emphasize that some children are more vulnerable to media influence than the majority, but the characteristics that make for this vulnerability are not well understood.

The authors advise parents to deal with video games like other media. Parents should monitor what their children use, and should avail themselves of the ESRB ratings, parental controls, and other resources available to parents on the Web and elsewhere. They should play some games with their kids, especially because most kids enjoy an opportunity to teach their parents. Games can provide occasions for helping kids to develop media literacy. Above all, parents should not succumb to moral panic:

> For most kids and most parents, the bottom-line results of our research can be summed up in a single word: relax. While concerns about the effects of violent video games are understandable, they're basically no different from the unfounded concerns previous generations had about the new media of their day. Remember, we're a remarkably resilient species.[50]

Other studies. One study led by Christopher J. Ferguson randomly assigned college students to play violent or nonviolent video games and found no relationship between the nature of the game and subsequent aggressive behavior. Whether playing violent or nonviolent video games, men displayed more aggressive behavior than women. A second experiment by the same research team analyzed self-reported video game exposure, experience of violence in the home, and violent behavior in real life against trait aggressiveness measured by a standard questionnaire. The researchers found that the experience of family violence was a better predictor of actual violence than video game use, and that people with higher trait aggression selected more violent games. The games acted as a "stylistic catalyst" in that they did not affect whether the subject committed violent acts, but only affected the kind of violent behavior committed. "These results suggest that playing violent video games does not constitute a significant risk for future violent acts."[51]

[49] The factors are drawn from the National Television Violence Study, conducted by Joel Federman in the mid-1990s.

[50] *Grand Theft Childhood*, 220-27; quoted at 227.

[51] Christopher J. Ferguson, et al, "Violent Video Games and Aggression," 330.

Vulnerability. Kutner and Olson are representative of some optimists in their view that most children are unharmed by extensive exposure to video games, but in a minority of children, video game play may bring to the surface "emotional or behavioral problems," such as "a deterioration or breakdown in the key elements of [a] child's life: family relationships, friendships, school achievement, health, and emotions."[52] At the same time, research is inconclusive as to whether some children may be particularly likely to experience bad effects from playing VVGs.[53] "Although video game violence appears to be of relatively little concern for most individuals, it still may be worth examining whether there are special populations for whom video game violence may pose a particular risk."[54] One study suggested that college students who were prone to anger were more likely to give aggressive responses to a story completion test than other subjects after playing a VVG and that trait anger may make people more aggressive when exposed to VVGs, while others would be little affected.[55] Another character trait that may similarly conduce to enhanced likelihood to manifesting aggression upon playing VVGs is "psychoticism," a term which describes people who "tend to be cold, lacking in sympathy, unfriendly, untrustworthy, odd, unemotional, unhelpful, antisocial, and paranoid.."[56]

Publication Bias. Optimists argue that if there is a preponderance of studies claiming to show a link between VVGs and aggression, it is attributable to publication bias, sometimes called the "file drawer effect": "articles with positive (i.e., statistically significant) results are selected for publication to a greater proportion than are articles which report negative results. As a result, the extant literature in peer-reviewed publications may provide a biased sample of all the studies actually carried out, portraying more positive findings than actually exist."[57] There is no single way of measuring publication bias, but using six different procedures, Ferguson found some evidence of such bias in both experimental and non-experimental studies. He also criticized the other studies for use of unstandardized measures that may be subject to manipulation, confusing thoughts about aggression with thoughts that might lead to aggressive behavior, and using unreliable measures of aggression, such as the noise blast test.[58]

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[52] Kutner and Olson, *Grand Theft Childhood*, 210.

[53] Kutner and Olson, *Grand Theft Childhood*, 210.

[54] Christopher J. Ferguson, "The Good, the Bad and the Ugly: A Meta-Analytic Review of Positive and Negative Effects of Violent Video Games," *Psychiatr Q* [sic] 78 (2007): 314.

[55] Gary W. Giametti and Patrick M. Markey, Violent Video Games and Anger as Predictors of Aggression," *Journal of Research in Personality* 41 (2007) 1234-43.3

[56] Patrick M. Markey and Kelly Scherer, "An Examination of Psychoticism and Motion Capture Controls as Moderators of the Effects of Violent Video Games," *Computers in Human Behavior* (2008), (forthcoming).

[57] Christopher J. Ferguson, "Evidence for Publication Bias in Video Game Violence Effects Literature: A Meta-Analytic Review," *Aggression and Violent Behavior* 12 (2007): 473.

[58] Ibid., 476-80.

Civic Engagement

The recent report by the Pew Internet & American Life Project cited earlier in this chapter included an in-depth study on the effect of video game play on the patterns of civic engagement by American teenagers.[59] The study measured six activities among the sample of children aged 12-17, labeled "civic gaming experiences": helping or guiding other players; playing games where one learns about a problem in society; playing games that explore a social issue the player cares about; playing a game where the player has to think about moral or ethical issues; playing a game where the player helps make decisions about how a community, city, or nation should be run; and organizing game groups or guilds (41). These are listed in descending order of the percentages of subjects reporting experiencing them "at least sometimes" or "often," with helping or guiding other players as easily the most common (93%) (42). The kids who have the most civic gaming experiences also had higher levels of "civic and political engagement," which the investigators define as "civic and political commitment" (viz., report being committed to civic participation; report being interested in politics) and "civic and political activities" (viz., go online to get information about politics or current events; raise or give money to charity; stay informed about political issues and current events; volunteer; persuade others how to vote in an election; and participate in a protest, march, or demonstration) (42-44). Gamers who play with others in the room show a slightly higher level of civic and political engagement than those who play alone or with others online (45). "Youth who take part in social interaction related to the game, such as commenting on websites or contributing to discussion boards are more engaged civically and politically" (46). However, the sheer quantity of games play is unrelated either positively or negatively with engagement (43). Unlike other high school civic learning opportunities, civic gaming opportunities are equally available to lower income, lower achieving, and minority students, but civic gaming opportunities are more available to boys than to girls (47). The differences found by this study are statistically significant, but weak (below r=0.3) or very weak (below r=0.1) under the Cohen description.

School Shootings

The controversy over the effect of VVGs has been significantly heightened by anxiety over the shootings on high school campuses carried out by students against their fellow classmates. The most famous of these took place at Columbine High School in Littleton Colorado on April 20, 1999, where two students went on a rampage that resulted in the deaths of 13 students and ended with their own suicides. There was a series of similar incidents from roughly

[59] Amanda Lenhart, Sr., Joseph Kahne, Ellen Middaugh, Alexandra Rankin Macgill, Chris Evans, and Jessica Vitak, "Teens, Video Games, and Civics" (Washington, D.C.: Pew Internet & American Life Project, September 16, 2008). Page references in this subchapter are in the text.

1997 through 2001.[60] A common thread running through these incidents was that the perpetrators were often avid consumers of violent media. It was widely reported that the two perpetrators of the Columbine massacre were avid players of the VVGs *Doom* and *Wolfenstein 3D*. (They also liked the movie *Natural Born Killers*.)[61] A comprehensive survey of school shootings from 1974 to June 2000 found that 24 of the 41 perpetrators manifested "some interest in violence, through movies, video games, books, and other media."[62] Five perpetrators showed an interest in video games. The study recommends that a student's fascination with violent media should be considered a factor in the assessment of a threat by a student against a school. The failure of the student's parents to monitor his or her use of television, the Internet, and the computer is also a threat factor, and presumably so would parental neglect of their children's video game play.[63]

The intensive coverage of these events by the media should not obscure the fact that they are extremely rare occurrences. There were 25 school-associated deaths in the 1996-97 school year and 43 in the 1997-98 school year; by comparison, there were about 2,100 juvenile murder victims in 1997. School related shootings thus represented only one to two percent of juvenile murder victims.[64] The odds that a child will die in school by homicide or suicide are literally about one in a million (6). "School shootings are a rare, but significant, component of the problem of school violence. Each school-based attack has had a tremendous and lasting effect on the school in which it occurred, the surrounding community, and the nation as a whole (7)."

As with other connections between VVGs and real life violence, a causal connection is impossible to verify. Forty-one students is a very small sample, and it is therefore possible that the fact that one-eighth of them played VVGs may be due to chance; indeed, given the overwhelming prevalence of video game play among kids today, it would be far more likely than not that a perpetrator of such an incident would be a video game player. Even if the connection is more than a coincidence, trait aggressiveness may have caused both their use of video games and their perpetration of a school shooting, or both phenomena may be the result of some other cause.

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[60] Glenn W. Muschert, "Research in School Shootings," *Sociology Compass* 1:60-80 (2007), 60.

[61] Wikipedia s.v. "Columbine High School massacre" http://en.wikipedia.org/wiki/Columbine_shootings (visited September 26, 2008).

[62] U.S. Secret Service and U.S. Department of Education, "The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States" (Washington, D.C.: May 2002), 22. Subsequent page references are in the text.

[63] FBI Academy, "The School Shooter: A Threat Assessment Perspective" (Quantico, Va.: FBI, n.d.), 20, 22.

[64] Richard Lawrence and David Miller, "School Shootings and the Man-Bites-Dog Criterion of Newsworthiness," *Youth Violence and Juvenile Justice* 1: 330-45 (2003), 335.

Lay Commentators

The controversy over VVGs represents part of a broader discussion of the effect of contemporary media on Americans and their culture. Thinkers with backgrounds in disciplines other than social science have participated vigorously in this debate. While the general state of American culture is a topic far beyond the limits of House Resolution 94, it may be worthwhile to sample advocates of some of the positions.

Robert H. Bork. In his book *Slouching towards Gomorrah*, conservative former Federal Judge Robert H. Bork argues that the United States should institute a censorship regime that would impose an outright ban on media that features excessive sex and violence. He believes the unrestrained vulgarity of contemporary media poses a threat to the American political system as well as its culture:

> Morality is an essential soil for free and democratic government. A people addicted to instant gratification through the vicarious (and sometimes not so vicarious) enjoyment of mindless violence and brutal sex is unlikely to provide such a soil. A population whose mental faculties are coarsened and blunted, whose emotions are few and simple, is unlikely to be able to make the distinctions and engage in the discourse that democratic government requires.[65]
>
> There is, of course, more to the case for censorship than the need to preserve a viable democracy. We need also to avoid the social devastation wrought by pornography and endless incitements to murder and mayhem. Whatever the effects upon our capacity to govern ourselves, living in a culture that saturates us with pictures of sex and violence is aesthetically ugly, emotionally flattening, and physically dangerous.[66]

While the physical danger arising from violent video games may be theoretically quantifiable, the emotional affect would appear more difficult to put into numbers, and the aesthetic impact conceptually impossible to measure. These factors may nevertheless be important.

Susan Jacoby. Susan Jacoby, a liberal journalist, worries that video games and other new media are crowding out more substantial fare. She cites a survey conducted by the National Endowment for the Arts that show a decline in reading of fiction from 1982 to 2002, especially among people under age 25 (10% decline

[65] Robert S. Bork, *Slouching towards Gomorrah: Modern Liberalism and America's Decline* (New York: Harper Collins, 1996), 142.

[66] Ibid., 142-43.

for all ages, 28% decline under 25).[67] She rejects the argument that printed literature is giving way to media that are equally good, though in a different way:

> Of course different media and different activities provide different cognitive rewards by challenging different parts of the brain. Riding a bicycle, milking a cow, and reading a book require the services of different, as well as some of the same, neurons, but only reading is indispensable to intellectual life. The more sophisticated video games require intense concentration, but in the end, the cognitive reward for the master of the game amounts to little more than an improved ability to navigate other, more complex video games. Reading good books, by contrast, does little to improve reading skills—certainly not after the age of seven or eight—but it does expand the range of the reader's knowledge and imagination in just about every area of conceivable interest to human beings.[68]

Although her political views are very different from Judge Bork's, her analysis is similar to his in placing relatively less reliance on social science and measurable outcomes.

Steven Johnson. Journalist and author Steven Johnson defends video games and other contemporary media from the charge that they are dumbing the culture down and lowering its moral standards.[69] His analysis relies heavily on scientific studies, particularly intelligence testing, neuroscience, and economics, as well as narrative theory (209). He argues that contemporary media are steadily increasing the population's problem-solving skills, especially those of the vast majority of people with average intelligence. He notes that IQ tests have been continually renormed upwards; the average score is still 100, but that score represents greater intelligence than earlier tests, an average increase of 13.8 points in 46 years. Those who believe intelligence has declined have succumbed to nostalgia:

> It's not the change in our nutritional diet that's making us smarter, it's the change in our mental diet. Think of the cognitive labor–and play–that your average ten-year-old would have experienced outside of school a hundred years ago: reading books when they were available, playing with simple toys, improvising games like stickball and kick the can, and most of all doing household chores–or even working as a child-laborer. Compare that to the cultural and technological mastery of a ten-year-old today: following

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[67] Susan Jacoby, *The Age of American Unreason* (New York: Pantheon Books, 2008), 250.

[68] Ibid., 251-52.

[69] Steven Johnson, *Everything Bad Is Good for You: How Today's Popular Culture Is Actually Making Us Smarter* (New York: Riverhead Books, 2005). Page references are in the text.

> dozens of professional sports teams; shifting effortlessly from phone to IM to email in communicating with friends; probing and telescoping through virtual worlds; adopting and troubleshooting new media technologies without flinching. . . . [T]heir brains are being challenged at every turn by new forms of media and technology that cultivate sophisticated problem-solving skills. (144-45)

In his view, the violent or sexual content of the media children use is less important than whether it improves kids' cognitive abilities:

> [W]e urge parents to instill a general love of reading in their children, without worrying as much about what they are reading—because we believe there is a laudable cognitive benefit that comes just from the act of reading alone, irrespective of the content. The same principle applies to television or film or games. (190)

Johnson's thinking is more deeply influenced by biological findings, and he views humans in more naturalistic terms than either Bork or Jacoby. This may partially account for why his attitude toward the new media differs from theirs.

CHAPTER 3
VIOLENCE IN GAMES AND OTHER MEDIA

The video game industry is part of an entertainment industry complex that exposes children to an unprecedented deluge of depictions of violent acts. By one estimate, children can be expected to watch 30,000 depictions of murders and 200,000 dramatized acts of violence in television, movies, and video games by the time they reach age 18.[70]

Depictions in Specific Games

At its meeting on May 7, 2008, the Task Force was shown a demonstration of four popular video games, conducted by task force member Andrew M. Paris of the Office of the Attorney General. What follows is a description of the games demonstrated at that meeting.

Marvel Ultimate Alliance is a T-rated game[71] (suitable for persons age 13 or older) that carries content descriptors for "mild language" and "violence." The game features the Marvel comic book characters. The characters compose a team to fight the villain Dr. Doom and his allies, using the superpowers the characters possess in the printed cartoons. The characters are depicted as cartoon figures, and when characters are killed, there is no blood or viscera.

Call of Duty 4: Modern Warfare is an M-rated game that carries content descriptors for "blood and gore," "intense violence," and "strong language." The story involves the user playing an American, British, or Russian soldier helping to keep the peace at the invitation of an allied government against armed Arab or ultranationalist Russian terrorist guerillas; the player may also take the role of a Soviet or Arab enemy. Like many video games, this one includes a multiplayer mode that enables a gamer to play against opponents around the world. The game features a reward system, whereby kills, shots in the head, and similar violent acts are rewarded by improvements in the effectiveness of weapons (e.g., improved accuracy, better camouflage, or improved destructive capability). The player may in this fashion earn a golden weapon that indicates to other players his status as a

[70] Lt. Col. Dave Grossman and Gloria DeGaetano, *Stop Teaching Our Kids to Kill: A Call to Action against TV, Movie and Video Game Violence*, (New York: Crown Publishers, 1999), 49 (citing speech by President Bill Clinton).

[71] The ratings used in this chapter are those of the Entertainment Software Rating Board (ESRB), the predominant organ for rating video games for age-appropriateness and content. ESRB's rating system is described in chapter 5.

skilled player. A player can be "killed" any number of times during a game session and respawn as another soldier.

Gears of War is an M-rated game that also carries content descriptors for "blood and gore," "intense violence," and "strong language." In this story line, human invaders battle giant natives of the planet. A unique feature of this game is the chainsaw bayonet, which can destroy an opponent in close quarters with a good deal of blood and gore.

Grand Theft Auto IV: Liberty City was released on April 29, 2008, as the latest addition to a highly controversial game series. It is rated M and carries six content descriptors: "blood," "intense violence," "partial nudity," "strong sexual content," and "use of drugs and alcohol." The protagonist is Niko Bellic a Serbian veteran of the Bosnian War, who has immigrated to Liberty City, which is patterned after New York City. Carjacking and running over defenseless civilians are typical of play in this game. The game is called a "sandbox style" game, in that the character may either complete given missions or be directed by the player. It is up to the player how law-abiding or antisocial Bellic's behavior is. Criminal activity results in pursuit by the police, who are depicted as incompetent. The game has been almost unanimously praised by critics in the trade press for its imaginative and engrossing gameplay—indeed, it received the second highest rating of any video game ever released.[72]

In the last three games, the players are depicted as human beings in a manner that is more realistic than a cartoon, but is not nearly as realistic as a feature film. Present technology does not permit cinematic realism in a video game.

In *ESA v. Swanson*, 519 F.3d 768 (8th Cir. 2008), the court gave the following explicit description of violence in M-rated video games:

- "*Postal 2: Apocalypse Weekend*—The ads for this game boast that new weapons will enable you 'to hack your enemies to meaty bits!' It involves a game character who commits violent acts against unarmed civilians. Other features in the *Postal* series include: urinating on people to make them vomit in disgust, using cats as gunshot silencers, and playing fetch with dogs using human heads.

- "*The Punisher*—Game player is able to jam knives into victims' sternums and pull up to increase the damage, cut off heads, ram a character's open mouth onto a curb, run a character over with a forklift, rip a character's arms off with an industrial hook, and set a character on fire in an electric chair.

[72] Wikipedia s.v. "Grand Theft Auto IV" http://en.wikipedia.org/wiki/Grand_Theft_Auto_IV (visited October 16, 2008).

"*Resident Evil: 4*—Game player uses a special blood-spattered chainsaw controller designed for playing the game, which includes chainsaw decapitations and impalements, and characters ripping off other character's throats and biting off their heads.

- "*Manhunt*—Game player's character is James Earl Cash, a convicted serial killer facing execution. The execution is ordered to be faked so that a character named 'The Director' can use Cash as a star in a series of snuff films. As the Cash character kills other characters, by suffocating them with a plastic bag, slicing them up with a chainsaw, shooting them point blank with a nail gun, stabbing them in the eyeballs with a glass shard, or beheading them with a cleaver, The Director makes comments such as 'You're really getting me off, Cash' and 'You're really doing it for me! Why I ain't been this turned on since . . . Well, let's not go there.' The game has two difficulty settings: fetish and hardcore.

- "*God of War*—Game features disembowelment, mouth-stabbing, eye-gouging, severed limbs, and human sacrifice." Swanson, 519 F.3d 768, 770.

Some have worried that violent video games pose a special danger to children because they are interactive. Unlike a novel or movie, a video game permits the user to change the plot of the story. In this way, a video game seems more like real life, where actions have consequences in the world. Interactivity in this sense is also characteristic of other games and participatory sports, but video games depict a much broader range of experience than other games. The setting of Grand Theft Auto IV is a simulation of New York City; that of chess, probably the greatest board game ever devised, is 64 black and white squares.

Violence in Other Media

Other media besides video games abound in violent content. As Judge Posner observes, "Violence has always been and remains a central interest of mankind and a recurrent, even obsessive theme of culture both high and low."[73] He cites such classic works of literature as the *Odyssey*, the *Divine Comedy*, *War and Peace*, *Frankenstein*, *Dracula*, and the stories of Edgar Allen Poe.

[73] *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

Commission staff's knowledge of classical and Renaissance literature is lamentably spotty, but it is easy to find other examples that bear out Judge Posner's observation. Depictions of violence go back to the Homer's epic poems, two of the earliest sources of Western literature. From the *Iliad*, here is Homer's description of the slaying of a Trojan prince by the Greek hero Achilles:

> [Lykaon] let go of the spear and sat back, spreading wide both hands; but Achilleus drawing his sharp sword struck him beside the neck at the collar-bone, and the double-edged sword plunged full length inside. He dropped to the ground, face downward, and lay at length, and the black blood flowed, and the ground was soaked with it.[74]

Greek drama includes many examples of violence, mitigated by the convention of having violent acts committed offstage and announced by a character or the chorus. The central action in the *Agamemnon* by Aeschylus is the murder of the titular character by his wife Clytemenestra and her lover. In the next play of the same trilogy, *The Libation Bearers*, Clytemnestra's son Orestes returns from a long absence, is told of the murder of his father by his sister Electra, and in turn murders his mother. The action in Sophocles's *Oedipus the King* includes the suicide of Oedipus's wife Jocasta and the self-blinding of Oedipus, both in response to the revelation that the man Oedipus slew in a "road rage" incident long before the main action was Oedipus's father and that Jocasta is also his mother. In *Medea* by Euripides, the title character slays her own children because their father Jason abandoned her to marry a princess.

The tradition of violence in drama continued in the tragedies written by or attributed to the Roman Stoic philosopher Seneca, which featured bloodthirsty plots involving horrible crimes, including plays based on *Agamemnon*, *Oedipus the King*, and *Medea*.[75] Senecan violence and gruesomeness appears in some of William Shakespeare's plays, including Hamlet, King Lear, Macbeth and the plays drawn from Roman and English history. *Titus Andronicus*, Shakespeare's goriest play, was very popular during his lifetime.[76]

By the 19th century, prose fiction had become the most important medium of imaginative literature, and much of that fiction consisted of depictions of violence and the often gruesome outcomes of violence. In the United States, the macabre fiction of Edgar Allan Poe influenced a large number of novelists in both the Gothic (from H. P. Lovecraft to Anne Rice and Stephen King) and the detective genres. Violent themes abound in European fiction, including the works

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[74] *Iliad*, XXI (trans. Richmond Lattimore), quoted in George Steiner, *Tolstoy or Dostoyevsky* (New York: E.P. Dutton & Co., 1971), 76.

[75] Answers.com s.v. "Senecan tragedy" http://www.answers.com/topic/senecan-tragedy; Sanderson Beck, "Senecan Tragedy" in *Roman Empire 30 BC to 610* http://www.san.beck.org/AB7-RomanDecadence.html#4 (visited Sept. 16, 2008).

[76] Royal Shakespeare Company, "Critics on Titus" http://www.rsc.org.uk/titus/about/critics.html (visited Sept. 16, 2008).

of Leo Tolstoy and Feodor Dostoyevsky. Operas such as *Don Giovanni*, *Il Trovatore, Tristan und Isolde, Carmen, Tosca, and Wozzeck* feature violence or gruesomeness, but in a highly stylized manner that is unlikely to be imitated in real life.

As some of the examples mentioned show, violent themes are prevalent in fiction of the highest distinction as well as in lesser works. This is because fiction requires a departure from ordinary life if it is to attract the interest of readers and viewers. Few people want to take in a piece of fiction that reads like the transcript of the action and speech of ordinary people living an ordinary day. Violence is one of the most effective ways of injecting drama into a story by making the situation depicted a life-and-death issue.

Violence in Contemporary Media

Turning to contemporary media that children are likely to encounter, observers both lay and scientific have noted the predominance of violence and sex in contemporary popular culture.[77] One conduit for violent imagery is popular music, especially rock and rap. Examples of rock songs with lyrics that depict violence are "Dirty Deeds Done Dirt Cheap" by AC/DC, a comical song about a contract killer, and Pearl Jam's "Jeremy," about a teenage suicide. Even an artist as mainstream and innocuous as Barry Manilow included a gunshot in "Copacabana" as part of the local color.

Television shows have featured violent themes ever since Westerns such as *Gunsmoke*, *Rawhide*, and *Bonanza* dominated the airwaves. Recent examples include 24, *Deadwood*, *Battlestar Galactica*, *Life on Mars*, and the various iterations of *CSI* and *Law and Order*. Television has also featured violent sports, boxing, no-holds-barred wrestling, and the increasingly popular mixed martial arts shows like *Ultimate Fighting Championships (UFC).*

Perhaps no medium relies on violence as "a recurrent and even obsessive theme of culture both high and low" to the same extent as the cinema. As with other media, the depictions of explicit and implicit violence go back to the very origins of the medium in films such as *Birth of a Nation* and *Nosferatu*, through the gangster films and Westerns of the 1930s and 1940s and the war films that were prominent in the late 1940s and 1950s.

Some of the most recent examples hark back to earlier genres, such as 3:10 to *Yuma* (Western), and a large number of zombie films like *Land of the Dead*, *28 Days Later*, and *I Am Legend*. One of the predominant subgenres of horror is the "slasher" film, which features a villain wielding a cutting-edge weapon who kills one hapless victim after another. These include the *Friday the*

[77] Robert H. Bork, *Slouching towards Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996), 123-32; Dick Meyer, *Why We Hate Us: American Discontent in the New Millennium* (New York: Crown Publishing, 2008), 194-95.

13th series (eleven films to date), the *Halloween* series (eight films), the *Saw* series (five films), and the *Child's Play* or *Chucky* series (five films).[78] No one who follows the movies even casually would have trouble recalling many recent examples besides those mentioned here.

While some of the films mentioned in the previous paragraph were of mediocre quality, violent themes also pervade distinguished films. For instance, here is an informal selection from the Academy Award winners for best picture: *Gone with the Wind* (1939); *From Here to Eternity* (1953); *On the Waterfront* (1954); *The Bridge on the River Kwai* (1957); *Ben-Hur* (1959); *West Side Story* (1961); *Lawrence of Arabia* (1962); *Patton* (1970); *The French Connection* (1971); *The Godfather* (1972); *The Godfather Part II* (1974); *Rocky* (1976); *The Deer Hunter* (1978); *Platoon* (1986); *Dances with Wolves* (1990); *The Silence of the Lambs* (1991); *Unforgiven* (1992); *Schindler's List* (1993); *Braveheart* (1995); *The English Patient* (1996); *American Beauty* (1999); *Gladiator* (2000); *Lord of the Rings: The Return of the Ring* (2003); *Million Dollar Baby* (2004); *Crash* (2005); *The Departed* (2006); and *No Country for Old Men* (2007). Note that the last five Academy Awards for best picture have gone to films with violent content.

Violent films carry age ratings that would forbid sale of tickets to young teens or younger kids, but the enforcement failure rate in 2008 for R-rated movie tickets (35%) and DVDs (47%) are higher than for M-rated video games (20%).[79] It is likely that kids have at least as easy access to violent movies as they have to VVGs, so that the latter represent only a part of the media violence kids are exposed to.

[78] Film tallies from the eponymous entries in Wikipedia.

[79] Federal Trade Commission, "Undercover Shoppers Find It Increasingly Difficult for Children to Buy M-Rated Games" http://www.ftc.gov/opa/2008/05/secretshop.shtm (released May 8, 2008, corrected May 16, 2008, last modified June 20, 2008).

CHAPTER 4
LEGAL VALIDITY OF RESTRICTIONS

One of the more obvious responses to the problems that may be caused by minors' access to VVGs is legislation imposing criminal penalties on the sale of games to minors. This is not a viable alternative, however, because all statutes and ordinances providing for criminal penalties relating to sale or other commercial access to video games have been invalidated by the courts, primarily on the grounds that they violate the Freedom of Speech Clause of the First Amendment to the Federal Constitution.[80] As of this writing, nine federal cases have made that holding, and none of the litigated statutes have been upheld.

While prescribing criminal penalties for sale of age-inappropriate games to minors has been the predominant strategy for restrictive legislation, others that have been attempted are penalties for sale to minors without caretaker consent and mandatory labeling or signage. The cases discussed in this chapter are summarized in Table 1.

Entertainment Merchants Association v. Henry, 2007 U.S. Dist. LEXIS 69139 (W.D. Okla. 2007) is typical of the analysis the courts have used to invalidate legislation criminalizing the sale or other distribution of video games. The Oklahoma statute under review in Henry prescribed "criminal penalties for any person who knowingly displays, sells, furnishes, distributes, or otherwise disseminates to minors any materials considered 'harmful to minors.'" Included in the statutory definition of "harmful to minors" was "any description, exhibition, presentation or representation, in whatever form, of inappropriate violence." "Inappropriate violence," in turn, was defined in terms parallel to the federal Supreme Court's definition of obscenity, in terms that will be detailed later in this chapter. The plaintiffs were two trade associations representing creators and retailers of video games that sought a permanent injunction against enforcement of the statute. The court granted plaintiffs' motion for summary judgment, thereby invalidating the statute.

The court initially cited eight cases that have all ruled similar restrictions to be invalid.[81] Video games have been held to be creative expression entitled to

[80] "Congress shall make no law, . . . abridging the freedom of speech, or of the press, . . ." The First Amendment is applicable to the states under the Due Process Clause of the Fourteenth Amendment.

[81] The cited cases were *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Machine Ass'n v . Kendrick*, 244 F.3d 572 (7th Cir. 2001); *cert. denied* 534 U.S. 994 (2001); *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188, 2007 U.S. Dist. LEXIS 57472 (N.D. Cal. Aug. 6, 2007); E*ntertainment Software*

protection under the First Amendment, since entertainment, as well as political and ideological speech falls under its protection. The interactive nature of the games does not remove them from the scope of the First Amendment, since all literature is intended to be interactive. *American Amusement Machine Association v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001), *cert. denied* 534 U.S. 994 (2001). "[W]hether the court believe[s] the advent of violent games adds anything of value to society is irrelevant, because they are just as entitled to First Amendment protection as the finest literature." *Entertainment Software Association v. Foti*, 451 F.Supp 2d 823, 829 (M.D. La. 2006), quoting *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948).

Once it has been determined that the games are protected, the court must then decide whether the restriction violates the First Amendment. All parties to Henry agreed that the statute constituted a "content-based regulation;" the standard of review applicable to such restrictions is "strict scrutiny."[82] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S.Ct. 2538 (1992). Strict scrutiny gazes more pitilessly than Yeats's Sphinx, for few statutes have ever survived it.[83] Under this standard, the statute is presumed to be invalid and can be upheld only if the state "can show the regulation is necessary to serve a compelling state interest" and that it is "narrowly tailored to address that problem without unnecessarily interfering with First Amendment freedoms."

The limitation of a statute to regulating consumption by minors only does not rescue it from strict scrutiny. "The fact that Defendants are attempting to regulate the flow of information to minors, rather than to adults, does not render the values protected by the First Amendment any less applicable." *Henry*, citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268 (1975). The standard for material advocating violence and directed at adults permits restriction by the state only if "such advocacy is directed to inciting or producing imminent lawless action or is likely to incite or produce such action" *Schwarzenegger*, 2007 U.S. Dist. LEXIS 57472, at *12, quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Applying the *Brandenburg* test to video games would immediately lead to invalidation, because they clearly contain no such incitement, but the

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Ass'n v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entertainment Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N .D. Ill. 2005) *aff'd on other grounds*, 469 F.3d 641 (7th Cir. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

[82] The opposite alternative is the rational basis test, where the state is upheld if it bears a rational relationship to a permissible state interest. This is the most generally applicable test for statute, unless the statute bears unequally on a "suspect category" of persons who have frequently been the victims of discrimination or it impinges on a fundamental right. The rational basis standard is very deferential to the legislature, and the statute analyzed under it is almost always upheld. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). The rational basis standard does not apply to the statutes considered in this chapter because they are held to impinge on the fundamental right to free speech.

[83] Strict scrutiny to laws that discriminate against traditionally disadvantaged groups as well as those that impinge on fundamental right.

Schwarzenegger court stopped short of applying this test: "The rationale underlying *Brandenburg*—that in a society of free men, men must be free to make even foolish choices—does not apply unequivocally to those still learning how to choose." *Schwarzenegger*, at *14. The statute nevertheless faced the severe test of strict scrutiny.

Foti tested an Louisiana statute drafted so as to parallel the test for obscenity prescribed by the Supreme Court in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1972). Consistent with this strategy, the statute forbade games meeting the following criteria:

1) The average person, applying contemporary community standards, would find that the video or computer game, taken as a whole, appeals to the minor's morbid interest in violence.
2) The game depicts violence in a manner patently offensive to prevailing standards in the adult community with respect to what is suitable for minors.
3) The game, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors. Foti, 451 F. Supp. 2d 823, 829 (2006).

The statute was patterned after the obscenity prohibitions because the Supreme Court has held that a statute may regulate obscene material in order to help parents protect minors and that strict scrutiny does not apply to such regulations. *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274 (1968). No court has held, however, that material depicting violence is sufficiently similar to obscenity that First Amendment protection should be decided on the same basis. While some courts have refused to apply the standard governing obscenity simply because the violence depicted in the video games does not involve sex, which is a necessary element for the material to be considered obscene in the First Amendment context (*see Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004)), the *Schwarzenegger* court entertained the possibility that sale of violent video games may be restricted to minors, but only if the state could sustain the heavy factual burden required under strict scrutiny. Like every other state so far, California failed to advance sufficient proof.

In *Henry*, the compelling state interests the state advanced to support the statute were promotion of the well-being of the state's youth and protection of that youth from the harmful effect of video games. However, support for the statute requires more than positing a threat to youth in the abstract. The state "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Henry, 2007 U.S. Dist. LEXIS 69139, at *16, quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445 (1994). No support was advanced in Henry beyond an appeal to common sense and "a complete dearth of legislative findings, scientific studies, or other rationale in the record to support the passage of the Act." *Henry* at * 17.

In *American Amusement Machine Ass'n v. Kendrick*, a panel of the Seventh Circuit Court of Appeals, speaking through the eminent Judge Richard A. Posner, in effect argued a countervailing state interest in exposing older children to violent media content, as well as the danger of government control of the media, which forbade state or local restrictions on violent arcade games:

> The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble. . . .
>
> Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault is aware. To shield children right up to the age of eighteen 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. *Kendrick*, 244 F.3d 572, 577.

The state is not permitted to defend the statute on the ground that it may advance its interest in protecting children from psychological harm, because such an interest comes close to "impermissible thought control." "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end." Foti, 451 F. Supp. 2d 823, 831 quoting *Ashcroft, v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002). "[In no case] does the Supreme Court suggest that the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to governments to regulate what minors read and view. . . . [T]he government cannot silence protected speech by wrapping itself in the cloak of parental authority." Id., at 831-32; *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003) and *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1052 (E.D.Ill. 2005), *aff'd on other grounds*, 469 F.3d 641 (7th Cir. 2006). Nor can the state prohibit otherwise protected speech

on the ground that the speech may encourage crime.. "'[T]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.' Thus, the government may not punish speakers based solely on a prediction or suspicion that their words will tend, in the aggregate, to encourage undesired behavior." Foti, 451 F. Supp. 2d 823, 831, quoting *Ashcroft, supra.*

Evidence has been advanced of harm to minors, but all courts have found it insufficient. In *Kendrick,* Judge Posner rejected leading social psychology studies that purported to show a causal link between VIVGs and real life violence:

> 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 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 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. *Kendrick,* 244 F.3d 572, 578-79.

The studies dismissed included the study[84] by Craig T. Anderson and Karen E. Dill, leading academic researchers in favor of restrictions on minors' access to VVGs. The courts considering the evidence since the relatively early *Kendrick* case have been no more impressed with it. "It appears that much of the same evidence has been considered by numerous courts and in each case the connection was found to be tenuous and speculative." *Foti*, 451 F. Supp. 2d 823, 832.

The next requirement under strict scrutiny is that the statute must be shown to materially advance the state's interest. The courts have dismissed the government's arguments on this point by noting that video games constitute "a tiny fraction of the media violence to which modern American children are exposed." *Id*. at 833; *Henry* at *18, both quoting *Kendrick*, 244 F.3d 572, 579. The minor "may still legally buy or rent the book or movie on which the game was based." The underinclusiveness of the statute "indicates that regulating violent video games is not really intended to serve the proffered purpose." Foti, 451 F. Supp. 2d 823, 833, quoting *Blagojevich; Henry* at *18.

[84] "Video Games and Aggressive Thoughts, Feelings and Behavior in the Laboratory and in Life," *Journal of Personality and Social Psychology* 78 (2000): 772-790.

Statutes under strict scrutiny must also be "narrowly tailored" to prohibit no more than is necessary to advance the state interest in question. Notwithstanding it's under inclusiveness, the Oklahoma statute analyzed in *Henry* was found dramatically overbroad in its coverage in that it applied to "any person" disseminating violent video games and therefore could apply to dissemination by a parent or teacher to a minor, even if the child plays the game under parental supervision. *Henry* at *21. *Foti* emphasized less restrictive alternatives available to the state, "including encouraging awareness of the voluntary ESRB video game rating system . . . and the availability of parental controls that allow each household to determine which games their children can play." *Foti*, 451 F. Supp. 2d 823, 833.

Other statutes have also run afoul of the precision requirement in various ways. *Schwarzenegger* analyzed a provision that contained two alternative definitions of the "violent video games" banned by the statute, such that the statute would apply to a game that fell under either. The first, an obscenity style definition, was faulted for imposing the ban regardless of the age of the child, agreeing with *Kendrick* that the harm to children decreases with age, especially in light of the desirability to expose older children to media that will help develop them intellectually. The second definition was held overbroad for failing to exclude games of some redeeming value. Furthermore, the statute failed to define "image of a human being" to exclude cartoonlike or otherwise unrealistic targets. *Schwarzenegger* at *27-29.

A closely related line of attack against video game regulation has been through the Due Process Clause of the Fourteenth Amendment, based on the a claim that the statute is impermissibly vague. "It is well settled that the Constitution demands that statutes be set forth with 'sufficient definiteness that ordinary people can understand what conduct is prohibited.'" Foti, 451 F. Supp. 2d 823, 835, citing *Kolendar v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855 (1983) and *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972). "The vagueness of a content-based regulation of speech, particularly one imposing criminal penalties, 'raises special First Amendment concerns because of its obvious chilling effect on free speech.'" *Foti*, 451 F. Supp. 2d 823, 835, quoting *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329 (1997). The *Foti* court noted that *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006) had struck down a similar statute on vagueness grounds. The statute failed to define "morbid interest" or "violence" in specific enough terms so that citizens would not have to guess about whether the statute applied to their conduct. Foti, 451 F. Supp. 823, 836. Similarly, *Henry* found that the statute under review abounded in vague and undefined terms: "interactive video game," "graphic" "glamorized," "gratuitous," "realistic violence," and "brutal weapons." *Henry* at * 25. This raised an unacceptable danger that vendors "will 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked.' Such behavior will deprive access to such expression by adults as well

as minors." *Henry* at*27, quoting *Granholm*. (The danger that statutory restrictions will deter protected speech is called the "chilling effect.")

One term that would seem to be necessary for any meaningful restriction on video games that could potentially be upheld would be a restriction to games that depict violence against human beings. The court in *Blagojevich* pointed out some practical difficulties that would make such a provision unconstitutionally vague:

> In the video game context, the [Illinois] act's definition of "violent video games" is vague because it is unclear what falls into the category of "human" and what constitutes "serious physical harm." Video games create multiple worlds of fiction: some resemble reality, others are devoid of reality, and many fall somewhere in between. Some video game characters depict human beings; others represent aliens, zombies, mutants, and gods; and others have characters that transform over the course of a game from humans into other creatures or vice versa. Some of these characters will "suffer" injuries that would be fatal to a normal human being, but will nonetheless survive due to super powers; others may appear to die but come back to life. Blagojevich, 404 F. Supp. 2d 1051, 1077, quoted in Granholm, 426 F. Supp. 2d 646, 655.

Both *Kendrick* and *Schwarzenegger*, however, held out the possibility that a statute could be drafted imposing criminal penalties on the sale to minors of particularly realistic games:

> We have emphasized the "literary" character of the games in the record and the unrealistic appearance of their "graphic" violence. If the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be), a more narrowly drawn ordinance might survive a constitutional challenge. *Kendrick*, 244 F.3d 572, 579-80.

> [T]his court is not as doubtful as other courts have been as to the legislature's power to restrict the access of minors to violent video games or as skeptical of Dr. Anderson's conclusions. The legislature does have the power, despite *Brandenburg*, to enact legislation that limits a minor's First Amendment rights if the legislation can be shown to truly protect a minor's psychological well-being and is narrowly drafted to pass strict scrutiny. However, at this point, there has been no showing that violent

> video games as defined in the Act, in the *absence of other violent media*, cause injury to children. *Schwarzenegger* at *31, 32.

Since violent video games represent only a small part of the violent media that children are exposed to, it is difficult even in principle to see how the kind of proof required by *Schwarzenegger* can be supplied.

Most recently, the Eighth Circuit upheld the Federal District Court of Minnesota in striking down the statute providing for a civil penalty for any minor purchasing a video game rated M (mature) or AO (adults only) and requiring retail outlets to post signage notifying consumers about this law. *Entertainment Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008). Ruling as a three-judge panel, the court held that Minnesota had failed to meet the constitutionally required burden to uphold the statute, but it expressed, for the first time in this line of cases, open skepticism toward the prevailing approach:

> As did the *Interactive Digital* court,[85] we accept as a given that the State has a compelling interest in the psychological well-being of its minor citizens. Likewise, we believe that the State's evidence provides substantial support for the contention that violent video games have a deleterious effect upon the psychological well-being of minors. Nevertheless, in light of the heightened standard of proof that Interactive Digital says must be applied, we conclude that the evidence falls short of establishing the statistical certainty of causation demanded thereby. In so holding, we are not as dismissive of that evidence as have been some of the courts that have found similar evidence to be inadequate to establish the causal link between exposure to violent video games and subsequent behavior. [Citations omitted.]
>
> Whatever our intuitive (dare we say commonsense) feelings regarding the effect that the extreme violence portrayed in the above-described video games may well have upon the psychological well-being of minors, *Interactive Digital* requires us to hold that, having failed to come forth with incontrovertible proof of a causal relationship between the exposure to such violence and subsequent psychological dysfunction, the State has not satisfied its evidentiary burden. The requirement of such a high level of proof may reflect a refined estrangement from reality, but apply it we must. *Swanson*, 519 F.3d 768, 772

[85] As *Interactive Digital* is a prior decision of the Eighth Circuit Court of Appeals, it is binding precedent directly applicable to this case. In other words, the court in this case must either follow *Interactive Digital* or overrule it, which would be highly unusual for a case decided only five years earlier.

Federal or state court cases arising in Pennsylvania would be bound by the holdings of the Third Circuit Court of Appeals, which has not been faced with the issue of the validity of legislation restricting the manufacture or sale of VVGs. However, recent cases dealing with statutes challenged under the First Amendment indicate that the Third Circuit would follow the analysis of the other Federal courts and strike down such legislation. See *U.S. v. Stevens*, No. 05-2497 (3d Cir, 2008) (invalidating Federal statute outlawing commercial manufacture or sale of depictions of animal cruelty) and *ACLU v. Mukasey*, No. 07-2539 (3d Cir. 2008) (invalidating the Child Online Protection Act).

Taxpayers have paid a price for unconstitutional video game legislation. For instance, in August 2008, the state of California paid the Entertainment Software Association (ESA) nearly $283,000 for attorney's fees. The amount was received by ESA after California attempted to defend an unconstitutional law restricting the constitutional rights of video game publishers, developers and consumers. In June 2008, the state of Minnesota paid ESA $65,000 in attorney fees and expenses incurred as a result of ESA's successful challenge to Minnesota's unconstitutional video game law. In total, state and local governments across the country have paid out more than $2 million to ESA in such fees and litigation costs related to video game legislation.[86]

A Dissenting View

A recent monograph by Kevin W. Saunders, a constitutional scholar from the Michigan State University College of Law, argues that the prevalent approach to the First Amendment unnecessarily restricts the government from helping parents to protect their children from media sex and violence.[87] He argues that the benefits and costs of free speech differ between adults and children, justifying a lower burden of justification for legislation aimed at protecting children. "Rather than concluding that the rights of children and adults should be equal, we should consider the possibility of limiting children's rights to correspond to their capacities (2)."

Because of children's immaturity and greater vulnerability to bad influences from the media, Saunders believes that the courts should consider replacing the current doctrine applicable to media violence with one of two alternatives. The first possibility is to broaden the definition of "obscenity" to apply to violent as well as sexual content, thereby rendering "violent obscenity" unprotected by the First Amendment (150-58). He argues that the generally understood meaning of "obscenity" includes extreme violence and that the reasons for denying First Amendment protection to sexual obscenity apply equally well to obscene violence. Redefinition would be permit the legislature and the courts to identify violent content that that may be banned for sale to

[86] E-mail from task force member Clay Calvert to commission staff, September 3, 2008.

[87] Kevin W. Saunders, *Saving Our Children from the First Amendment* (New York: New York University Press, 2003). Page references are in the text.

minors. In the end, it is likely very little will be ruled off limits to adults, as is the case with sexual obscenity, but there may be an undesirable chilling effect while the courts formulate the test for violent obscenity.

The other approach, which Saunders prefers, would restructure First Amendment analysis to limit strict scrutiny to material directed at adults, while testing restrictions directed at sales to children by the deferential "rational basis" test (158-163). Under this approach, virtually all violent material would be protected as to sale to adults, and adults would also be able to permit their own children to view any violent material the adult thought was suitable for the child. But laws that prohibited sales of violent material to children, if drafted with sufficient specificity to satisfy the Due Process "vagueness" test, would be upheld unless opponents could show that the state's concern with the ill effect of violent material on children was irrational. Saunders maintains that under the current state of social research, such concern is not demonstrably justified, but neither is it irrational; therefore a carefully crafted prohibition would be struck down under the current strict scrutiny approach, but upheld under the rational basis test. The approach advanced by Saunders has been uniformly rejected by the unbroken line of cases invalidating laws restricting the sale or rental of violent video games.

Conclusion

Whatever the misgivings expressed by the Eighth Circuit and those who disagree with the Federal court's approach to the First Amendment, that approach offers virtually categorical protection of violent video games against criminal prohibitions on their sale to minors. Of course, the constitution permits voluntary agreements among manufacturers and distributors to prohibit sales of inappropriate games to minors, and an extensive program to accomplish that end has been established, as will be detailed in the next chapter. Given the current state of the law, the task force advises that the General Assembly avoid challenging the legal consensus and refrain from enacting criminal sanctions on the sale of video games to minors or other measures similar to those invalidated elsewhere.

TABLE 1
Cases Invalidating Statutes Restricting Video Games

Jurisdiction	Case Citation	Statute Struck Down	Provisions	Rationale
California	*Video Software Dealers Ass'n v. Schwarzenegger*, 2007 WL 2261546 (N.D. Cal. 2007)	Cal. Civ. §§ 1746-1746.5 (West 2005)	Sale and rental of "violent video games" to minors was prohibited. Violent video games to be sold at retail in California were required to have a 2-inch by 2-inch label containing the number "18" on the front face of the package. The law defined a "violent video game" as a video game "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that" a reasonable person would find: appeals to a deviant or morbid interest in minors; is patently offensive to prevailing community standards as to what is suitable for minors; and lacks serious literary, artistic, political or scientific value for minors. The definition also included a video game "which enables a player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim."	Video games, though mere entertainment, are protected by the First Amendment. A state may limit protected expression only to promote a compelling interest and must choose the least restrictive means to further that interest. Neither the legislative findings nor the evidence showed that playing violent video games results in real-world violence. While a state may have a compelling interest in limiting the exposure of minors to expression that would lead to violent antisocial or aggressive behavior, court cases "have, without exception, held that the First Amendment precludes restrictions on minors' access to violent video games," either on the theory that such restrictions can only apply to obscenity or that the connection between exposure to violent videos and feelings of aggression or antisocial behavior has not been adequately shown. A permanent injunction against enforcement of the statute was issued. The case is being heard on appeal by the 9th Circuit on October 29, 2008.
Illinois	*Entertainment Software Ass'n* (ESA) *v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006)	720 Ill. Comp. Stat. 5/12A-15 and 12B-15	Prohibited retailers from selling or renting a violent or sexually explicit video game to a minor. Video game retailers were required to place a 2-inch by 2-inch square label with the numerals '18' on any violent or sexually explicit video game. Retailers were required to post a sign explaining the video game rating system and make brochures available upon request.	The district court invalidated the Act's restrictions on both violent and sexually explicit games. The State appealed the decision with respect to sexually explicit games only. The Seventh Circuit affirmed, finding that the labeling requirements for sexually explicit games compel controversial speech subject to strict scrutiny under the First Amendment. It also held that the labeling and signage requirements failed the narrow tailoring requirement.

Jurisdiction	Case Citation	Statute Struck Down	Provisions	Rationale
Indianapolis	*American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).	Indianapolis City Ordinance	The ordinance forbade any operator of five or more video-game machines in one place to allow a minor unaccompanied by a parent, guardian, or other custodian to use "an amusement machine that is harmful to minors." "Harmful to minors" included an amusement machine that predominantly appeals to minors' morbid interest in violence or prurient interest in sex, patently offensive to prevailing standards in the adult community as a whole.	Communications to children in video games are protected by the First Amendment. Interactivity does not distinguish video games from other expressive content, such as town hall meetings, theatrical performances and literature where readers identify with the characters. The regulation of protected expression was overbroad.
Louisiana	*ESA v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006)	La. Rev. Stat. Ann. § 14:91.14 (2006)	Prohibited the sale or rental of certain interactive video or computer games as defined by the statute to anyone under the age of 18 in Louisiana. The statute applied to a game if: 1) the average person applying contemporary community standards would find that the game, taken as a whole, appeals to the minor's morbid interest in violence; 2) the game depicts violence in a manner patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; 3) The game, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.	Under the strict scrutiny standard, the State must (1) articulate a compelling state interest; (2) prove that the statute actually serves that interest and is 'necessary' to do so; and (3) show that the statute is narrowly tailored and a material advancement of that interest. The state failed to show that a plausible, less restrictive alternative does not exist. "Alternatives exist including encouraging awareness of the voluntary ESRB video game rating system, and the availability of parental controls that allow each household to determine which games their children can play." Also, terms such as "the minor's morbid interest in violence" were not adequately defined and resulted in unconstitutional vagueness.
Michigan	*ESA v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006)	2005 Mich. Pub. Acts 108	The act prohibited dissemination or exhibition of sexually explicit and "ultra-violent" explicit video games to minors without the consent of their parents or guardians.	The court found that the Act failed strict scrutiny in numerous ways: it furthered no compelling state purpose; no substantial evidence supported the State's claims that video games were harm; and the Act was not narrowly tailored. In addition, the Act was unconstitutionally vague.

Jurisdiction	Case Citation	Statute Struck Down	Provisions	Rationale
Minnesota	*ESA v. Swanson*, 519 F.3d 768 (8th Cir. 2008)	Minn. Stat. § 325I.06 (2006)	The statute Imposed a $25 fine for those under 17 for renting or purchasing video games that had an ESRB rating of AO or M and required posting of signs with 30 point font or larger by video game merchants or retailers that notified minors of the prohibition.	In concluding that the Act failed strict scrutiny, the Court held there were was no causal relationship between the exposure of violent video games and subsequent psychological dysfunction. Apart from the First Amendment issues, the lower court also found that the legislature could not constitutionally delegate to ESRB the power to determine which games are permissible. Finally, the lower court held that because the law forbidding the sale of AO and M games to minors was unconstitutional, the sign requirement was therefore unconstitutional as well. The Court of Appeals affirmed the lower court.
Oklahoma	*Entertainment Merchants Ass'n v. Henry*, 2007 WL 24743097 (W.D. Okla. 2007)	Okla. Stat. tit. 21 § 1040.76 (2006)	Prohibited the knowing display, sale, or other distribution to minors of any material considered "harmful to minors."	The Court found the Act failed strict scrutiny because it served no compelling interest and because no substantial evidence supported the State's claim of harm. The Court further noted that because the act prohibited the sale of video games harmful to minors whether supervised or not by an adult, the act overreached and enforcement "would presumably lay penalties on parents, guardians, and others lying far outside the sphere of retail." Also, the statute was unconstitutionally vague because average citizens did not know what was or was not covered by the act. The words "interactive video game," "graphic," "glamorized," "gratuitous," "realistic video violence," and "brutal violence" were not defined.
St. Louis	*Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003)	St. Louis County Ordinance No. 20,193 (Oct. 26, 2000)	Ordinance prohibited sale, rental, or other distribution of graphically violent video games to a minor without a parent or guardian's consent.	St. Louis County failed to advance any evidence that violent video games cause harm to minors. While video games might be characterized as "interactive," the best literature "draws the reader into the story" and leads readers to make judgments about the characters. Video games are thus similar to literature and other art forms.
Washington	*Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).	Wash. Rev. Code. § 9.91.180 (2003).	Prohibited the distribution of video games to minors that depict violence against law enforcement personnel.	The state failed to produce evidence showing a correlation between playing violent video games and actual violence against law enforcement and therefore the law represented an inappropriate restriction on the freedom of speech.

CHAPTER 5
RATINGS AND OTHER CONTROLS

The task force directing this study agrees that the primary responsibility for ensuring that children are protected from any harmful effects of VVGs lies with parents, with the assistance of the video game industry. This chapter will describe the measures taken by video game manufacturers and distributors to assist parents in this task. The Commonwealth has a constructive role in making parents aware of the resources that can help them make intelligent choices about selecting the VGs that are appropriate for their children.

ESRB and Its Purpose. The Entertainment Software Rating Board was established by the electronic game industry in 1994 to administer a voluntary system to aid parents in selecting games for their children that are appropriate for the child's age and whose content is considered suitable for the child. A description of the rating system was presented at the February 15, 2008, meeting of the task force by Patricia Vance, president of ESRB.[88]

In the industry's view each consumer has the right to decide what games he or she will allow their children to play. Since children differ in their response to games, it is each parent's responsibility to determine what is appropriate for his or her children.

Game Ratings. The rating system is composed of two equally important parts: content descriptors and rating categories. Currently, over 30 content descriptors are used, nine of which relate to violence: Violence, Cartoon Violence, Fantasy Violence, Violent References, Intense Violence; Sexual Violence, Animated Blood, Blood, and Blood and Gore. Content descriptors are adjusted contextually as the ratings become more restrictive. For example, crude humor that is listed for a Teen game might not be listed in the description of a violent and bloody Mature-rated game. Content descriptors are not meant to provide a menu of the game's contents, but rather to give notice of potentially sensitive characteristics that a consumer might want to know to decide whether to buy the game.

Rating categories suggest the age appropriateness of the games. Six rating categories are used: EC (Early Childhood); E (Everyone); E 10+ (Everyone Ten Plus); T (Teen); M (Mature 17+); and AO (Adults Only 18+). The EC rating is

[88] Statements in this chapter that are not otherwise attributed are based on the PowerPoint presentation made by Patricia Vance to the task force on February 15, 2008. This chapter also relies heavily on information set forth on the ESRB website http://www.esrb.org/ .

rarely used because most parents do not purchase game consoles for children until they are at least six years old,. The E rating includes most sports games and should not be confused with children's games. The rating relates to age-appropriateness of the content in the game, not the target demographic or skill level required to play it.

Few AO games are made, because most console manufactures do not allow games with that rating to be published on their systems and most retailers do not sell them. If an AO rating is assigned preliminarily, the manufacturer will typically alter the game and resubmit it in order to lower the rating to M. Because AO games are so marginal to the market, the games most troubling to those concerned with violent content are those rated M and T. The M rating indicates games that "may contain intense violence, blood and gore, sexual content and/or strong language." Games rated T "may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and/or infrequent use of strong language." There is aggression in E and E-Ten-Plus games, but those categories do not apply to content that might upset children or show realistic physical aggression against humans. The ratings are less restrictive if the violence is against objects or depicted in a comical or slapstick fashion. The ratings also indicate when there is the possibility for exposure to user-generated content, which is impossible for ESRB to rate.

The ESRB assigned over 1,500 ratings in 2007, a 22% increase over 2006. The E rating applies to 59% of the games rated in 2007 and has been easily the most widely used over the past three years. The M rating accounts for only 6% of the ratings assigned. This share has diminished in the past three years, the only category to do so. In ESRB's view the media exaggerate the importance of this rating relative to its significance in the market. A popular misconception is that the M games are the best sellers, but they represented only 15% of sales, behind E at 45% and T at 28%. In 2007 only four M games made the top 20 in sales; this is consistent with most previous years.[89]

If a game is published on different consoles,[90] it may be rated separately for each system. This is because each of those platforms offers different features or capabilities, so the game may have different content or enhanced audio-visual resolution on them.

Ratings Process. ESRB employs a staff of raters, who are adults over age 18 and are recruited from a culturally diverse population. Not all raters are parents, but some form of experience with children is required, whether by

[89] Entertainment Software Association, "Essential Facts about the Computer and Video Game Industry." This annual report is available at
http://www.theesa.com/facts/pdfs/ESA_EF_2006.pdf ;
http://www.theesa.com/facts/pdfs/ESA_EF_2007.pdf ; and
http://www.theesa.com/facts/pdfs/ESA_EF_2008.pdf .

[90] Consoles are the control devices that enable the player to play a video game. The most important consoles at this time are Nintendo Wii, Microsoft Xbox and Xbox 360, and Sony PlayStation 2 and PlayStation 3.

profession or personal experience. Raters must be able to evaluate all the factors of a game, while being sensitive to the differences between a child's reaction to games and an adult's. The most important trait for a rater is good judgment. Each rater goes through significant training on the various factors to consider when rating a game and to develop skill in applying the rating descriptions consistently to particular games. Raters are shown game content over several days, showing how games were rated previously and the relevant types of content. Important factors include context, frequency, reward structure, player control, intensity, and parity. Context is vital, as is consistency in the assignment of ratings, which is the most important factor in maintaining consumer trust. At least three raters are used for each submission. Raters have no ties to the industry and are prohibited from having any contact with submitting companies.

At the start of the ratings process, the game publisher submits to the ESRB extensive documentation about the game. This disclosure includes all pertinent game content, frequency of that content, the reward system, the most extreme content, lyric sheets for soundtracks of the games, a highlighted script, and a DVD of the specific pertinent content within the context of how someone playing the game would experience it. ESRB staff records tracking codes in the DVD whenever pertinent content occurs. Since 2005, publishers are also required to disclose locked-out, code-based content. If the written disclosure or DVD submitted is incomplete or inconsistent, ESRB returns the submission to the publisher. Once the submission is determined to be complete, the raters review the DVD and make a recommendation about which rating category and content descriptors they deem most suitable, and submit it for the ESRB's review and approval. Once the rating is finalized, ESRB notifies the publisher of it.. The publisher can then either accept the rating or modify the game and resubmit, in which case the process starts over.

The raters' initial determination is usually adopted by ESRB. However, the Board occasionally alters the raters' recommendation based on consistency with prior ratings. Rating assignments involve an interplay of objective standards and subjective judgment, and there can be disagreement among raters with respect to a game that seems to lie on the borderline between categories or descriptors. There may be some disagreement about assigning M versus T, but disagreement in assigning M versus E is very unlikely. The more categories exist, the more often there will be disagreements about applying neighboring categories to particular games. Through research conducted by Peter D. Hart, ESRB has found that 82% of the time parents agree with the ratings, and 5% of the time they think the ratings are too strict. ESRB has also consistently found in its research that most parents consider sexual content and strong language more offensive than violence.

Ratings Enforcement. ESRB ratings are determined for virtually all games sold in the United States and Canada. The console manufacturers do not allow anyone to publish a game without an ESRB rating, and most major retailers do

not carry unrated games. The comprehensive coverage of the ESRB system largely depends on the role the retail segment and console manufacturers will continue to play. If more games can be downloaded from the Internet and consoles become a less dominant platform for games, the coverage of the rating system may diminish.

A publisher who submits a game to the ESRB is legally bound by the latter's rules, including complete content disclosure, display of ratings information, and responsible marketing. Publishers must provide a finished copy of the product as marketed. ESRB makes sure that game publishers meet the guidelines for display of the content descriptors and ratings, and is empowered to penalize companies that do not. Advertising is monitored and frequently pre-cleared. The rules limit what publishers may show in an advertisement. For example, ads for a T or M game may not show the most intense violence. ESRB monitors all advertising media, including print, TV, and Internet. Advertising placement on TV is monitored through Nielsen Media Research. M games cannot be advertised in any TV program if 35% or more of the audience is under 17 or in any publication if 45% or more of its readership is under 17. The FTC has not reported any violations of these guidelines. However, the FTC has criticized the advertising guidelines as too lenient, in that they permit many children under 17 to view ads for M-rated games. The FTC monitored advertising in three game enthusiast magazines (*Electronic Gaming Monthly*, *GamePro*, and *Nintendo Power*), and found that the 45% print ad standard prohibits advertising only in *Nintendo Power*.[91]

ESRB's rigorous and detailed enforcement system comprises seven classes of violations that address advertising, display of ratings, and intentional failure to submit all pertinent content. Sanctions vary in severity from fines of up to $1 million to orders that companies withdraw products from the market. ESRB can revoke ratings or refuse to rate products from an uncooperative publisher. Incomplete or inaccurate disclosure of pertinent content may prompt a recall, if the failure results in a change to the rating category. A recall can often cause more commercial damage to a publisher than a fine.

Public Outreach. In recent years, ESRB has launched several initiatives to broaden public awareness of the rating system and of its usefulness in assisting consumer choice. Since 2003, the "OK to Play?" advertising campaign has included public service announcements (PSAs), billboards, television, radio, and ads in magazines and other media targeted to game enthusiasts and parents. National and local campaigns were conducted just before the holiday shopping seasons in 2006 and 2007. To date, they have generated over 700 million impressions on TV around the country. Each TV campaign also has a

[91] Federal Trade Commission, Marketing Violent Entertainment to Children: A Fifth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (FTC, April 2007) available at http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf (FTC Report).

corresponding radio version that includes conventional and satellite stations in English and Spanish. To date over 200 million radio impressions have been generated. ESRB has developed partnerships with state and local officials that have resulted in public information campaigns. These have featured Governors, Attorneys General, and other well-known officials in PSAs reminding consumers to check the ratings before they buy games. Informational brochures are available and PSAs are shown in some retail stores. In-store signage about ESRB ratings and other retailer communication vehicles generate over one billion impressions a year. Examples of the print and TV ads are available on the ESRB website's media library http://www.esrb.org/about/media_library.jsp .

ESRB works with the national PTA and local chapters to distribute information on ratings, parental controls, and ways to protect children from online games. An especially useful resource for parents is a 17-page pamphlet jointly published by the ESRB and the PTA, entitled "A Parent's Guide to Video Games, Parental Controls and Online Safety."[92] It describes the ESRB rating system and includes step-by-step instructions for installing parental control software on Xbox 360, Wii, PlayStation 3, and Windows Vista, as well as online safety measures, a family discussion guide, and a list of resources for parents. The Ratings Search Widget enables parents to put the ratings information on their computer desktop or personal web page, and the widget can be forwarded to friends.[93] An extensive list of online resources is provided in ESRB's website.[94]

In 2007 there were 7.1 million visitors to ESRB's website, 4 million searches for game ratings, and over 4,000 consumer inquiries received and answered. In 2008 ESRB launched an opt-in e-mail service called "ParenTools" at www.esrb.org/parentools that provides parents with biweekly updates on new ratings, customized to their selection of rating categories and game systems. GamerTools, a similar newsletter geared more towards the gamer audience, is available as well. ESRB has also introduced "rating summaries," which provide more descriptive information about game content, including supplemental information about the context and relevant content that factored into each assigned rating. The rating summaries are available on ESRB's website, the ParenTools and GamerTools newsletters, a ratings search "widget" application, and a new mobile website at m.esrb.org . The mobile website enables parents to quickly and easily search for rating summaries while in the store buying games. ESRB continues to conduct research to identify additional tools parents will find useful.

[92] The pamphlet is available at http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf (visited October 2, 2008).

[93] See http://www.esrb.org/about/widget/widget-consumer.jsp (visited October 6, 2008).

[94] See http://www.esrb.org/about/resources.jsp (visited October 2, 2008).

Effectiveness of the Ratings. ESRB believes that its rating system has been highly effective in informing parents about the content of video games and in preventing children from buying games that are inappropriate to their age. The FTC has reported to Congress on games, music, and movies since 2000. Its latest report commends ESRB for the effectiveness of its program, including a high level of parental awareness. The FTC's study also found that 89 percent of parents currently claim they are involved in game purchases, and 87 percent say they are either "somewhat" or "very satisfied" with the ratings. According to a survey by Peter D. Hart Research Associates commissioned by the ESRB, 69-percent of parents say ESRB ratings are the "most" or a "very important" part of their decision on whether to buy or rent a game.

Research has found that parents of children over the age of 13 are twice as likely to allow their children to play M-rated video games than parents of younger children; the M rating designated games appropriate to 17 years or older. Thus, many parents apparently believe their own children are mature enough to play M games at age 13. In the industry's view the correctness of the judgment is not for a rating board to determine. Research shows an increase in the percentage of parents who play video games with their children. Research also indicates that parents are informed about the ratings and content, and they judge that their children can distinguish a game from reality.

Controls have been developed that enable parents to block content based on ESRB ratings. Even if the child obtains a game from a friend, he or she will not be able to play it at home on a blocked system. Awareness of this option is already prevalent among parents, but ESRB is trying to inform all parents of these tools in conjunction with the ratings.

In their book *Grand Theft Childhood*, Lawrence Kutner and Cheryl Olson observe that the ESRB system is "more effective and more informative than other media rating systems."[95] They acknowledge that creating a rating system for video games may be even more difficult than researching their effects (163). They nevertheless advance a few criticisms of the system. In their view, the rating system may overemphasize realism as opposed to consequences and rewards; children may be more adversely affected by a fantasy game where the victims of violence disappear than by a more realistic game that shows the victim bleeding and in pain. The rating of a realistic game is the same whether the protagonist accumulates or loses points from killing other characters (11, 184-85). However, ESRB policy includes the reward system as one of many contextual factors that raters are directed to take into account in determining the rating assigned to a game.[96] Kutner and Olson further observe that many parents are frustrated that the ratings and the information on the game box do not sufficiently

[95] Kutner and Olson, *Grand Theft Childhood*, 10. Subsequent page references are in the text.

[96] http://www.esrb.org/ratings/faq.jsp#8 ; ESRB Power Point presentation to HR 94 Task Force, February 15, 2008, p. 10.

inform them about game content (173, 184-85). They suggest that printouts be available in stores that would allow parents to access the detailed narrative descriptions provided by such resources as whattheyplay.com, Gamespot.com, or CommonSenseMedia.org .[97] The rating summaries recently instituted by ESRB may help alleviate concerns about insufficient information by providing an easily accessible source of additional information about game content, including the game's reward structure.

Enforcement of Age Restrictions. An important byproduct of the rating system is that retailers prevent children from purchasing games that are rated for older ages. The ESRB supports retailer policies by providing training materials to enable store personnel to enforce age restrictions. Customized store signage available from ESRB includes basic ratings information and definitions, along with "OK to Play?" and "We Check ID" signs. Smaller independent stores, who represent about 10% of the market, are included through a large wholesaler.

The leading national retailers support ESRB ratings education and enforcement of their store policies not to sell computer and video games rated M to customers under age 17 without permission from a parent or guardian by using one or more of the following strategies to ensure implementation:

- Provide sales associate training, including information about the rating system and store policy
- Use of register prompt messaging for cashiers when the bar code of an M-rated game is scanned
- Implementation of age verification by cashiers and other store personnel
- Display of ratings education and store policy signage
- Participation in or conduct of store audits measuring compliance
- Taking appropriate action against managers, sales associates, cashiers, and other employees who do not comply with their video game sales policies. Appropriate actions for non-compliance vary by retailer and can include retraining or punitive measures, including disciplinary action or termination.[98]

In 2006, the ESRB Retail Council (ERC) was created to improve enforcement by establishing a forum for communication among retailers about ratings enforcement. Currently the ERC includes Best Buy, Circuit City, Game Stop, Movie Gallery (Hollywood Video, Game Crazy), Sears/Kmart, Target, Toys R Us, and Wal-Mart. ERC members adopted a minimum set of voluntary self-regulatory measures in support of the ESRB ratings and their store policy called the Ratings Education and Enforcement Code, which is posted on ESRB's web site.[99] The code requires retailers to enforce their store policies, display signage

[97] Kutner and Olson, conference call with commission staff, August 22, 2008.
[98] E-mail from task force member Sally Jefferson to commission staff, October 2, 2008.
[99] Ibid. The website is at http://www.esrb.org/retailers/retail_council.jsp

about the ratings, train store associates, and participate in twice yearly audits to evaluate compliance. The council established a method for resolving customer complaints: if a customer complains that a store sold an M-rated game to his minor child, the store must provide a store credit or refund.

To monitor compliance, the ERC has conducted a series of anonymous shopping audits. In November 2007 the shopping audit covered more than 900 store locations. The audit found that 76% of the stores enforce store policy and 77% display the ratings education signage properly. Compliance has increased every year. The council enables comparison of compliance levels in order to encourage improvement. The system tabulates store-level data to enable corporate management to take measures to improve compliance at individual stores. Another shopping audit is planned for spring 2008.

The 2008 FTC review of enforcement of age restrictions found compliance for video games to surpass that for movies, CDs, or DVDs. Twenty percent of underage purchasers were able to buy M-rated video games. The corresponding figures for R-rated movies, R-rated DVDs, and PAL CDs were 35 percent, 47 percent, and 56 percent, respectively. The enforcement failure rate ranged from 6 percent at Game Stop/EB Games to 40 percent at Hollywood Video.[100]

Other Resources. ESRB game ratings are not the only source of information parents can turn to aid their decision on whether to buy a game. The title of the game and the illustrations and descriptions on the cover can provide clues about the nature of a game. There is also an extensive set of magazines and websites describing new games, as well as regular newspaper reviews.

[100] Federal Trade Commission, "Undercover Shoppers Find It Increasingly Difficult for Children to Buy M-Rated Games" http://www.ftc.gov/opa/2008/05/secretshop.shtm (released May 8, 2008, corrected May 16, 2008, modified June 20, 2008).

CHAPTER 6
RECOMMENDATIONS

The Task Force on Violent Interactive Video Games established under 2007 House Resolution No. 94 makes the following recommendations to the General Assembly:

The General Assembly should consider devoting resources to the establishment of a publicly funded consumer education program on video and computer games. Such an initiative could help parents make informed choices regarding the video games they allow their kids to play. A possible model is a statute enacted by the District of Columbia.[101] Its operative provision directs the District's Department of Consumer and Regulatory Affairs to "develop a consumer education program to educate consumers about the appropriateness of video and computer games for certain age groups, which may include information on video and consumer game rating systems and the manner in which parental controls can enhance the ability of parents to regulate their children's access to video and computer games."

The members of the task force agree that parents bear the primary responsibility for protecting their children from whatever harmful effects may arise from violent video games and other media. The Commonwealth can help by helping parents connect with the informational resources they need for this purpose, particularly the ESRB ratings, the informational websites, and the parental control mechanisms described in chapter 5. The task force expresses no opinion as to what agency should be charged with this responsibility; however, that agency should be afforded sufficient additional resources to ensure effective performance of the mandate.

The General Assembly must avoid enacting restrictive legislation similar to those that have been invalidated by the Federal courts. As chapter 4 shows, a number of states and municipalities have attempted to apply restrictions and impose penalties on the sale of violent video games to children. All such measures have been struck down by the Federal courts as violating the First Amendment or the Due Process Clause of the Fourteenth Amendment. The United States Constitution as interpreted by controlling legal precedent makes it virtually impossible for any such law to be upheld in court. The members of the task force agree that the General Assembly should acquiesce to the uniform position of the courts by not attempting to enact any statute similar to those that

[101] D.C. Code § 28-3906(a)(2A).

have been invalidated elsewhere, because the passage of such a law would be an exercise in futility. If the Commonwealth or a Pennsylvania municipality is unwise enough to enact restrictive legislation, it is very likely to be ordered to pay the legal costs incurred by the challengers as well as its own costs of defending the laws—money better spent on the media educational program mentioned above. While the invalidated legislation reflects concerns that may be legitimate, the Constitution requires that those concerns be addressed in other ways.

The task force calls upon the academic community of this Commonwealth to pursue more scientific, objective research on the positive or negative effects of video games and other modern media on children and young adults. Research on this topic is difficult because of the recency of these media, their rapid evolution, and ethical restraints on the exposure of human subjects to harm, among other factors. Yet too little is known about such issues as the effect of interactivity and the interconnectedness of media and how they shape the perceptions and the character of users over extended periods of time. The research should include studies on how video games can be used to enhance the social and learning skills of our youth as well as the avoidance of negative effects. The insights gained from sound research can help public authorities and industry groups like the ESA and the ESRB to craft the content and the dissemination strategies for programs of public education.

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