

COMMENT

IT'S ALL FUN AND GAMES UNTIL SOMEONE GETS HURT: THE EFFECTIVENESS OF PROPOSED VIDEO-GAME LEGISLATION ON REDUCING VIOLENCE IN CHILDREN*

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I. INTRODUCTION

Recently, one military expert described video games as “firearms trainers at best, murder simulators at worst.”¹ Since the infancy of the video-game industry, there has been controversy.² Early critics voiced concern that video games turned children into brainless zombies.³ Now the critics suggest that children are turning not only into brainless zombies, but brainless zombies with a disturbing penchant for gross violence.⁴ It is estimated that 92% of children between the ages of two and seventeen play video games, and 20% of adolescents play video games compulsively.⁵ Those percentages

1. DAVE GROSSMAN & GLORIA DEGAETANO, STOP TEACHING OUR KIDS TO KILL: A CALL TO ACTION AGAINST TV, MOVIE & VIDEO GAME VIOLENCE 111 (1999). Lieutenant Colonel Dave Grossman, one of the coauthors of *Stop Teaching Our Kids to Kill*, is a military psychologist. See Henry Jenkins, *Make Meaning, Not War: Rethinking the Video Game Violence Debate*, INDEP. SCH., Summer 2004, at 38, 41 (discussing the arguments Grossman put forth).

2. Lauren Gonzalez, *When Two Tribes Go to War: A History of Video Game Controversy*, <http://www.gamespot.com/features/6090892/index.html> (last visited Mar. 30, 2007) (noting that controversy began even before video games with the advent of pinball machines).

3. STEVEN L. KENT, THE ULTIMATE HISTORY OF VIDEO GAMES 347 (2001).

4. See *id.* at 543–55 (documenting the May 1999 Senate hearing concerning the impact of violent video games on children, especially the testimony of Lieutenant Colonel Dave Grossman).

5. DAVID WALSH, NAT’L INST. ON MEDIA & THE FAMILY, 6TH ANNUAL VIDEO AND COMPUTER GAME REPORT CARD (2001), available at http://www.mediafamily.org/research/report_vgrc_2001-2.shtml.

result in a large number of violent zombies, both on the screen *and* glued to the controller.

With the recent controversy surrounding *Grand Theft Auto: San Andreas* (*GTA: San Andreas*),⁶ proponents of video-game regulation have begun clamoring for a change once again,⁷ specifically calling for regulation similar to the proposed Protect Children from Video Game Sex and Violence Act of 2003 (Violent Video Game Act).⁸ In June 2005, video-game players discovered a secret minigame in *GTA: San Andreas*.⁹ As the objective of this minigame, players attempt to engage in sexual acts with a virtual female character.¹⁰ The discovery of this minigame catalyzed cries from politicians and various watchdog groups for governmental regulation of the video-game industry.¹¹ These cries renewed fervor over the already existing controversy surrounding violence and sex in video games.¹²

The technology available in recent video games—allowing the game player a first-person interaction with the game’s graphical surroundings and characters—has advanced the controversy.¹³ As the reality, albeit virtual, of these new games

6. Victor Godinez, *Just How Violent Are These Games?*, DALLAS MORNING NEWS, Nov. 17, 2004, at 1E (detailing the author’s five-minute span playing *Grand Theft Auto: San Andreas* (*GTA: San Andreas*), which included violent car-jacking, assault on a female, vehicular homicide, crack houses, murder, gangs, prostitutes, and extremely vulgar language).

7. See, e.g., Brian D. Crecente, *Video-Game Execs Playing up to Clinton*, ROCKY MOUNTAIN NEWS, Aug. 9, 2005, at 26A (noting Senator Clinton’s calls for new legislation and a Federal Trade Commission (FTC) investigation).

8. Protect Children from Video Game Sex and Violence Act of 2003, H.R. 669, 108th Cong. (2003). The bill has not garnered the requisite support in order to pass in the House of Representatives. See Russell Morse, Comment, *If You Fail, Try, Try Again: The Fate of New Legislation Curbing Minors’ Access to Violent and Sexually Explicit Video Games*, 26 LOY. L.A. ENT. L. REV. 171, 179 (2006) (citing Int’l Game Developers Ass’n, Anti-Censorship Lobbying, <http://www.igda.org/censorship/lobbying.php> (last visited Apr. 12, 2007)) (reporting on the efforts to keep the Protect Children from Video Game Sex and Violence Act of 2003 alive despite the Act’s failure to become law immediately).

9. Victor Godinez, *Forget Child’s Play: “Auto” for Adults Only*, DALLAS MORNING NEWS, July 21, 2005, at 1A.

10. Christopher Hutsul, *Stores Pull Game After Porn Revealed*, TORONTO STAR, July 22, 2005, at A01.

11. See, e.g., Press Release, Hillary Rodham Clinton, Senator Clinton Announces Legislation to Keep Inappropriate Video Games out of the Hands of Children (July 14, 2005), <http://clinton.senate.gov/news/statements/details.cfm?id=240603>.

12. KENT, *supra* note 3, at 90–92 (indicating that the furor over violence in video games stretched as far back as 1976 with the release of *Death Race*, a car game aimed at running over “gremlins” with surprisingly human vocalizations).

13. Desson Thomson, Editorial, *“Doom”: Your Standard Weapon of Mass Destruction*, WASH. POST, Oct. 21, 2005, at T45 (relating the revolutionary impact of *Doom*

increases, so too might the effect these games have on the realities and choices of their youthful players.¹⁴ Some current research supports a causal link between violent video games and violence in children, while other research rejects the existence of any such link.¹⁵

This Comment examines how enacting the Violent Video Game Act, or a similar statute, would fail to reduce the problem of violence in children, if any problem actually exists.¹⁶ The Violent Video Game Act, which imposes criminal liability upon retail sellers, is an incomplete solution.¹⁷ It fails to remedy all of the market failures that allow exposure of violent and sexual video games to children.¹⁸ Specifically, the proposed legislation fails to provide for educational programs aimed at parents. Including a parental education component in the legislation would address the persistent market failure of parents allowing their children access to violent video games.

Part II of this Comment summarizes the history of the video-game controversy and examines the main complaints lodged against the video-game industry from a variety of sources. Part III analyzes the evidence supporting and refuting a causal link between violence and video games. Part IV examines the current regulatory scheme, the proposed legislation, and suggests additional provisions necessary to make any regulatory system effective. In Part V, this Comment concludes that any proposed legislation similar to the Violent Video Game Act would address a potentially nonexistent problem—violence in children attributable to video games. Furthermore, assuming a problem does exist, the Act's costs far outweigh any prospective benefits because the Act fails to adequately address parents allowing their children to access potentially dangerous video games.

on the video-game industry, whilst taking a short jab at the critically panned, movie version of *Doom*).

14. See Stewart Woods, *Loading the Dice: The Challenge of Serious Videogames*, 4 INT'L J. COMPUTER GAME RES. (2004), <http://www.gamestudies.org/0401/woods>.

15. See *infra* Part III (acknowledging the litany of evidence supporting and, on the other hand, refuting any causal link between video games and violence in children).

16. See Protect Children from Video Game Sex and Violence Act of 2003, H.R. 669, 108th Cong. sec. 3(a), § 2733 (2003) (delineating the proposed penalties for violating the Act, which are limited to retail sellers only).

17. *Id.*

18. See also *infra* Part IV.B.1 (discussing at length the market failure in which parents buy their children violent games, ignoring the possibility that the games might be harmful); *cf.* H.R. 669, sec. 3(a), § 2733 (penalizing only retailers and ignoring the impact parents have on the potential problem).

II. A HISTORY OF THE VIDEO-GAME CONTROVERSY

One might believe that controversy surrounding video games is novel, arising with the new, more graphically capable, sexually explicit, and violent video games.¹⁹ However, violent and sexual video games have been the target of cries for regulation since the inception of the industry.²⁰ Recently, the cries have intensified.²¹

Death Race was released in 1976, resulting only in a rally by political leaders for video-game regulation to curb the portrayed violence.²² Using the crude graphics available in the 1970s, *Death Race* required players to drive a car over stick-figure “gremlins” that screamed like people when run over.²³ Tombstones replaced these gremlins, providing an additional obstacle the gamer had to avoid.²⁴ The game’s original title—*Pedestrian*—highlights the cause for the controversy.²⁵ The original title obviously indicates that the preliminary game design called for players to run over stick-figure humans, and not “gremlins” as advertised.²⁶

The controversy continued with the release of other violently and sexually themed games like *Custer’s Revenge*,²⁷ *Night Trap*,²⁸

19. See, e.g., Steve Lohr, *In Video Game, A Download Unlocks Hidden Sex Scenes*, N.Y. TIMES, July 11, 2005, at C3 (documenting the controversy surrounding *GTA: San Andreas* due to the discovery of a lewd scene buried in the game’s code, playable with a simple download).

20. See KENT, *supra* note 3, at 90–92, 346–48, 543–55 (detailing the history of the video-game controversy from 1976 until the Senate hearing in 1999).

21. See, e.g., Brian D. Crecente, *Gaming Industry Braces for Backlash After Raunchy Discovery in “San Andreas,”* ROCKY MOUNTAIN NEWS, July 29, 2005, at 26D (illustrating that video-game controversy is alive today and has intensified with more frequent calls for regulation).

22. See KENT, *supra* note 3, at 90–92; see also Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-2.html>.

23. See Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-2.html> (describing the *Death Race* arcade game in detail, the turmoil surrounding it, and specifically the gremlin-human interchangeability of the onscreen characters).

24. *Id.*; see also KENT, *supra* note 3, at 90–92 (noting the disturbing similarity between the “gremlins” and humans that sparked the first real controversy about violence in video games).

25. Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-2.html>.

26. See *id.* The human targets would more closely mirror the movie *Death Race 2000*, after which the game was modeled. *Id.* *Death Race 2000*, starring Sylvester Stallone, had the tagline, “In the year 2000, hit and run driving is no longer a felony. It’s the national sport!” *Id.*

27. See *id.* at <http://www.gamespot.com/features/6090892/p-3.html> (noting that the goal of *Custer’s Last Revenge* is the rape of a Native American girl, rewarding players that win the game with a low-tech scene of the rape taking place).

28. See *id.* at <http://www.gamespot.com/features/6090892/p-4.html> (indicating that *Night Trap* mainly involves scenes of vampires laying in wait in the rooms and showers of unsuspecting coeds while players watch the coeds, and lay traps for the vampires).

and *Duke Nukem*.²⁹ However, two games in particular brought the controversy to a crescendo in the 1990s—*Mortal Kombat* and *Doom*.³⁰ These two games shared a striking similarity: copious amounts of graphic carnage.³¹ *Mortal Kombat*, released in 1992, pitted players against each other in a side-view hand-to-hand fighting arcade game, similar to other coin-operated arcade games popular during the 1990s.³² It became (in)famous for both its spectacularly medieval settings, rife with opportunities for fantastic deaths, and its exceedingly gory finishing moves, called “fatalities.”³³

Doom, released in 1994, absolutely revolutionized the video-game industry.³⁴ *Doom* is a so-called “first-person shooter” game.³⁵ First-person shooter games harness advances in visual graphics technology, allowing the game players to see onscreen exactly what the video-character would see in the virtual environment.³⁶ Because of this first-person perspective, players interact with the virtual environments in a more personal way, often mentally inserting themselves into the action.³⁷ Some critics observe that the digital characters in first-person shooter games lack an identifiable personality; this homogenization of the virtual characters allows players to further project themselves into the

29. See *id.* (explaining that *Duke Nukem* provides a unique game because, in addition to the excitement of a “shooting game” via a first-person interface, *Duke Nukem* offers a main character that has a strong personality that is both “abrasive and sexist”).

30. See William Cross, Note, *Hot Coffee & Freeze-Dried First Amendment Analysis: The Dubious Constitutionality of Using Private Ratings for Public Regulation of Video Games*, 4 FIRST AMENDMENT L. REV. 299, 308–09 (2006). See generally KENT, *supra* note 3, at 466–78 (detailing the December 1993 Senate hearings, which ultimately gave rise to the self-regulatory board of the video-game industry, the Entertainment Software Rating Board (ESRB)); Matthew Hamilton, Comment, *Graphic Violence in Computer and Video Games: Is Legislation the Answer?*, 100 DICK. L. REV. 181, 184–86 (1995) (commenting on the violent nature of both *Doom* and *Mortal Kombat*).

31. See Hamilton, *supra* note 30, at 184–86.

32. See KENT, *supra* note 3, at 463–66 (detailing the phenomenon of *Mortal Kombat*).

33. *Id.* at 464; Stephanie Griest, ‘*Mortal Kombat’s*’ Bloodless Coup, WASH. POST, Aug. 28, 1995, at D1 (comparing the lack of blood and gore in *Mortal Kombat*, the movie, to the copious amounts in *Mortal Kombat*, the video game, and relaying a child’s description of the dangerous settings for the fights).

34. See KENT, *supra* note 3, at 457, 459–60 (emphasizing the long-lasting impact *Doom* has had on the video-game world).

35. *Id.* at 459.

36. See Woods, *supra* note 14 (opining that, when a first-person perspective is utilized, the decisions of the character and the player become intertwined and confused, thus allowing a much more personal interaction with games using the first-person interface).

37. *Id.*

virtual action.³⁸ *Doom* exemplifies this technique—defly coupling the ability of game players to visualize themselves in the action with a simple plotline. Players meander through mazes and use an assortment of weapons from chainsaws to rocket-launchers, destroying anything and everything in the player's path in order to escape from hell.³⁹

These games prompted the introduction of the Video Game Rating Act of 1994 by Senators Joseph Lieberman, Herb Kohl, and Byron Dorgan.⁴⁰ The Video Game Rating Act sought to create the Interactive Entertainment Rating Commission, a regulatory agency designed to enforce the ratings of video games and penalize the selling of games to underage purchasers.⁴¹ To preempt federal regulation, the video-game industry began self-regulation in September 1994 by establishing the Entertainment Software Rating Board (ESRB).⁴² The ESRB rates and labels video games according to their age-appropriateness, and then relies on the retailers of video games to sell only to age-appropriate customers.⁴³

Nevertheless, the creation of the ESRB did not halt violent video games or the concerns surrounding them.⁴⁴ With the release of the *Grand Theft Auto (GTA)* series, the turmoil rose to its current pitch.⁴⁵ *GTA* cleverly blends solid gameplay and bloody,

38. See Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-4.html> (noting the current theory that the characters in video games have become more bland and formulaic in order to allow the game player to disregard the character and see himself performing the action).

39. See KENT, *supra* note 3, at 457–60; see also Graeme Hammond, *Doom—What Started as a Game Became a Monster*, SUNDAY TELEGRAPH MAG. (Sydney), July 27, 2003, at 20 (describing *Doom*, its lasting impact, and the potentially negative consequences of that impact).

40. Video Game Rating Act of 1994, S. 1823, 103d Cong. (1994); see also Video Game Rating Act of 1994, H.R. 3785, 103d Cong. (1994) (introducing a similar bill in the House).

41. S. 1823, § 3; see also KENT, *supra* note 3, at 466–80 (detailing the complex relationships between video-game industry executives and proponents of video-game regulation that undermined the effectiveness of the Senate hearings); Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-5.html> (summarizing the reformation attempts in 1993).

42. See KENT, *supra* note 3, at 479–80; see also Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-5.html> to <http://www.gamespot.com/features/6090892/p-6.html> (demonstrating the self-regulatory nature of the ESRB).

43. See *infra* Part IV.A (summarizing the function of the ESRB and its ability, or lack thereof, to enforce its ratings at the retail level).

44. See, e.g., Lynda Gledhill, *Judge Blocks Ban on Sale of Violent Video Games to Minors*, S.F. CHRON., Dec. 23, 2005, at A1 (noting that as of the end of 2005, controversy surrounding violent video games was still very much a newsworthy story as the fight to restrict violent video games from reaching children made it to the court system).

45. See Crecente, *supra* note 7 (tracking the current furor caused by *GTA: San*

complex missions into an appealing mix for diehard video gamers.⁴⁶ This cocktail has made *GTA* one of the most successful video-game series to date.⁴⁷ The *GTA* series requires players to mug, torture, carjack, murder for money, and assassinate police officers.⁴⁸ The series gained infamy when players discovered that a recent installment of the series, *GTA: San Andreas*, could be enhanced by downloading a modification (mod) that allowed players to engage in crude sexual acts with a female character.⁴⁹ The mod, dubbed “Hot Coffee,”⁵⁰ drew severe backlash from politicians, watchdog groups, and video-game insiders.⁵¹ As a result, the ESRB changed the rating for *GTA: San Andreas* from M (Mature) to AO (Adults Only).⁵² Most retailers, like Wal-Mart, refuse to sell any AO games and thus promptly removed the game from their shelves.⁵³

Even before the *GTA: San Andreas* controversy, politicians called for government regulation in order to ensure that children could not obtain age-inappropriate games because they believed that violent video games increased violence in children.⁵⁴ Most

Andreas and the ensuing call for governmental regulation, specifically Senator Clinton’s impassioned call for timely and effective legislation that would penalize retailers for sales to minors).

46. See Neil Drumming, *For Adults Only; Grand Theft Auto Takes Videogames to a Whole New Extreme*, ENT. WKLY., Nov. 12, 2004, at 12 (detailing the immense popularity of the *Grand Theft Auto (GTA)* games—selling more than sixteen million copies—and their extreme content).

47. See Bill Hutchens, *Grand Theft Auto Games Come to Xbox*, NEWS TRIB. (Tacoma, Wash.), Sept. 5, 2003, at 21 (announcing that the popular *GTA Series* would be made available for the Xbox, Microsoft’s video-game console).

48. See Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-10.html> to <http://www.gamespot.com/features/6090892/p-11.html> (examining the *GTA* games and their enormous popularity).

49. See Godinez, *supra* note 9 (chronicling the modification (mod) fiasco and the responses to the event from various industry groups).

50. See Hiawatha Bray, *Sex Scene Stirs up a Fuss over Grand Theft Auto*, BOSTON GLOBE, July 9, 2005, at C1 (detailing the “Hot Coffee” scandal and mentioning the origins of the mod name). In the unmodified version of the action in *GTA: San Andreas*, a female character asks the player in for a “cup of coffee,” which spawned the “Hot Coffee” mod title. *Id.*

51. See Godinez, *supra* note 9.

52. *Id.*; see *infra* text accompanying note 121 (providing definitions of each of the ratings offered by the ESRB).

53. See Godinez, *supra* note 9; see also Sean Dodson, *Storm in a Hot Coffee Cup*, GUARDIAN (London), Aug. 4, 2005, at 21 (recognizing that, in addition to the United States, Australia banned the AO-rated version of *GTA: San Andreas* and that the game also stirred up trouble in England).

54. See Protect Children from Video Game Sex and Violence Act of 2003, H.R. 669, 108th Cong. (2003); see also Congressman Joe Baca, Fact Sheet on H.R. 669: Protect Children from Video Game Sex & Violence Act of 2003, <http://www.house.gov/>

notably, Representative Joe Baca introduced the Violent Video Game Act.⁵⁵ The Act placed liability on any retailer selling “Mature” games to customers under the ESRB-recommended age of seventeen.⁵⁶ The proposed fines were \$1,000 for the first infraction and up to \$5,000 for repeat offenses.⁵⁷ This type of retailer liability closely parallels that imposed on retailers for selling alcohol, tobacco, or pornography to underage purchasers.⁵⁸ The proposed bill ultimately failed to pass in the House because the video-game industry lobbied against governmental regulation, pointing to the successes of the ESRB.⁵⁹

With the recent controversy surrounding violent video games like *GTA: San Andreas*, Senator Hillary Clinton and other politicians continue to malign the ESRB and to promote video-game legislation nearly identical to Representative Baca’s proposal.⁶⁰ Because the Violent Video Game Act serves as the model legislation for proponents of video-game legislation, the Act also serves as the model legislation in this Comment.⁶¹

[baca/hotissues/video_factsheet.htm](#) (communicating Representative Baca’s concerns about violent video games and his proposed Violent Video Game Act as the solution).

55. H.R. 669.

56. *Id.* sec. 3(a), §§ 2731(3), 2732 (defining minor as an individual younger than eighteen years of age and prohibiting the sale or rental “to a minor [of] any video game that depicts nudity, sexual conduct, or other content harmful to minors”).

57. *Id.* sec. 3(a), § 2733.

58. *See, e.g.*, TEX. ALCO. BEV. CODE ANN. § 106.03 (Vernon 1995 & Supp. 2006) (defining the sale of alcoholic beverages to minors as a misdemeanor); TEX. HEALTH & SAFETY CODE ANN. § 161.082 (Vernon 2001) (preventing minors from gaining access to tobacco products); TEX. PENAL CODE ANN. § 43.24 (Vernon 2003) (regulating the distribution of harmful material to minors with particular focus on sexually explicit material and failing to mention violent material expressly). Apparently, for negative externalities involving minors (for example, violence, addiction, corruption from tobacco, alcohol, and pornography), the customary cure seems to be regulation of advertising and restriction of distribution. *See, e.g.*, Gregory M. Saylin & Leanne N. Webster, *Utah’s Newest Anti-Spam Law: The Child Protection Registry*, UTAH B.J., Nov.–Dec. 2005, at 33 (discussing liability of e-mail marketers for selling or advertising tobacco, alcohol, or pornography to minors via spam e-mails sent to minors). These “solutions” only diminish the supply, and neglect to address the demand for these harmful activities, potentially creating a perverse demand—but this effect is beyond the scope of this Comment. Sam Wylie, *Smoke and Mirrors*, TUCK PARADIGM, Fall 1999, http://mba.tuck.dartmouth.edu/paradigm/back_issues/fall1999/default.htm (describing the demand for cigarettes as inelastic because smoking is a habit that is so hard for people to stop).

59. *See* Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-6.html>.

60. *See* Press Release, Hillary Rodham Clinton, *supra* note 11 (documenting Senator Clinton’s call for a yet unnamed act proposing criminal fines for sales of video games to underage patrons); *see also* Misha Davenport, *Game Zone: Reviews, Tips and Trends on Video Games*, CHI. SUN-TIMES, Mar. 2, 2007, available at 2007 WLNR 4024436 (mentioning Senator Brownback’s effort to reintroduce video-game regulation bills).

61. While this Comment responds specifically to the proposed federal legislation,

Some states and cities have adopted similar acts limiting the sale of violent, sexual, or disturbing games to minors.⁶² However, courts have found most of these state laws to be unconstitutional infringements on the right to free speech protected in the First Amendment.⁶³ The remaining state laws are being contested by the video-game industry on similar First Amendment grounds but have not yet come before a court.⁶⁴

III. THE EVIDENCE CONCERNING A CAUSAL LINK BETWEEN VIDEO GAMES AND VIOLENCE IN CHILDREN

A. *Evidence Supporting a Causal Link Between Video Games and Violence in Children*

Some psychological and statistical evidence claims to demonstrate a causal link between violent video games and violence in children.⁶⁵ However, the studies do not necessarily provide conclusive results because psychologists cannot perform pure clinical experiments, only observational studies, which do not lend themselves to qualitative results.⁶⁶ To address these

the same analysis applies to state legislation that focuses myopically on regulating retailers, rather than addressing all of the market failures that lead to children obtaining violent video games. *See infra* Part IV.B (discussing the inability of the federal bill to redress all necessary aspects of the problem and the high enforcement costs, both criticisms apply to state legislation attempting to enforce video-game legislation similarly).

62. *See, e.g.*, Clay Calvert & Robert D. Richards, *The 2003 Legislative Assault on Violent Video Games: Judicial Realities and Regulatory Rhetoric*, 11 VILL. SPORTS & ENT. L.J. 203, 203–10 (2004) (discussing the various state and city laws prohibiting the sale of violent video games to minors that have recently been struck down on First Amendment grounds). Interestingly, these cases suggest that sexual games might be subject to regulation as obscene material analogous to pornography, while violent games might be protected as free speech. *Id.* at 210.

63. *See* Gledhill, *supra* note 44 (recounting a California law to enforce age ratings struck down on First Amendment grounds). The constitutionality of video-game legislation has been debated at length and is beyond the purview of this Comment. This Comment asserts that any such legislation, whether ultimately deemed constitutional or not, would fail to correct the perceived problem of children obtaining violent video games.

64. William Triplett & Ben Fritz, *Naughty Vidgames in Pols' Line of Fire*, DAILY VARIETY, Dec. 1, 2005, at 1 (discussing a St. Louis ordinance enforcing age limits on video games that has been struck down, and similar California, Michigan, and Illinois statutes being challenged).

65. *See* Baca, *supra* note 54 (summarizing some of the psychological and statistical data that supports a causal link between violent video games in violence in children).

66. *See, e.g.*, Jeffrey Goldstein, *Does Playing Violent Video Games Cause Aggressive Behavior?* (Cultural Pol'y Ctr., Univ. of Chi., Conference Working Paper, 2001), available at <http://culturalpolicy.uchicago.edu/conf2001/papers/goldstein.html> (criticizing some of the psychological methods used to evaluate the link between violence and video games). Professor Goldstein explains that clinical experiments fail to capture the impact of

limitations, some researchers recently have advocated a General Aggression Model (GAM) with which to study the effects of violent video games on players.⁶⁷ Using this new method, some researchers have concluded that “[e]xposure to violent video games causes increases in aggressive behavior, cognitions, and affect.”⁶⁸

The GAM technique supports the already existing idea that violent video games, as well as other violent media, encourage violent behavior.⁶⁹ Additionally, literature notes that the effect is more pronounced, or observable, in younger children rather than in teenaged or college-aged persons.⁷⁰ This more pronounced effect is to be expected as younger children are more susceptible to developmental stimuli than older individuals.⁷¹ The theory that violent video games cause violent behavior has been bolstered by countless studies claiming to reach similar conclusions.⁷²

playing video games on the behavior of children because a laboratory cannot replicate the home environment where games typically are played. *Id.*; see also Mark Griffiths, *Violent Video Games and Aggression*, 10 *PSYCHOLOGIST* 397, 397–401 (1997), available at <http://www.academicarmageddon.co.uk/library/GRIF.htm> (criticizing the conclusions that violent video games cause violence because those conclusions were made with a paucity of empirical evidence).

67. See, e.g., Craig A. Anderson & Brad J. Bushman, *Human Aggression*, *ANN. REV. PSYCHOL.*, Feb. 2002, at 27, 32–42 (explaining that the GAM method examines short-term behavior in response to violent stimuli); see also Brad J. Bushman & Craig A. Anderson, *Violent Video Games and Hostile Expectations: A Test of the General Aggression Model*, 28 *PERSONALITY & SOC. PSYCHOL. BULL.* 1679, 1680–84 (2002) (introducing the GAM method as applied to video-game stimuli).

68. N.L. Carnagey & C.A. Anderson, *Violent Video Game Exposure and Aggression: A Literature Review*, 45 *MINERVA PSICHIATRICA* 1, 1 (2004), available at <http://www.psychology.iastate.edu/faculty/caa/abstracts/2000-2004/04CA.pdf>; see also Steven J. Kirsh, *The Effects of Violent Video Games on Adolescents: The Overlooked Influence of Development*, 8 *AGGRESSION & VIOLENT BEHAV.* 377, 377 (2003), available at <http://www.geneseo.edu/~kirsh/vita/avb.pdf> (“[V]iolent video games influence aggressive behavior, aggressive affect, aggressive cognition, and physiological arousal.”).

69. See generally Susan Villani, *Impact of Media on Children and Adolescents: A 10-Year Review of the Research*, 40 *J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY* 392, 393–99 (2001), available at http://www.lionlamb.org/research_articles/01C392.pdf (citing forms of media ranging from movies to television to music to the internet, in addition to video games, as capable of eliciting violent behavior).

70. See, e.g., Kevin D. Browne & Catherine Hamilton-Giachritsis, *The Influence of Violent Media on Children and Adolescents: A Public-Health Approach*, 365 *LANCET* 702, 702 (2005).

71. *Id.* at 705; see also Kirsh, *supra* note 68, at 378.

72. See, e.g., Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 *J. PERSONALITY & SOC. PSYCHOL.* 772, 782–89 (2000) (claiming a link between violent video games and violent behavior in children); see also Craig A. Anderson et al., *The Influence of Media Violence on Youth*, 4 *PSYCHOL. SCI. PUB. INT.* 81, 105 (2003), available at

Some of these researchers acknowledge that there exist only “weak evidence from correlation studies” linking violent stimuli to crime.⁷³ This “weak” link to crime becomes important when dealing specifically with any proposed legislation aimed at curbing violent crimes attributable to video games.

In addition to psychological research, other data support the enactment of the Violent Video Game Act.⁷⁴ More than 70% of teenaged boys have played the M-rated, *GTA: Vice City*—a single game in the *GTA* series—even though this rating should have prevented children sixteen and younger from obtaining access to the game.⁷⁵ Additionally, one study by the Federal Trade Commission (FTC) found that 78% of underage children were able to purchase age-inappropriate games from retailers.⁷⁶

The fact that so many underage players apparently have open access to violent video games, coupled with the belief that violent video games cause violent behavior in children, seems to be a logical justification for the U.S. government to regulate the video-game industry. This justification intensifies when one considers the sensational current events involving video games and violence in children.⁷⁷ For example, after the tragic Columbine massacre, investigations revealed videotapes of the

synergy.com/doi/pdf/10.1111/j.1529-1006.2003.pspi_1433.x (same); Browne & Hamilton-Giachritsis, *supra* note 70, at 708 (same); Kirsh, *supra* note 68, at 387 (same); Jessica Nicoll & Kevin M. Kieffer, Presentation at the 113th Annual Convention of the American Psychological Association, Session 2185: Violence in Video Games—A Review of the Empirical Research (Aug. 19, 2005) (same).

73. Browne & Hamilton-Giachritsis, *supra* note 70, at 702.

74. Merle English, *Video's No Game to Haitians*, NEWSDAY (N.Y.), Nov. 25, 2004, at A06 (citing Gallop Poll figures concerning the rate that underage children play *GTA: Vice City*, the installment in the *GTA* series before *GTA: San Andreas*).

75. *Id.*; see also *infra* note 121 (defining the ratings).

76. FED. TRADE COMM'N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A ONE-YEAR FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRY 33 (2001) [hereinafter FTC REPORT], available at <http://www.ftc.gov/os/2001/12/violencereport1.pdf> (following up the comprehensive study the FTC conducted in 2000, which the FTC presented to the Senate in a prepared statement that may be found at <http://www.ftc.gov/os/2000/09/violencerpttest.htm>). For an in-depth commentary on the 2000 FTC study, see Sonya A. Grier, *The Federal Trade Commission's Report on the Marketing of Violent Entertainment to Youths: Developing Policy-Tuned Research*, 20 J. PUB. POL'Y & MKTNG. 123 (2001), available at http://faculty-gsb.stanford.edu/grier/pages/JPPMGrierFTC_report_mktg_violent_entertainment.pdf (noting that the FTC found high correlation between violent behavior and exposure to media violence and that 85% of children under seventeen were easily able to purchase M-rated electronics).

77. See, e.g., Nancy Gibbs & Timothy Roche, *The Tale of the Columbine Tapes*, TIME, Dec. 20, 1999, at 40, 44 (describing the Columbine tragedy).

killers making references to their favorite violent video games.⁷⁸ In the videos, one of the killers, Eric Harris, calls his shotgun Arlene, a character in *Doom*, and describes the shotgun as “straight out of *Doom*.”⁷⁹ Harris went on to describe the pending massacre: “It’s going to be like f[***]ing *Doom*.”⁸⁰ The discovery of these videos presented a challenge for opponents of governmental video-game regulation, but it was not a “fatality” for their cause.

B. Evidence Supporting No Causal Link Between Video Games and Violence in Children

Despite the evidence suggesting a link between violent behavior in children and violent games, other psychological research and statistical data suggest a causal relationship does not exist. Psychological research doubting any causal relationship between violent video games and violence in children is nearly as voluminous as the literature supporting the connection.⁸¹ Those who question a causal relationship recognize the logical fallacy in *post hoc, ergo propter hoc*.⁸² Because a simple correlation exists between violent video games and violent children does not mean that a causal relationship exists.⁸³ Hence, those acknowledging the logical fallacy observe that authors of carefully written psychological articles tread cautiously between the words “link” and “cause,” refusing to say that violent video

78. See *id.*; see also KENT, *supra* note 3, at 544–45 (recounting the events surrounding the Columbine massacre and the connection to the video game *Doom*).

79. Gibbs & Roche, *supra* note 77, at 40–43.

80. KENT, *supra* note 3, at 545 (alteration added).

81. See Jeanne B. Funk et al., Presentation at the Annual Meeting of the American Psychological Association, Session 4157: Asking the Right Questions in Research on Violent Electronic Games (Aug. 7, 2000) (arguing that analysis in previous studies is incorrect, that there is no link between video games and violence, and that the personalities of children caused aggressive responses to video games more than the video games themselves), cited in News Release, Am. Psychological Ass’n, Children’s Personality Features Unchanged by Short-Term Video Play (Aug. 2000); see also Jenkins, *supra* note 1, at 40–41 (offering an alternative approach to the video-game debate that critically examines the regulatory reaction by suggesting positive uses and benefits of video games); Andrea Lynn, *No Strong Link Seen Between Violent Video Games and Aggression*, NEWS BUREAU UNIV. OF ILL. AT URBANA-CHAMPAIGN, Aug. 9, 2005, <http://www.news.uiuc.edu/news/05/0809videogames.html> (same).

82. Richard H. Underwood, *Logic and the Common Law Trial*, 18 AM. J. TRIAL ADVOC. 151, 175–78 (1994) (explaining that correlation does not necessarily imply causation). *Post hoc, ergo propter hoc* translates to “after this, therefore because of this.” BLACK’S LAW DICTIONARY 1205 (8th ed. 2004).

83. See Henry Jenkins, Reality Bytes: Eight Myths About Video Games Debunked, <http://www.pbs.org/kcts/videogamerevolution/impact/myths.html> (last visited Apr. 12, 2007) (stressing that other factors might account for the correlation between violent children and violent video games).

games “cause” violence.⁸⁴ Furthermore, most of the articles denouncing a causal link posit that violent children simply choose to play violent video games—resulting in a chicken-and-egg conundrum.⁸⁵ Some experts argue that video games represent a very minor risk factor, if any, in changing a person’s behavior.⁸⁶ Instead, those experts identify home environment, current setting, and social development as more influential risk factors.⁸⁷

Statistical data illustrate that violence in children has, in fact, decreased during the time video games have been played.⁸⁸ The Bureau of Justice Statistics at the Department of Justice (DOJ) compiles figures for crime rates on a national scale.⁸⁹ The DOJ figures demonstrate that the victimization rates for violent crimes peaked in 1994 with one person victimized for every twenty people in the United States over the age of eleven; the figures show that the victimization rate dropped to about one in fifty in 2005.⁹⁰ Further, DOJ studies show that, after spiking around 1993, “the offending rates for [homicide by] young teens reached the lowest levels recorded and have fallen below those for 25–34 year olds.”⁹¹ Moreover, the DOJ states: “Offending rates for [homicide by] children under age 14 increased in the late 1980s and early 1990s, but have recently fallen to the lowest levels recorded.”⁹² Thus, since the release of *Mortal Kombat* and *Doom* in 1992 and 1994, respectively, the rates of both violent crimes and homicides committed by children have decreased sharply.⁹³ If games like *Mortal Kombat* and *Doom* cause violence in children, then why is the rate of violent crimes committed by children at an all-time low? Why is the rate of homicides

84. *Id.*

85. *See id.*

86. *See id.*

87. *Id.*

88. *See* BUREAU OF JUSTICE STATISTICS, VIOLENT CRIME RATE TRENDS, <http://www.ojp.usdoj.gov/bjs/glance/viort.htm> (last visited Mar. 31, 2007) [hereinafter DOJ REPORT ON VIOLENT CRIMES] (showing the rate of violent crimes at an all-time low in 2005).

89. Philip Cherner, *Felony Sex Offender Sentencing*, COLO. LAW., Dec. 2004, at 11, 18.

90. DOJ REPORT ON VIOLENT CRIMES, *supra* note 88. The DOJ defines violent crime as homicide, rape and sexual assault, robbery, and assault. *Id.*

91. BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: AGE TRENDS, <http://www.ojp.usdoj.gov/bjs/homicide/teens.htm> (last visited Mar. 31, 2007) [hereinafter DOJ REPORT ON HOMICIDE RATES].

92. *Id.*

93. *Id.*; DOJ REPORT ON VIOLENT CRIMES, *supra* note 88 (painting a far different picture than all of the evidence “proving” violent video games cause violence in children).

committed by children likewise down? Statistics like these draw into sharp doubt the validity of the psychological reports expressing a causal relationship between violent video games and violent children.

Some researchers have pointed to “moral panic” as the reason people desire to find video games and other violent media the cause of the violence sensationalized in today’s society.⁹⁴ Moral panic is the reaction society has to glamorized antisocial behavior, and this reaction usually includes a “deviancy amplification spiral.”⁹⁵ A deviancy amplification spiral occurs when the media sensationalizes antisocial behavior, thereby causing what are actually rare and minor antisocial events to look more serious and common.⁹⁶ This misconception, in turn, causes the public to look for the antisocial behavior, and for others to engage in the “common” scandalous behavior.⁹⁷ Ultimately, misplaced public concern forces law enforcement, judges, and politicians to expend resources dealing with what, in reality, should not have been an issue.⁹⁸

When applied to the violent video-game debate, the moral panic analysis evolves as follows.⁹⁹ There are a few isolated incidents of antisocial, violent behavior linked to video games, such as the Columbine killers’ statements.¹⁰⁰ The media sensationalizes the effects that violent video games had on the event in order to create entertaining stories for the evening news.¹⁰¹ The public reacts by searching for similar links between

94. Stephen Kline, *Moral Panics and Video Games* (Simon Fraser Univ., Working Paper presented at the Research in Childhood, Sociology, Culture and History Conference, 1999), available at <http://www.sfu.ca/media-lab/research/mediaed/Moral%20Panics%20Video%20Games.pdf> (surveying the occurrences of moral panic concerning video games).

95. See Anne-Marie McAlinden, *The Use of “Shame” with Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 373, 379 n.17 (2005). See generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 17–18 (St. Martin’s Press 1980) (1972) (constituting the leading work in the field of moral panic).

96. See McAlinden, *supra* note 95, at 379 n.17.

97. *Id.*

98. *Id.*

99. Example extrapolated from Jenkins, *supra* note 1, at 44–45.

100. See KENT, *supra* note 3, at 544–45 (outlining a few of the tragic school shootings occurring in the late 1990s).

101. See Gibbs & Roche, *supra* note 77, at 40–41 (exemplifying the way in which *Time* magazine glorified the events surrounding the Columbine horror). This phenomenon breeds what pejoratively has been labeled “infotainment.” See Matt Nisbet, *That’s Infotainment!*, Apr. 30, 2001, <http://www.csicop.org/genx/infotainment>. Infotainment exists when the media tries to sensationalize the news in order to capture the biggest audiences. *Id.* This “soft journalism” clouds truth, cloaks news, and helps create moral

video games and violence, and, because they want to find a link, they “find” it in other places.¹⁰² The media picks up and runs these newly discovered stories about the “epidemic” of video-game violence, even though very few links are authentic or newsworthy.¹⁰³ The events are further sensationalized, and copycats arise—such as the recent Virginia Tech shooting.¹⁰⁴ And

panic by glamorizing and tantalizing tragic events. *See id.*

102. *See* Chris Williams, *Canadian Shootings Linked to Website, Videogames*, REGISTER, Sept. 15, 2006, http://www.theregister.co.uk/2006/09/15/canadian_shooting (exemplifying the “blame game” that occurs after a violent incident when people try to discover the cause of the violent behavior, turning attention to violent video games and other media that provides alternative views, such as vampirefreaks.com).

103. *See, e.g.*, Developments to Watch, *A Simple, Low-Cost Way to Lock Those Guns*, BUS. WK., Mar. 27, 2000, at 109 (advancing ways to stop “[t]he many school shootings of the past few years”).

104. *See* KENT, *supra* note 3, at 544–45 (demonstrating that once a school shooting occurred a few copycats followed); *see also* Gadi Dechter & Liz Bowie, *Copycat Crime Can Feed More Violence*, BALTIMORE SUN, Oct. 3, 2006, available at <http://www.baltimoresun.com/news/local/bal-te.school03oct03,0,3506787.story?coll=bal-local-columnists&?track=stor-elcon> (“A spate of school shootings in less than a month has raised fears that even more ‘copycat’ crimes lie ahead—with psychologists warning that news media attention could, in fact, perpetuate the violence.”).

The horrific events surrounding the Virginia Tech shooting on April 16, 2007, provide a startling example of this moral panic. *See* Christine Hauser, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES.COM, Apr. 16, 2007, available at <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?ex=117560000&en=57f0238f7b4754d&ei=5070>. The Virginia Tech shooter made references to Columbine in videos he mailed to NBC the day of the shootings, clearly copycatting the events at Columbine. Andrea Hopkins & Patricia Zengerle, *Va Tech Gunman Praises Columbine Shooters in Video*, 13 WHAM.COM, Apr. 19, 2007, available at http://www.13wham.com/news/national/story.aspx?content_id=3030fbb2-c239-4f62-89ac-5e95202c91f8&rss=104.

Only a few hours after the tragic event in Blacksburg unfolded, news outlets and television personalities were drawing conclusions pointing to video games as the cause of the shooter’s violent rampage. *See* Daniel Terdiman, *Debunking Jack Thompson’s Virginia Tech Video Game Claims*, CNET NEWS.COM, Apr. 17, 2007 (criticizing Jack Thompson’s comments on Fox News where he argued that violent video games were a probable cause of the violence at Virginia Tech), available at http://news.com.com/8301-10784_3-6176816-7.html; Gibran Nawaz, *Dr. Phil Blames Video Games for Virginia Tech Shooting*, DIGITALBATTLE.COM, Apr. 17, 2007 (quoting television personality Dr. Phil’s comments to Larry King that violent video games were the cause of the Virginia Tech tragedy), available at <http://www.digitalbattle.com/2007/04/17/dr-phil-blames-video-games-for-virginia-tech-shooting>.

However, a bit more patience seems to have been in order. When the police searched the shooter’s dorm room at Virginia Tech, they found no video games; thus, demonstrating exactly how media outlets and personalities sensationalize what, in reality, was a non-issue. *See* Nate Ahearn, *No Games Found in Shooter’s Dorm at Virginia Tech*, GWN.COM, Apr. 19, 2007 (listing the items police actually found in the shooter’s dorm room, notably not mentioning any video games), available at http://www.gwn.com/news/story.php/id/12287/No_Games_Found_in_Shooters_Dorm_at_Virginia_Tech.html; *see also* John Bardinelli, *No Video Games Found in VT Shooter’s Dorm*, JOYSTIQ.COM, Apr. 19, 2007 (commenting on the quickness to blame video games for the violence, even though no games were found in the shooter’s dorm), available at

so on, until this unfounded panic forces the government to respond to cries for regulation of a harmless industry—enter Representative Joe Baca and his Violent Video Game Act.¹⁰⁵ This example of moral panic illustrates one reason why so many people try to find a causal link between violent video games and violence in children¹⁰⁶ despite DOJ statistics suggesting that these critics are chasing the wind.¹⁰⁷

C. *Weighing and Interpreting the Conflicting Evidence*

Before a problem can be solved, a problem must actually exist, and the proponents of the Violent Video Game Act remain unable to prove a problem in fact exists.¹⁰⁸ The amount of evidence both supporting and denouncing a causal link between violent video games and violence in children is remarkable.¹⁰⁹ Researchers from both sides of the debate present potentially valid evidence for their respective positions.¹¹⁰ Other statistical

<http://www.joystiq.com/2007/04/19/no-games-found-in-vt-shooters-dorm>.

The Virginia Tech shooting provides a textbook example of moral panic. The shooter copycatted Columbine, probably due to the media's sensationalizing those events. The media draws erroneous conclusions about video games being the direct cause. The evening news runs stories and interviews television personalities supporting such a link. And now, the critics of video games have more "evidence" of the violence caused video games.

105. See Baca, *supra* note 54 (listing some of the reasons the Violent Video Game Act is necessary to curb rampant violence in children).

106. The same moral panic surrounded MTV's *Beavis and Butthead* in the early 1990s. See Peter Stack, *Butting Heads with Cartoon*, S.F. CHRON., Sept. 2, 1993, at D2 (reporting on the backlash the MTV series received because of the animated violence, including harm to animals). *Dungeons & Dragons* also faced a similar moral panic in the mid-1980s. See Michael Isikoff, *Parents Sue School Principal*, WASH. POST, Aug. 13, 1983, at A1 (documenting the controversy surrounding *Dungeons & Dragons* after a high school student committed suicide and investigators found copious game paraphernalia in his bedroom, including a suicide note referencing "unexplainable-type things," which the investigators thought were references to the game's mythological basis).

107. See DOJ REPORT ON VIOLENT CRIMES, *supra* note 88; see also DOJ REPORT ON HOMICIDE RATES, *supra* note 91 (demonstrating the fall of adolescent crime rates over the last twenty years).

108. See *supra* Part III.A (outlining weak evidence supporting a causal link between violence and video games).

109. See *supra* Parts III.A–B (detailing the weighty evidence on both sides of the debate surrounding the link between violence in children and video games).

110. For a great discussion summarizing much of the debated causal link between violent video games and violent children, compare Craig A. Anderson, *Violent Video Games: Myths, Facts, and Unanswered Questions*, <http://www.apa.org/science/psa/sb-anderson.html> (last visited Apr. 14, 2007) (blasting video games for their connection to violence in children), with Jenkins, *supra* note 83 (pointing to other factors that draw violent children to violent video games and stressing the important role parents play in selecting their children's entertainment).

evidence by governmental agencies, such as the FTC and the DOJ, lends credibility to both sides of the debate.¹¹¹ Even those psychological researchers urging that some link exists admit that only weak evidence proving the correlation between violent stimuli and actualized crime exists.¹¹²

So much equally weighted, conflicting evidence prevents proponents of video-game regulation from demonstrating that a problem in need of correction actually exists. The proponents' major claim, that video games are causing children to become more violent, directly contradicts the DOJ reports and some psychological research.¹¹³ Moreover, it seems that no problem actually exists because violence in children has not grown proportionately with the violent video-game market, but has, in fact, decreased dramatically.¹¹⁴ Thus, the Violent Video Game Act is flawed at the outset because it aims to correct a problem that has not been proven to exist.

However, if proponents of video-game regulation could, in the future, demonstrate that a causal relationship exists between violent video games and violent children, would the Violent Video Game Act prevent violent games from reaching children? The answer to this question requires an analysis of how well the mechanisms put into place by the Act keep violent games out of the hands of the country's youth.

IV. THE IMPACT OF THE VIOLENT VIDEO GAME ACT

A. *The Current Regulatory Scheme for Video Games—The ESRB*

Any changes the Violent Video Game Act would produce must be compared against the backdrop of the existing regulatory scheme, the ESRB.¹¹⁵ As discussed above, the video-game industry created the ESRB to self-regulate the sale of

111. FTC REPORT, *supra* note 76, at 33 (containing statistics relevant to the debate as to the ability of video games to cause violent behavior); *see also* DOJ REPORT ON HOMICIDE RATES, *supra* note 91 (same); DOJ REPORT ON VIOLENT CRIMES, *supra* note 88 (same).

112. *See* Browne & Hamilton-Giachritsis, *supra* note 70, at 702 (admitting that the translation of violence in children to actual criminal activity perpetrated by children is attenuated at best).

113. *See supra* Part III.B.

114. *Id.*

115. JOYCE APPLEBY ET AL., TELLING THE TRUTH ABOUT HISTORY 10 (1994) ("What historians do best is to make connections with the past in order to illuminate the problems of the present and the potential of the future.").

violent video games to children.¹¹⁶ The effort resulted in a mix of successes and failures.

1. *An Overview of the ESRB.* The ESRB is the means through which the video-game industry self-regulates.¹¹⁷ In response to the congressional hearings and Senate investigations into video-game violence, the Entertainment Software Association created the ESRB as an effort to pacify those leaders calling for governmental regulation of video games.¹¹⁸ To date, the ESRB has reviewed and rated for age-appropriateness well over 10,000 games.¹¹⁹

The ESRB reviews the games submitted to it by video-game publishers in the United States.¹²⁰ After a thorough review, the ESRB issues a rating on a scale from EC to AO.

- “EC” indicates video games suitable for players in early childhood, three years of age, or older.
- “E” denotes a video game suitable for everyone over six years of age.
- “E10+” signifies video games appropriate for ages ten and up.
- “T” video games are deemed suitable for teenagers and older persons.
- “M” video games should be played only by mature gamers, meaning seventeen or older.
- “AO” video games are restricted to adult use, with adult being defined as eighteen years old or older.¹²¹

116. See KENT, *supra* note 3, at 480 (discussing the birth of the ESRB as an independent rating organization); see also *supra* text accompanying note 42.

117. See KENT, *supra* note 3, at 480; see also Entertainment Software Rating Board, <http://www.esrb.org> (last visited Mar. 31, 2007) (containing an overview of most of the information contained in this section, including explanations of the structure, goal, and effects of the ESRB); Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-5.html> to <http://www.gamespot.com/features/6090892/p-6.html>.

118. See *supra* text accompanying notes 40–43.

119. See Entertainment Software Rating Board, Frequently Asked Questions, <http://www.esrb.org/ratings/faq.jsp> (last visited Mar. 31, 2007) (calculating approximately 1,000 games rated per year since 1994).

120. See *id.* (detailing the way in which the ESRB operates).

121. See Entertainment Software Rating Board, Game Ratings & Descriptor Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Mar. 31, 2007) (describing the various ratings, the information displayed on the front of the box, and the rating explanations present on the back of the box). An additional designation, “RP,” indicates video games for which the rating is pending, and this designation only appears in advertisements for the game prior to release. *Id.*

The ESRB ratings appear conspicuously on the front of video-game boxes in large, black type; they are not removable stickers.¹²² Additional information pertaining to the nature of the ratings, such as the presence of “mature humor,” “mild violence,” or “sexual themes,” appears in similar type on the back of video-game boxes.¹²³ In 2006, 8% of rated video games received an M and less than 1% of rated games received an AO rating.¹²⁴

The current ESRB framework places the responsibility on retailers and parents to enforce the age guidelines and to limit underage access to inappropriately violent video games.¹²⁵ The ESRB has no official enforcement powers over retailers, and video-game publishers are free to bypass the rating system altogether.¹²⁶ The ESRB does have some limited, unofficial enforcement power at the retail level, which derives from the ESRB’s informal partnership with the majority of video-game retailers in the United States.¹²⁷ These retailers will not carry AO games and are supposed to sell video games only to age-appropriate patrons.¹²⁸

2. *Effectiveness of the ESRB on Preventing Underage Gamers from Playing Age-Inappropriate Video Games.* The effectiveness of the ESRB at preventing violent video games from reaching underage children has been simultaneously praised and impugned.¹²⁹ Proponents of governmental regulation argue that

122. *Id.*

123. *Id.*

124. *See* Entertainment Software Rating Board, Rating Category Breakdown, <http://www.esrb.org/about/categories.jsp> (last visited Mar. 31, 2007); *see also* Godinez, *supra* note 9 (noting that in 2004 the percentages of games receiving the M and AO rating were 12% and less than 1%, respectively).

125. *See* Entertainment Software Rating Board, *supra* note 119 (detailing the nonbinding relationship between retailers and the ESRB, which provides the only measurable enforcement power of the ESRB).

126. *See id.*

127. *See id.* (“In the United States, virtually all major national retailers, countless independent retailers and many game center operators are working with the ESRB to educate their customers and employees about ESRB ratings and store policies regarding the sale or rental of M (Mature) and AO (Adult Only) rated games.”).

128. *See id.*; *see also* Godinez, *supra* note 9 (observing that Wal-Mart removed the *GTA: San Andreas* video games containing the “Hot Coffee” mod upon the game receiving an updated AO rating from the ESRB).

129. *Compare* Press Release, Entm’t Software Rating Bd., Senators Hillary Rodham Clinton and Joe Lieberman Join ESRB to Launch Nationwide Video Game Ratings TV PSA Campaign (Dec. 7, 2006), <http://www.esrb.org/about/news/12072006.jsp> (relating Senator Lieberman’s praising comments about the ESRB), *with* Baca, *supra* note 54 (illustrating Representative Baca’s displeasure with the ineffectiveness of the ESRB).

the ESRB lacks effectiveness, while others commend the ESRB's efforts at educating customers about video-game content.

The FTC applauded the ESRB, stating "there is much in the game industry's rating disclosure requirements that merits duplication by [other industries]."¹³⁰ Senator Joseph Lieberman lauds the ESRB ratings system for being the "most comprehensive [rating system] in the media industry."¹³¹ The founder of Action for Children's Television also has praised the effectiveness of the ESRB.¹³² The National PTA's 2000 report card gave the video-game industry an "A" for creating the ESRB.¹³³

The ESRB's role in educating the consumer becomes particularly important in light of the FTC's finding that adults choose the video games played by their children 70% of the time; sometimes guided by the input of children.¹³⁴ Moreover, 83% of the time, adults actually purchase the video games, sometimes with the child present.¹³⁵ Therefore, parents seem to support the video-game choices of their children.

On one hand, the ESRB has been praised as an effective, reliable, and enviable self-regulatory measure adopted by the video-game industry.¹³⁶ On the other hand, some critics of the ESRB voice concern that the lack of retail enforcement undermines the ESRB's effectiveness and continues to allow children access to age-inappropriate video games.¹³⁷ The Violent

130. FED. TRADE COMM'N, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A TWENTY-ONE MONTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRY iii* (2002), available at <http://www.ftc.gov/reports/violence/mvecrpt0206.pdf> [hereinafter *FTC FOLLOW-UP*] (following up on an FTC study conducted in 2000 and later updated in *FTC REPORT, supra* note 76, and praising the ESRB for progress brought about by the rating system). For a commentary on the report, see Press Release, Fed. Trade Comm'n, *FTC Issues Third Follow-up Report on the Marketing of Violent Entertainment to Children* (June 28, 2002), <http://www.ftc.gov/opa/2002/06/mvec0602rev.htm>.

131. Press Release, Entm't Software Ratings Bd., *supra* note 129 (relaying Senator Joseph Lieberman's comments).

132. Kristi Turnquist & Sarah Allen, *What's the Controversy*, OREGONIAN, Nov. 17, 2000, at E01 (expressing the view of Peggy Charren, founder of Action for Children's Television).

133. *Id.*

134. FED. TRADE COMM'N, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRY 42* (2000), available at <http://www.ftc.gov/reports/violence/vioreport.pdf> [hereinafter *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN*].

135. *See id.*

136. *See* *FTC FOLLOW-UP, supra* note 130, at 30 (praising the strides the ESRB has made to self-regulate effectively).

137. *See* Baca, *supra* note 54 (noting that 78% of children ages thirteen to sixteen

Video Game Act seeks to close this loophole by preventing children from obtaining age-inappropriate games.¹³⁸

The 2001 FTC report found that 73% of underage children were able to purchase M-rated video games from retailers.¹³⁹ This finding demonstrates the perceived drawback of the ESRB: the organization has no real enforcement power at the retail level.¹⁴⁰ New legislation modeled after the Violent Video Game Act would enforce the ESRB-recommended age limitations on video games.¹⁴¹

B. *The Proposed Legislation—The Violent Video Game Act*

1. *The Act Does Not Remedy All Market Failures.*

Assuming, arguendo, that the violence in video games causes children to act violently, the Violent Video Game Act does not offer the solution—it does not cure all of the market failures that allow children access to violent video games.¹⁴² Market failures create industry-wide ills not corrected by natural market forces.¹⁴³ Because natural market forces will not correct the

had access to M-rated games.)

138. See *id.* (elucidating the aim of the Act). Of course this goal assumes that violent video games do, in fact, cause violence in children.

139. FTC REPORT, *supra* note 76, at 33 (listing the purchase statistics for video games).

140. See Entertainment Software Rating Board, *supra* note 119 (admitting that no real enforcement power exists at the ESRB). There has been further controversy surrounding the ESRB for its unwillingness to give a rating of AO based upon violence alone. Critics point to the game *Manhunt*, which clearly depicts excessive human gore, murder, and even decapitation, as evidence; the game only received an M rating. See Gonzalez, *supra* note 2, at <http://www.gamespot.com/features/6090892/p-12.html> (commenting on the extreme gore present in *Manhunt*). Of the current twenty-three AO titles, only two received this listing without significant sexual content; the ESRB gives gambling as the explanation for one AO rating and “Animated Blood and Gore, Animated Violence” for the AO rating of *Thrill Kill*. See Entertainment Software Rating Board, <http://www.esrb.org> (select “Adults Only”; then follow “Search” link) (last visited Mar. 31, 2007). Moreover, *GTA: San Andreas* received its AO rating only after the game’s hidden “Hot Coffee” mod, which allowed players to engage in sexual acts with a female character, was discovered. Godinez, *supra* note 9. This reluctance to give a video game like *Manhunt*, complete with graphic decapitations, an AO rating begs the question: What level of violence is required to earn an AO rating?

141. See Baca, *supra* note 54 (demonstrating that Representative Baca’s Act seeks to stop children from buying violent games by forcing retailers not to sell to the minors).

142. See Protect Children from Video Game Sex and Violence Act of 2003, H.R. 669, 108th Cong. (2003) (omitting from the proposed legislation any mention of parental responsibility for child exposure to violent video games).

143. See Abbie Crites-Leoni & Angellee S. Chen, *Money for Life: Regulating the Viatical Settlement Industry*, 18 J. LEGAL MED. 63, 86 (1997) (discussing the nature of market failures in the viatical settlement industry where speculators purchase the damages or insurance awards of terminally ill patients unable to use the entire award

problem, governmental regulation seeks to fix the market failure and ensure an efficient marketplace.¹⁴⁴ A few possible market failures lead to children receiving and playing violent video games.¹⁴⁵ These include: (1) retailers being ignorant of, or apathetic to, the dangers violent games pose to children and, thus, not enforcing the ESRB ratings; (2) irrational children not knowing or underestimating the possible dangers of violent games; and (3) parents underestimating or not understanding the risk that violent games present children.¹⁴⁶ The Violent Video Game Act attempts to prevent minors from purchasing video games by forcing retailers not to sell age-inappropriate video games to underage customers.¹⁴⁷ Thus, the Act seeks to rectify two market failures: retailers who do not appreciate the potentially harmful consequences of selling violent video games to underage patrons and children who do not understand the dangers of playing such games.¹⁴⁸ The Act addresses retailer apathy by penalizing lack of adherence to the ESRB ratings with fines, and child ignorance by preventing minors from buying the games.¹⁴⁹

Although the Act attempts to remedy retailer- and child-related market failures, it neglects the parent-related market failure.¹⁵⁰ The proposed Video Game Act states that “[w]hoever sells at retail or rents, or attempts to sell at retail or rent, to a minor any video game that depicts nudity, sexual conduct, or other content harmful to minors, shall be fined under this chapter.”¹⁵¹ The bill, in essence, would force retailers to apply the ESRB age limits strictly, removing the supply of violent games from young persons.¹⁵² The decrease in supply of violent games accessible to children, the argument proceeds, will cause a

because of their impending deaths).

144. *Id.*

145. *See* Baca, *supra* note 54 (pointing only to retailer irresponsibility).

146. *Id.*

147. *See* H.R. 669 (putting the liability squarely on the shoulders of retail sellers, not on the child purchasers or irresponsible parents).

148. *See id.* (demonstrating that the Act prohibits retailers from selling to children, thereby remedying that market failure directly, and at the same time making it more difficult for children to purchase age-inappropriate games, thereby correcting that market failure indirectly).

149. *Id.*

150. *Id.* (neglecting to mention any parental control measures).

151. *Id.* sec. 3, § 2732.

152. *See id.* sec. 3(a) (stating regulations that mirror the standards established by the ESRB even though the proposed legislation does not refer to the ESRB directly).

decrease in the rate of violence in children.¹⁵³ Furthermore, the Act tries to counteract irrationality in children by removing their ability to choose to purchase violent video games.¹⁵⁴ These measures seem to be a reasonable way to limit children's exposure to violent video games, but in reality the proposed legislation misses the target.

As drafted, the Violent Video Game Act ignores the most important market failure: parental ignorance or apathy.¹⁵⁵ Stopping retailers from selling and prohibiting children from buying violent video games will not necessarily stop these potentially dangerous video games from reaching children.¹⁵⁶ As the 2001 FTC report demonstrated, 83% of video games, including violent games, are purchased with parents present.¹⁵⁷ This leads to a few possible conclusions: parents do not understand the ESRB ratings, disregard the ESRB ratings, or underestimate the risk that violent video games pose.¹⁵⁸ Limiting a child's ability to purchase age-inappropriate video games will do little to prevent violent video games from reaching children because parents will not be prohibited from buying or renting the games on behalf of their children.

The rectification of retailer and child market failures is necessary to prevent violent video games from getting to impressionable children; these remedies alone, however, are not sufficient.¹⁵⁹ Parental education is an essential piece of the puzzle, without which the puzzle is incomplete and ineffective.¹⁶⁰

153. *See id.* sec. 2 (substantiating the compelling state interest in regulating video-game sales with scientific findings indicating that violent video games can lead to aggressive attitudes and values in children); *see also* Baca, *supra* note 54 (indicating that the ultimate goal of the Act, a decrease in violence in children, will be brought about by punishing "those who profit from selling [violent video games] to our kids").

154. *See* H.R. 669, secs. 2(8), 3(a) (eroding the ability of children to purchase violent video games from retail stores that would be subject to liability).

155. *Id.* (ignoring parents as a possible conduit through which children gain access to games and focusing only on retail sales of age-inappropriate games to minors).

156. *See* MARKETING VIOLENT ENTERTAINMENT TO CHILDREN, *supra* note 134, at 52 (explaining that younger children can often purchase M-rated video games despite an already existing policy in many stores not to sell to underage children).

157. *See id.* at 42.

158. *See id.* The FTC does not explain why parents elect to purchase video games, but the statistic indicates a market failure exists.

159. *See* Baca, *supra* note 54 (promoting the idea that retailer liability is necessary to curb children's exposure to violence because it limits retailer sales of, *and* child purchases of, graphic video games).

160. *See* Jenkins, *supra* note 83 (citing parental education as the lynchpin to curbing child access to violent games).

Any legislation addressing violent video games is useless without provisions that correct parental apathy towards video games.

Just as underage children access other prohibited items, such as alcohol, tobacco, or pornography, children might gain access to violent video games using a number of alternative avenues.¹⁶¹ Friends and parents remain the most significant source of tobacco for minors, while store clerks selling illegally to underage customers represent a minor factor.¹⁶² Likewise, a child's risk of exposure to violent video games includes not only direct access to the games but also parents and friends' parents who provide children with access to potentially harmful games.¹⁶³ Thus, the proposed Violent Video Game Act, which limits child access at the retailer level, will do very little by itself to correct the problem of violent games reaching children.

The Violent Video Game Act does not target all of the market failures through which children gain access to violent video games. In order to have a significant impact, any proposed legislative or regulatory measure must target the market failure perpetuating parents' ignorance of, or apathy toward, the possible aggressive behavior caused by violent video games.

2. *The Benefits of the Violent Video Game Act as Drafted.*

The Violent Video Game Act, incomplete as it is, may have some attenuated and indirect beneficial impacts on the problem of children playing violent video games. If federal or state lawmakers seriously consider enacting a law similar to the Violent Video Game Act, they should carefully determine if the new law's benefits will outweigh the potential costs.

As discussed above, the Act seeks to decrease the number of underage players of violent games.¹⁶⁴ This targeted benefit will be undermined by parents acting as conduits for violent games.¹⁶⁵ Nonetheless, some benefits might be derived from the Act. Increased awareness and media coverage may prompt parents to

161. See Joseph R. DiFranza & Mardia Coleman, *Sources of Tobacco for Youths in Communities with Strong Enforcement of Youth Access Laws*, 10 TOBACCO CONTROL 323, 323 (2001) (citing parents and friends as the most common source of tobacco for minors, as opposed to the illegal sale of tobacco to minors by retailers).

162. See *id.*

163. See Jenkins, *supra* note 83 (pointing to parental education as the missing element required to keep violent games from children).

164. See Baca, *supra* note 54 (seeking to reach this goal by imposing penalties on retailers who sell or rent to under age children).

165. See Jenkins, *supra* note 83.

buy fewer violent video games for their children.¹⁶⁶ This could serve the purpose of the Act by indirectly decreasing the number of children playing violent video games and, assuming a causal link, decreasing violence in children.¹⁶⁷ However, the effect is highly theoretical because other avenues still exist for exposing children to violent video games.¹⁶⁸ Moreover, unlike pornography, tobacco, or alcohol, which parents more readily identify as harmful, video games are perceived as harmless “kids’ toys”—as demonstrated by the fact that 83% of parents purchase video games for their children.¹⁶⁹ Without provisions addressing parental education or responsibility, the regulation would be ineffective.

Other positive externalities might result from the enactment of the Violent Video Game Act. Less exposure to video games could mean less video-game addiction and more physical activity in children, including involvement in team sports.¹⁷⁰ This increased activity could help decrease the obesity epidemic affecting American youth.¹⁷¹ Any possible decrease in violence in children would, in turn, decrease the necessity for police activity attributed to responding to that violence.¹⁷² These benefits, however, are indirect and attenuated at best. The Violent Video Game Act seems a poor and expensive vehicle to affect such small, indirect benefits.

3. *The Costs of the Violent Video Game Act as Drafted.* Any benefits of the legislation will be offset by the gross costs the Violent Video Game Act produces. Video games do provide

166. See, e.g., Triplett & Fritz, *supra* note 64 (demonstrating the publicity that enacting video-game regulation naturally creates). This benefit might become a detriment if the media draws sufficient attention to feed into the moral panic phenomenon. See *supra* notes 99–107 and accompanying text.

167. See Baca, *supra* note 54 (implying that violent video games create violent children).

168. See *supra* Section IV.B.1 (detailing the inability of the Violent Video Game Act to stop children from playing violent games).

169. See MARKETING VIOLENT ENTERTAINMENT TO CHILDREN, *supra* note 134, at 42; Jenkins, *supra* note 83.

170. Elizabeth A. Vandewater et al., *Linking Obesity and Activity Level with Children’s Television and Video Game Use*, 27 J. ADOLESCENCE 71, 81–83 (2004) (reporting a causal link between video-game use and childhood obesity and concluding that time spent playing video games displaces time spent engaging in more physically demanding activity).

171. See *id.* at 83.

172. See Rosalind S. Helderman, *Loudoun Boy’s Defiance Draws Police Response*, WASH. POST, Dec. 15, 2004, at B1 (documenting the police response to remarks a child made in a threatening manner).

benefits to gamers; benefits that may be jeopardized if video games become more difficult to obtain.¹⁷³ In April 2005, Dr. James “Butch” Rosser commented that there is “a positive correlation between videogaming and increased hand-eye coordination, reaction time, spatial visualization, neuro-psychological tests, visual attentiveness and mental rotation.”¹⁷⁴ Any limitations to the availability of video games would adversely impact these potentially beneficial effects of playing video games, even violent ones.

The stereotypical video-game fan is a shut-in, socially-challenged teenaged boy.¹⁷⁵ However, according to one author, today’s video-game players are “consistently more social, more confident, and more comfortable solving problems creatively” than their nongaming colleagues.¹⁷⁶ One cannot ignore the potential social benefit that video games like *Pokémon* provide to children. *Pokémon* consists of players interacting by swapping digital characters and challenging other players’ characters to virtual, and violent, duels.¹⁷⁷ An underlying premise of this wildly popular game is the social interaction between players.¹⁷⁸ Moreover, some researchers have observed an increased ability to socialize in hyperactive children due to video-game play.¹⁷⁹ In addition, video games have been shown to provide diversionary pain management options to distract patients undergoing chemotherapy and other painful treatments.¹⁸⁰

173. See Steven Johnson, *Your Brain on Video Games*, DISCOVER, July 2005, at 39, 42 (citing a Harvard Business School study to illustrate some of the benefits that can be obtained from video-game playing).

174. David Roman, *Serious Games*, ELECTRONIC ENGINEERING TIMES, Apr. 25, 2005, at 28 (quoting Dr. James “Butch” Rosser) (describing the increased success rate experienced by surgeons who play video games). See generally JAMES PAUL GEE, WHAT VIDEO GAMES HAVE TO TEACH US ABOUT LEARNING AND LITERACY 3–7 (2003) (exploring the various ways in which video games, violent ones included, help game players learn, grow, and adapt).

175. See *Adult Women Like to Play Games*, WIRED.COM, Aug. 27, 2003, <http://www.wired.com/gaming/gamingreviews/news/2003/08/60204>; cf. Dean Takahashi, *Journey on the Information Superhighway*, L.A. TIMES, Apr. 10, 1994, at D8 (characterizing video gamers as “nerds” likely to be excited by new web technology).

176. STEVEN JOHNSON, EVERYTHING BAD IS GOOD FOR YOU: HOW TODAY’S POPULAR CULTURE IS ACTUALLY MAKING US SMARTER 153 (2005), quoted in Tim Appelo, *PH.D’OH!*, SEATTLE WKLY., May 11, 2005, at 79.

177. See generally KENT, *supra* note 3, at 566–68 (chronicling the history of *Pokémon* and highlighting the social element of the popular game).

178. See *id.*

179. See, e.g., Mark Griffiths, *Video Games and Health*, 331 BMJ 122, 122 (2005), available at <http://www.bmj.com/cgi/content/full/331/7509/122>.

180. *Id.* at 122. Furthermore, our national defense could be negatively affected by limiting access to certain video games. See Marc Saltzman, *Army Enlists Simulation to*

Video games can, and do, offer many real benefits to the users in addition to simple escapism.¹⁸¹ The current ESRB rating system does not unduly hamper children's access to these benefits.¹⁸² Any change to the current system could adversely affect these beneficial aspects of video games. Moreover, enforcement costs of any legislation could be high. Additional police officers will be needed to check for violations; undercover stings similar to the ones used to uncover alcohol and tobacco violations will be necessary to ensure compliance, and collection procedures will need to be implemented to ensure fine payments.¹⁸³ These enforcement procedures would be very similar to those carried out by the Bureau of Alcohol Tobacco and Firearms, and therefore should be expected to be similarly expensive. Because the Act responds to a problem that has not been proven to exist with a solution that provides only indirect relief, all of the costs constitute an extremely inefficient use of taxpayer money.

Help Tackle Terrorists, USA TODAY, Oct. 2, 2001, at 3D (explaining that the armed forces are using video-game technology to train a new generation of soldiers). Certain video-game technologies are used as training tools in the military. *Id.* Therefore, young players who play these games assist in lowering training costs for the Department of Defense (DOD) by becoming familiar with the games quickly. *Cf.* Rutheford B. Campbell, Jr., *Corporate Fiduciary Principles for the Post-Contractarian Era*, 23 FLA. ST. U. L. REV. 561, 580–81 (1996) (defining wealth transfers as transaction which redistribute wealth or value from one group to another). Any cost that can be shifted away from the DOD helps to reign in that department's expenditures. *See id.* Given the DOD's penchant for overspending, this trend could present a useful tool for the DOD. This argument is slightly tongue-in-cheek. However, for an eye-popping accounting of rampant and irresponsible government overspending, including \$25 billion in unaccounted expenses, \$100 million in unused plane tickets, and hundreds of thousands in government-issued credit card frauds, see Brian M. Riedl, *The Top 10 Examples of Government Waste*, BACKGROUND, Apr. 4, 2005, available at http://www.heritage.org/Research/Budget/bg1840.cfm#_ftn2 (quoting various government reports and audits revealing wasteful government spending).

181. *See* Kevin Maney, *Video Games Aren't Necessarily Turning Kids' Brains to Mush*, USA TODAY, July 12, 2005, at 3B (documenting some of the positive effects of playing video games).

182. *See supra* Part IV.A.

183. *Cf.* Protect Children from Video Game Sex and Violence Act of 2003, H.R. 669, 108th Cong. sec. 3(a), §§ 2732–2733 (2003) (outlining the measures to be enforced); Peter D. Jacobson & Jeffrey Wasserman, *The Implementation and Enforcement of Tobacco Control Laws: Policy Implications for Activists and the Industry*, 24 J. HEALTH POL. POLY & L. 567, 580 n.6 (1999) (discussing the difficulty in enforcing tobacco laws that are structured similarly to the proposed Violent Video Game Act in that they seek to prevent children from accessing substances by placing restrictions on retailers). The government expends a significant amount of money enforcing the tobacco laws. *See* DEP'T OF JUSTICE, FY2005 BUDGET AND PERFORMANCE SUMMARY (2005), <http://www.usdoj.gov/jmd/2005summary/html/p130-133.htm> (documenting the budget for the Bureau of Alcohol, Tobacco, Firearms and Explosives at almost \$900 million).

Thus, the Violent Video Game Act is premature at this time. The Act does not cure all of the necessary market failures—specifically ignoring parental acquiescence of video game purchases.¹⁸⁴ The Act must be redrafted to address all the market failures if it is to achieve its goal of limiting the exposure of children to violent video games. As currently drafted, the costs of the Act outweigh the benefits; thus, the Act should be avoided at the present time. Even if video games could be proven to cause violence in children, wisdom suggests avoidance of any legislation modeled after the Violent Video Game Act. However, if it can be proven that violent video games cause violence in children, what remedies would achieve the goal of limiting child exposure to these video games?

4. *An Alternate Solution Remediating All Market Failures.* Assuming that violent video games cause violence in children, something should be done to limit the exposure of these games to impressionable children.¹⁸⁵ In addition to addressing the retailer- and child-related market failures,¹⁸⁶ any new regulation from the federal government, the states, or the ESRB needs to address the market failures that allow parents to act as conduits transporting violent games to children.¹⁸⁷ Parents buying or renting these games for their children do not understand the ratings, underestimate the risk these “kids’ toys” present to children, or just do not care.¹⁸⁸ In any event, limiting children’s exposure to violent video games requires the inclusion of a method for educating parents about the dangers of video games in the Act itself.¹⁸⁹ The answer is supplemental education, not the proposed legislation.

Educating parents offers the key to preventing children from obtaining violent games. Because 83% of video-game purchases occur with the parent present, parents can restrict the purchase of violent, age-inappropriate video games.¹⁹⁰ Of course, parental

184. See *supra* Part IV.B.1.

185. See English, *supra* note 74 (citing Gallop Poll figures indicating many youth have played *GTA*, despite its M rating).

186. See *supra* Part IV.B (indicating that the proposed video-game legislation deals satisfactorily, with retailer and child market failures).

187. Jenkins, *supra* note 83.

188. *Id.* (noting that today video games are anything but “kids’ toys”: “62 percent of the [video game] console market and 66 percent of the PC market is age 18 or older”).

189. *Id.*

190. See *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN*, *supra* note 134, at 42 (reporting the finding of the FTC in the 2000 report on the video-game industry).

education does not solve the entire problem if children can purchase the violent video games without parents present.¹⁹¹ The Violent Video Game Act addresses this narrow issue and should assist in limiting the exposure of children to violent video games. The Act is necessary but not sufficient.

Video games are not simply “kids’ toys.”¹⁹² Parents, and society as a whole, need to realize that some of the content might harm their children. The Act will not succeed at educating parents by merely imposing liability on retailers for selling games to age-inappropriate consumers.¹⁹³ Analogous to the misconception that video games are innocent kids’ games is the belief that smokeless tobacco causes less harm than smoked tobacco.¹⁹⁴ Simply holding the retailers liable does not, on its own, educate parents or children about product dangers.

The liability-only approach surrounding smokeless tobacco does not compare favorably to the liability-plus-education approach used for cigarettes. Following the mass cigarette litigation in the 1990s, as part of the Multistate Settlement Agreement, tobacco companies ran counter-advertisements disclosing the dangers of smoking.¹⁹⁵ Since that time, cigarette use has dropped significantly.¹⁹⁶ During the same time, smokeless tobacco sales dipped, and then returned to prelitigation levels.¹⁹⁷ Most counter-advertisement focuses on educating consumers about the dangers of smoking.¹⁹⁸ Smokeless tobacco is not

191. *Id.* at 52 (revealing that underage children can easily purchase M-rated games).

192. *See* Jenkins, *supra* note 83 (“The game industry caters to adult tastes.”).

193. *Cf.* TeensHealth, Smokeless Tobacco, http://kidshealth.org/teen/drug_alcohol/tobacco/smokeless.html (last visited Mar. 31, 2007) (demonstrating that simply imposing liability on retailers has not changed the perception that using smokeless tobacco is safer than smoking).

194. *Id.* (disavowing the common misconception that smokeless tobacco is any less dangerous than smoked tobacco).

195. *See* Nat’l Ass’n of Att’ys Gen., Multistate Settlement with the Tobacco Industry 23–26, available at <http://www.library.ucsf.edu/tobacco/litigation/msa.pdf> (last visited Mar. 31, 2007) (showing the establishment and purpose of the educational programs).

196. *See* THOMAS C. CAPEHART, JR., U.S. DEP’T OF AGRIC., TRENDS IN THE CIGARETTE INDUSTRY AFTER THE MASTER SETTLEMENT AGREEMENT 3 (2001), available at <http://www.ers.usda.gov/publications/tbs/oct01/tbs250-01/tbs250-01.pdf> (showing a steady decline in the number of smokers in the United States since the Multistate Settlement Agreement).

197. *See* FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT FOR THE YEARS 2000 AND 2001, at 7 (2003), available at <http://www.ftc.gov/os/2003/08/2k2k1smokeless.pdf> (showing an increase in pounds of smokeless tobacco between 1999 and 2001).

198. *See, e.g.*, Phillip Morris USA, Home Page, <http://www.philipmorrisusa.com> (last visited Mar. 31, 2007) (devoting the majority of the homepage to health information and advice for quitting smoking).

afforded the same degree of attention.¹⁹⁹ Both products result in liability if sold to minors.²⁰⁰ This anecdotal evidence suggests that educational programs produce a larger decrease in the consumption of dangerous items than liability-only legislation. Establishing an independent education program would address the failure of parents to recognize the potential dangers violent games pose to their children.

A supplemental parental education program would effectively limit the exposure of violent video games to children, like smoking counter-advertising education,²⁰¹ because this provision would address parent-related market failures. Without the additional market correction of parental education, the Violent Video Game Act is nothing more than a useless gesture. Limiting child access to violent games needs to be attacked with a double-edged broadsword; both retailers *and* parents have an important part to play in limiting the exposure of violent games to children. Parents play a necessary role because without a shift in their thinking they will continue to purchase these “kids’ toys” for their children, ignoring the fact that some mature games might harm their children.²⁰² Thus, parental education is the missing, yet most important, factor to keep violent games out of the hands of children.

Any costs associated with this parental educational program could be paid by the funds generated from retailer fines for violating the Act, thereby limiting the strain on taxpayers. This cost-effective, dual approach to the problem of child exposure to violent video games ensures that potentially violent video games rarely get into the hands of children. Of course, the necessity of the dual approach is predicated upon proving a causal relationship between violent video games and violence in children in the first place.

V. CONCLUSION

The Violent Video Game Act as drafted fails at many levels and will operate as an utterly inefficient piece of legislation. As a threshold matter, the Act attempts to correct a problem that might

199. *Id.*

200. See Jennifer McCullough, Note, *Lighting up the Battle Against the Tobacco Industry: New Regulations Prohibiting Cigarette Sales to Minors*, 28 RUTGERS L.J. 709, 727 n.114 (1997) (compiling a list of all state tobacco statutes prohibiting the sale to minors, most of which are punishable by fine).

201. *Id.* at 726 (listing educational programs as one weapon being used to fight underage smoking).

202. See Jenkins, *supra* note 83.

not even exist. The debate still rages concerning the causal relationship between violent video games and violence in children; no definitive answer has been found.²⁰³ There exists evidence supporting a causal relationship, and evidence denouncing any causal relationship. Enacting legislation to cure a problem that may not even exist is the epitome of inefficiency and moral panic.²⁰⁴

Furthermore, assuming that a causal relationship exists, the Violent Video Game Act as drafted only corrects some of the market failures allowing children to be exposed to violent games: retailer ignorance or apathy and child irrationality or ignorance.²⁰⁵ Before the Act can achieve its goal, parental apathy or ignorance must be corrected. Without taking affirmative measures to educate parents, the Act is full of holes, thus allowing violent video games to reach, and possibly contaminate, young children.

The Violent Video Game Act itself, if enacted, would lead to costs that grossly outweigh any possible benefits.²⁰⁶ These costs are derived, ultimately, from the Act's inability to effectuate the singular goal of the legislation, combined with the Act's substantial enforcement costs. If a causal link can be proven to exist between violent video games and violence in children, then liability-only legislation is not the answer; it must be coupled with parental education.

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203. *See supra* Part III.C.

204. *See supra* Part III.B (discussing the idea that the perceived problem of violence in children attributable to violent video games is tantamount to moral panic).

205. *See supra* Part IV.B.

206. *See supra* Part IV.B.2–3.