

Written Testimony of
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Senior Fellow and Director,
Center for Digital Media Freedom
The Progress & Freedom Foundation

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

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

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My name is Adam Thierer. I am a senior fellow with the Progress & Freedom Foundation (PFF), and I direct its Center for Digital Media Freedom (CDMF).¹ I would like to thank Chairman Brownback and Ranking Member Feingold for the opportunity to submit written comments as part of the record for today’s hearing on “State Regulation of Violent Video Games & the First Amendment.”

I recently conducted a comprehensive review of the many federal, state and local proposals that seek to regulate video games in some fashion. In particular, I took a close look at a new federal legislative proposal, S. 2126, the “Family Entertainment Protection Act” (FEPA). I found that the FEPA, like many other state and local proposals, is being driven by a number of myths or misperceptions that should not serve as the basis of government intervention and content controls. The general conclusions of my study are as follows:

- ✓ **The video game industry’s ratings system is the most sophisticated, descriptive, and effective ratings system ever devised by any major media sector in America.**
- ✓ **The vast majority of video games sold each year *do not* contain intense violence or sexual themes.**
- ✓ **Just as every state law attempting to regulate video games so far has been struck down as unconstitutional, so too will the FEPA.**
- ✓ **The FEPA could derail the industry’s voluntary ratings system and necessitate the adoption of a federally mandated regulatory regime / ratings system.**
- ✓ **No correlation between video games and aggressive behavior has been proven. Moreover, almost every social / cultural indicator of importance has been improving in recent years and decades even as media exposure and video game use among youth has increased.**

¹ The views expressed here are my own and may not reflect those of The Progress & Freedom Foundation, its Board, or its supporters.

- ✓ **Video games might have some beneficial effects—especially of a cathartic nature—that critics often overlook. And, contrary to what some critics claim, violent themes and images have been part of literature and media for centuries.**

In sum, I believe that the video game industry’s self-regulatory system is working and should not be replaced by a government regulatory regime. The industry has created a comprehensive ratings and labeling system that offers parents and consumers extensive information about game content. While the enforcement of this scheme at the point-of-sale isn’t perfect, it is improving and certainly represents a less-restrictive means of addressing this issue than would a convoluted and likely unconstitutional federal or state regulatory regime.

For the Committee’s consideration, I have submitted the complete text of my recent study, “Fact and Fiction in the Debate Over Video Game Regulation.” This report is also available at the Progress & Freedom Foundation’s website, www.PFF.org.

I would be happy to respond to any questions that members of the Committee or their staff might have related to my findings. I can be contacted at athierer@pff.org.

Fact and Fiction in the Debate Over Video Game Regulation

by Adam Thierer

Playing games has become serious business. America's electronic gaming sector generated \$10.5 billion in sales in 2005² and by the late 1990s it was already growing three times faster annually than the motion picture industry.³ Consumers are playing games everywhere and doing so on multiple platforms.⁴ While video gaming consoles (PlayStation, XBox, Nintendo) continue to be the dominate platform, consumers are also playing games on personal computers (PCs), the Internet, cell phones, and various hand-held devices.

The phenomenal growth of this sector has been driven, at least in part, by the aging of the first generation of electronic gamers. The average age of video game players today is 30 and those gamers have been playing games for an average of 12 years, according to surveys by Peter D. Hart Research Associates.⁵ A surprising 19 percent of Americans over the age of 50 have played video games and 53 percent of current game players expect to be playing as much or more 10 years from now as they do today.⁶ Thus, video games can no longer be considered merely the domain of children.

I am part of that thirty-something generation that grew up straddling the divide between the "Cops and Robbers" era and the "Pac-Man" generation. The rise of electronic gaming opened my generation's eyes to an exciting new universe of visual, interactive entertainment. We were invited into a world of fantasy, exploration and learning that allowed us to live out dreams and enjoy games in a way that our parents' generation never could have imagined.

I am almost 40 years old now and have two children of my own who will soon become part of the next generation of gamers. The world of interactive video entertainment they already have at their disposal makes Pac-Man-era games look absolutely primitive by comparison. And yet, in another decade, it would not be at all

² "Video Game Set Sales Record in 2005," *CNN Money*, January 14, 2006,

<http://money.cnn.com/2006/01/13/technology/personaltech/gamesales/index.htm>

³ "A striking measure of the impact of the computer and video game software publishing industry on the U.S. economy was its 15 percent annual growth in sales between 1997 and 2000. In contrast, over the same period the U.S. economy grew only 6 percent per year and sales in the motion picture production, distribution, and allied services industry grew 4.6 percent per year." Robert Damuth, *Economic Impacts of the Demand for Playing Interactive Entertainment Software*, Entertainment Software Association, 2001, p. 5. Of course, it is important to realize that the video game industry numbers include both software (games) and hardware (consoles) sales whereas motion picture industry data is for box office receipts only.

⁴ For a brief but comprehensive overview of the video game industry's phenomenal growth over the past few decades, see David Kushner, "PlayNation: Inside the Multibillion Dollar Fascination with Video Games," *The World Almanac and Books of Facts 2006* (New York: World Almanac Books, 2006), p. 9.

⁵ "Essential Facts about the Computer and Video Game Industry: 2005 Sales, Demographics and Usage Data," Entertainment Software Association, 2005, pp. 2-3.
<http://www.theesa.com/files/2005EssentialFacts.pdf>

⁶ *Ibid.*

surprising if kids are asking their parents for the latest completely immersive virtual reality gaming system. (Think of it as the “holodeck” from Star Trek brought to your living room!)

Yet, while the games continue to grow increasingly sophisticated, the criticisms of them have remained largely the same ever since my generation traded in our cap guns for game controllers: Increased exposure to video games—and “excessively violent” games in particular—is bad for kids. Somehow, the virtual worlds we find in video games are perceived as significantly more dangerous than the imaginary worlds we once created in our back yards (which, at least in my case, included BB guns, bows-and-arrows, and sling shots!) Regardless, concerns about video game content, and “virtual violence” in particular, are now driving various efforts by federal, state and local policymakers to regulate children’s access to video games.

For example, last December, Senators Hillary Clinton (D-NY), Joe Lieberman (D-CT), and Evan Bayh (D-IN) introduced S. 2126, the “Family Entertainment Protection Act” (FEPA) to limit the exposure of children to violent video games. The FEPA would create a federal enforcement regime for video games sales and require ongoing regulatory scrutiny of industry practices. Specifically, S. 2126 would:

- Make it a federal crime for any retailer to sale or rent to someone under the age of 17 any video game with a Mature (“M”), Adults-Only (“AO”), or Ratings Pending (“RP”) rating, as specified under the industry’s Entertainment Software Ratings Board (ESRB) voluntary ratings system;
- Require the Federal Trade Commission (FTC) to contract with a private organization to evaluate the ESRB’s ratings system to determine if it remains “consistent and reliable over time” and to prevent “ratings slippage”;
- Require the FTC to conduct annual secret audits of video game retailers to determine how often minors are able to purchase games rated M, AO or RP;
- Require the FTC to conduct an investigation into embedded or hidden game content that can be accessed by key-stroke combinations or passwords to determine if this effects the accuracy of the ESRB’s voluntary ratings and whether this rises to the level of an “unfair or deceptive act” punishable by the FTC; and,
- Demand that the FTC’s Bureau of Consumer Protection ensure that consumers can file complaints regarding supposedly misleading or deceptive ESRB’s content-descriptions or labels on a video game and then submit an annual report to Congress tabulating these complaints.

While the FEPA proposes an ambitious new federal regulatory regime for the electronic software / video game industry, it’s not the only threat the industry faces. Similar efforts have been underway at the state and local level for many years now. As of early 2006, the Electronic Software Association (ESA), the video game industry’s trade association, was tracking over 75 state proposals to regulate some aspect of the video game industry.

This essay addresses several of the most common myths or misperceptions that are driving this push to regulate the electronic gaming sector. The general conclusions are as follows:

- ✓ **The industry’s ratings system is the most sophisticated, descriptive, and effective ratings system ever devised by any major media sector in America.**
- ✓ **The vast majority of video games sold each year *do not* contain intense violence or sexual themes.**
- ✓ **Just as every state law attempting to regulate video games so far has been struck down as unconstitutional, so too will the FEPA.**
- ✓ **The FEPA could derail the industry’s voluntary ratings system and necessitate the adoption of a federally mandated regulatory regime / ratings system.**
- ✓ **No correlation between video games and aggressive behavior has been proven. Moreover, almost every social / cultural indicator of importance has been improving in recent years and decades even as media exposure and video game use among youth has increased.**
- ✓ **Video games might have some beneficial effects—especially of a cathartic nature—that critics often overlook. And, contrary to what some critics claim, violent themes and images have been part of literature and media for centuries.**

Each of these issues is addressed in detail below.

Myth #1: The video game industry’s voluntary ratings scheme fails to provide parents with enough information about the content of games. Or, even if it does provide adequate information, it is not enforced properly.

Reality: The industry’s ratings system—the ESRB—is the most sophisticated, descriptive, and effective ratings system ever devised by any major media sector in America.

In a joint statement introducing the Family Entertainment Protection Act, Senators Clinton, Lieberman and Bayh argue that their legislation is needed because “young people are able to purchase these games with relative ease and parents are struggling to keep up with being informed about the content.”⁷ Both claims are

⁷ “Senators Clinton, Lieberman and Bayh Introduce Federal Legislation to Protect Children From Inappropriate Video Games,” U.S. Senate, December 16, 2005.

demonstrably false. To explain why, it is important to first understand the nature of the video game industry's voluntary ratings system.

In 1994, the video game industry established the Entertainment Software Ratings Board (ESRB), a self-regulatory labeling body. The ESRB ratings scheme is remarkably comprehensive. According to the ESRB, it rates over 1,000 games per year. Virtually every title produced by major game developers for retail sale today carries an ESRB rating and content descriptors. Generally speaking, the only games that do not carry ESRB ratings today are those developed by web amateurs that are freely traded or downloaded via the Internet.

The ESRB applies seven different rating symbols to the games it rates. These ratings are described in Table 1.

Table 1: ESRB Rating Symbols

“EC” - EARLY CHILDHOOD: Titles rated **EC** have content that may be suitable for ages 3 and older. Contains no material that parents would find inappropriate.

“E” – EVERYONE: Titles rated **E** have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.

“E10+” - EVERYONE 10+: Titles rated **E10+** have content that may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language, and/or minimal suggestive themes.

“T” - TEEN - Titles rated **T** have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood and/or infrequent use of strong language.

“M” – MATURE: Titles rated **M** have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content, and/or strong language.

“AO” - ADULTS ONLY: Titles rated **AO** have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.

“RP” - RATING PENDING - Titles listed as **RP** have been submitted to the ESRB and are awaiting final rating. (This symbol appears only in advertising prior to a game's release.)

Source: Entertainment Software Ratings Board

In addition to designating these ratings, the ESRB also has over 30 different content “descriptors” that it uses to give consumers highly detailed information about games. Thus, by simply glancing at the back of each game container, parents can quickly gauge the appropriateness of the title for their children. If parents want to do additional research in advance of a purchase, the ESRB's website (<http://www.esrb.org/>) allows parents to type in the name of any game and retrieve its rating and various content descriptors.

Table 2: ESRB Content Descriptors

- **Alcohol Reference** - Reference to and/or images of alcoholic beverages
- **Animated Blood** - Discolored and/or unrealistic depictions of blood
- **Blood** - Depictions of blood
- **Blood and Gore** - Depictions of blood or the mutilation of body parts
- **Cartoon Violence** - Violent actions involving cartoon-like situations and characters. May include violence where a character is unharmed after the action has been inflicted
- **Comic Mischief** - Depictions or dialogue involving slapstick or suggestive humor
- **Crude Humor** - Depictions or dialogue involving vulgar antics, including “bathroom” humor
- **Drug Reference** - Reference to and/or images of illegal drugs
- **Edutainment** - Content of product provides user with specific skills development or reinforcement learning within an entertainment setting. Skill development is an integral part of product
- **Fantasy Violence** - Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life
- **Informational** - Overall content of product contains data, facts, resource information, reference materials or instructional text
- **Intense Violence** - Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death
- **Language** - Mild to moderate use of profanity
- **Lyrics** - Mild references to profanity, sexuality, violence, alcohol, or drug use in music
- **Mature Humor** - Depictions or dialogue involving "adult" humor, including sexual references
- **Mild Violence** - Mild scenes depicting characters in unsafe and/or violent situations
- **Nudity** - Graphic or prolonged depictions of nudity
- **Partial Nudity** - Brief and/or mild depictions of nudity
- **Real Gambling** - Player can gamble, including betting or wagering real cash or currency
- **Sexual Themes** - Mild to moderate sexual references and/or depictions. May include partial nudity
- **Sexual Violence** - Depictions of rape or other sexual acts
- **Simulated Gambling** - Player can gamble without betting or wagering real cash or currency
- **Some Adult Assistance May Be Needed** - Intended for very young ages
- **Strong Language** - Explicit and/or frequent use of profanity
- **Strong Lyrics** - Explicit and/or frequent references to profanity, sex, violence, alcohol, or drug use in music
- **Strong Sexual Content** - Graphic references to and/or depictions of sexual behavior, possibly including nudity
- **Suggestive Themes** - Mild provocative references or materials
- **Tobacco Reference** - Reference to and/or images of tobacco products
- **Use of Drugs** - The consumption or use of illegal drugs
- **Use of Alcohol** - The consumption of alcoholic beverages
- **Use of Tobacco** - The consumption of tobacco products
- **Violence** - Scenes involving aggressive conflict

Source: Entertainment Software Ratings Board

Is this self-regulatory system effective? There are many ways to evaluate it, but it is important to realize that there will always be a degree of subjectivity involved in this process. This is true of the initial assignment of the ratings as well as any attempt to evaluate the effectiveness of those ratings. For example, some critics might bicker about what constitutes “mild violence” versus “intense violence” for purposes of the ESRB

content descriptors.⁸ Similarly, others might object to a video poker game being rated “T” for teenagers if they are opposed to any sort of simulated gambling. But these are examples of the sort of inherent challenges that all ratings systems face, and even a government-mandated ratings scheme would encounter similar disputes and difficulties.⁹

The important thing to keep in mind with the ESRB, however, is that it unquestionably offers more detailed information about the content it surveys than any other media ratings system in operation today. While the respective ratings systems used by the movie and television industry also offer consumers and parents valuable information about content, the video game industry’s is far more descriptive. Relative to the motion picture and television ratings schemes, the ESRB offers more major ratings designations as well as the dozens of highly detailed content descriptors listed above. Thus, claims that “parents are struggling to keep up with being informed about the content” would only be true if parents made absolutely no effort to examine the box the game came in and read its rating and content descriptors. Again, these ratings and the relevant content descriptors appear on the carton for every game sold by retailers in the United States. And, as mentioned, the ESRB website offers parents the ability to search for any game title and immediately determine its rating and content descriptors. This is a significant achievement not to be taken lightly by policymakers who imagine they can improve upon this system.

Importantly, the ESRB also operates an Advertising Review Council (ARC) that promotes and monitors advertising and marketing practices in the gaming industry. The ARC monitors compliance with ESRB guidelines and places restrictions on how game developers may market ESRB-rated games. Among the “Principles for Responsible Advertising” the ARC enforces are:¹⁰

1. An advertisement should accurately reflect the nature and content of the product it represents and the rating issued (i.e., an advertisement should not mislead the consumer as to the product’s true character).
2. An advertisement should not glamorize or exploit the ESRB rating of a product (e.g., an advertisement with a tag line that states: “banned by the ESRB” or “a (‘T’) rating has never been pushed this far,” etc.).
3. All advertisements should be created with a sense of responsibility towards the public.

⁸ It is worth noting that a recent Hart Research poll revealed that parents found the ESRB ratings were “about right” 83 percent of the time, and that 5 percent of the time, parents thought ESRB had been “too strict.” See Entertainment Software Ratings Board, “New Study Shows Parents Overwhelmingly Agree with Video Game Ratings,” November 22, 2004, http://www.esrb.org/downloads/validity_study_11_22_04.pdf

⁹ One need only follow the ongoing squabbles regarding the Federal Communications Commission’s efforts to define “indecent” on broadcast television and radio to understand why that would be the case.

¹⁰ Principles and Guidelines: Responsible Advertising Practices for the Interactive Entertainment Software Industry, Advertising Review Council of the ESRB, Second Edition, May 1, 2001, p. 5, http://www.esrb.org/downloads/principles_and_guidelines.pdf

4. No advertisement should contain any content that is likely to cause serious or widespread offense to the average consumer.
5. Companies must not specifically target advertising for entertainment software products rated “Teen,” “Mature,” or “Adults Only” to consumers for whom the product is not rated as appropriate.

In the event that a game publisher inappropriately labels or advertises a product, the ESRB can require corrective actions and impose a wide range of sanctions, including monetary fines when appropriate. An example of how this system works in action unfolded last summer when the ESRB conducted an investigation into the controversial best-selling game of 2004, “Grand Theft Auto: San Andreas.” Following the revelation that the game contained hidden sexually-mature material that could be accessed using a downloadable patch for the game, the ESRB launched an investigation. (The game’s publisher, Take-Two Interactive Software, Inc., claimed that the code was imbedded by a programmer without its knowledge).

Last July, the ESRB concluded its inquiry and decided to revoke the game’s “M” rating and substitute an “AO” (Adults Only) rating. Take-Two Interactive was required by the ESRB to immediately advise retailers to cease all sales of the game until corrective actions could be taken. Take-Two also agreed to take the following ESRB-mandated corrective actions:

- Offer retailers the option of either re-stickering existing inventory with an AO (Adults Only 18+) rating, or exchanging all unsold inventory for new versions of the game that has the hidden content removed and the original M rating intact.
- Make a downloadable patch available to all consumers who have previously purchased the PC version of the game, which will make the modification that unlocks the material inoperable.

To ensure the continued credibility and reliability of its ratings system, the ESRB also decided to, according to a press release, “require all game publishers to submit any pertinent content shipped in final product even if is not intended to ever be accessed during game play, or remove it from the final disc. Furthermore, the ESRB calls on the computer and video game industry to proactively protect their games from illegal modifications by third parties, particularly when they serve to undermine the accuracy of the rating.”¹¹ In that same press release announcing the penalties against Take-Two Interactive, Patricia Vance, president of the ESRB, noted that “The integrity of the ESRB rating system rests upon its accuracy and reliability, and we will continue to do whatever is necessary to protect the public’s trust in it.”¹² (Incidentally, Take-Two was also sued by its own shareholders over the incident. The class-action lawsuit claims that that a

¹¹ “ESRB Concludes Investigation into Grand Theft Auto: San Andreas; Revokes M (Mature) Rating,” Entertainment Software Ratings Board, July 20th, 2005, http://www.esrb.org/about_updates.asp#7-20-05

¹² Ibid.

failure to properly disclose information about hidden sexual material in “Grand Theft Auto” hurt the company’s stock values.)¹³

Although some politicians were quick to jump on the “Grand Theft Auto” episode as a supposed example of why government intervention was needed, the truth is just the opposite. This “Grand Theft Auto” episode proves that the video game industry’s self-regulatory scheme is a success, not a failure. When the integrity of the ratings system was threatened by one developer’s mistake, immediate corrective action was taken. Moreover, the ESRB adjusted its policies to better police such hidden code issues in the future. Finally, the “Grand Theft Auto” episode was the only incident of this sort to date. Would a government-run ratings system work as rapidly or effectively? It seems unlikely.

But not all critics complain about the ESRB’s ratings. Some instead focus on how the ratings system is enforced at the point-of-sale. Again, Senators Clinton, Lieberman and Bayh claim that federal legislation like FEPA is needed to “put teeth in the enforcement of video game ratings” because “young people are able to purchase these games with relative ease.”¹⁴

It is true that a potential weakness of the video game industry’s self-regulatory system is that depends on the cooperation of retail outlets. Retailers are responsible for enforcing the systems age-based ratings scheme. This is an objection that proves too much though. Almost all age-verification schemes, including those mandated by governments (like alcohol and tobacco restrictions), require private enforcement.

To ensure that the system is enforced properly, the ESRB provides a variety of materials to retailers as part of its “Ok to Play?” educational campaign. The materials include an ESRB employee training manual and quiz about the ratings system. The ESRB also provides stores with posters about the industry’s ratings system that can be displayed in the store. According to the ESRB, the “Ok to Play?” signage is displayed at 17 top national retailers who account for approximately 90 percent of all game sales. Prominent retailers involved in the effort include WalMart, Best Buy, Target, Toys R Us, and EB Games among others. These retailers, which are responsible for a significant portion of all video game sales, have enormous reputational incentives to abide by the ESRB ratings system. Importantly, the in-store signage used by these and other game retailers is also reproduced as consumer advertising in various magazines, newspapers, websites, and so on.

While this enforcement process will never be fool-proof, it is showing signs of steady improvement. The Federal Trade Commission (FTC) occasionally surveys the marketing and advertising practices of major media sectors (movies, music and video games) in a report entitled *Marketing Violent Entertainment to Children*. In the fourth

¹³ “More Legal Woes for ‘Grand Theft Auto’ Maker,” *CNET News.com*, February 15, 2006, http://news.com.com/More+legal+woes+for+Grand+Theft+Auto+maker/2100-1043_3-6040302.html?tag=nefd.top

¹⁴ “Senators Clinton, Lieberman and Bayh Introduce Federal Legislation to Protect Children From Inappropriate Video Games,” U.S. Senate, December 16, 2005.

such report, issued to Congress in July 2004, the FTC concluded that “As the Commission has recognized in its prior reports, the electronic game industry has adopted numerous standards that limit children’s exposure to ads for Mature-rated products and require the disclosure of rating information in most forms of advertising. The industry is actively enforcing those standards and penalizing those companies found to be in noncompliance.”¹⁵ On the other hand, the agency found that some companies “continue to place advertisements in television and print media with substantial youth audiences.”¹⁶

Rooting out all such marketing of M-rated games to younger audiences will likely be impossible, however. Some traditional television and print media outlets are clearly targeted toward younger audiences, making efforts to prevent marketing to children somewhat easier. But young people often read or view media content across a wide variety of sources and platforms meaning that it will be impossible to perfectly restrict all viewing of M-rated advertising. If a 10-year old sees an ad for an M-rated video game in *Sports Illustrated* or *Car and Driver*, for example, does that constitute a failure of the system? Moreover, in light of the more fluid nature of media today—with Internet websites, e-mail, blogs, etc.—it will become even more difficult to shield children from all game advertising. While the ESRB created the Advertising Review Council to address such concerns through its “Principles for Responsible Advertising,” it is important that policymaker realize that the system will never be fool-proof. And if government sought to impose formal restrictions on game advertising to address this issue, it would encounter many of the same difficulties and also potentially violate the First Amendment in the process.

The FTC’s latest report also deals with the sale of M-rated games to youngsters. The agency concluded that:

The industry, with the exception of some retailers, continues in nearly all instances to include in its advertising rating information that would be helpful for parents. Retailers, while doing a better job in restricting sales to children of Mature-rated products, still routinely make such sales to most buyers. These sales should diminish substantially, however, if promised industry improvements in adopting and enforcing restrictive sales policies are put into place by the end of this year.¹⁷

The FTC’s conclusion that retailers “routinely” are willing to sell M-rated games to minors is based on its “mystery shopper” surveys in which 13-to 16-year-olds are recruited to make an attempt to purchase such games without a parent being present. The number of teenagers who were able to purchase M-rated games as part of the mystery shopper surveys has fallen steadily since the FTC began such surveys in 2000 (85%) but

¹⁵ *Marketing Violent Entertainment to Children: A Forth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Washington, D.C.: Federal Trade Commission, July 2004), p. 28. (Previous installments of the FTC’s *Marketing Violent Entertainment* report can be found at: <http://www.ftc.gov/bcp/online/edcams/ratings/reports.htm>).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

was still very high in 2004 (69%).¹⁸ This explains why some policymakers feel the industry's voluntary ratings enforcement scheme is a failure and propose federal regulation as a remedy.

But the industry's system is still very new and is just beginning to reach a critical mass in terms of public / retailer awareness. The ESRB continues to work with retailers to improve the effectiveness of the system with the hope of making its ratings system as commonplace as the Motion Picture Association of America's (MPAA) ratings. But even the MPAA's widely recognized ratings system still isn't perfectly enforced by cinemas even though it has existed for more than three decades. The FTC's mystery shopper survey for movie-goers found that 36 percent of teens were able to purchase tickets for R-rated movies without a parent present.¹⁹

Importantly, too much should not be read into these FTC "mystery shopper" surveys for another reason: How often do 13-16 year olds really go into stores and buy games on their own? And even if kids are going in to stores and buying games on their own, where are they getting the money to do so? The retail price of a new video game ranges between \$40-\$50. Some of the most popular new titles can cost almost \$60. Thus, given the significant cost of the games, it is likely that an adult will be present when most games are purchased. Market surveys confirm that this is the case. According to Hart Research surveys, the average age of a video game purchaser is 37 and 92 percent of the time parents are present when games are purchased or rented.²⁰

Critics might argue that some kids can get access to their parents' credit cards or somehow get money from them to buy games on their own from an online vendor, for example. But this is clearly a matter of personal responsibility that parents must deal with in other many contexts as well. In a free society, government should not use a *potential* lack of parental responsibility as an excuse for regulatory intervention. That is especially the case when the intervention would affect freedom of speech or artistic expression.

Finally, parents also have another line of defense once video games are brought into their homes. Major game consoles developers (Sony, Microsoft and Nintendo) are all including sophisticated parental controls in their new gaming systems.²¹ These console controls allow parents to enter the ESRB rating level that they believe is acceptable for their children. Once they do so, no game rated above that level can be played on the console. (All ESRB-rated games contain embedded "flags," or a string of code in the software, that allow the consoles to automatically recognize the game's rating). Thus, a parent could set the rating threshold on their child's video game console to "T" for "Teen" and then no games rated Mature (M) or Adults Only (AO) could be played on the

¹⁸ *Ibid.*, p. B-3.

¹⁹ *Ibid.*

²⁰ "Essential Facts about the Computer and Video Game Industry: 2005 Sales, Demographics and Usage Data," Entertainment Software Association, 2005, p. 3, 7.

<http://www.theesa.com/files/2005EssentialFacts.pdf>

²¹ Tim Surette, "PS3 to Include Parental Controls," *Gamespot News*, November 28, 2005,

<http://www.gamespot.com/news/6140451.html>

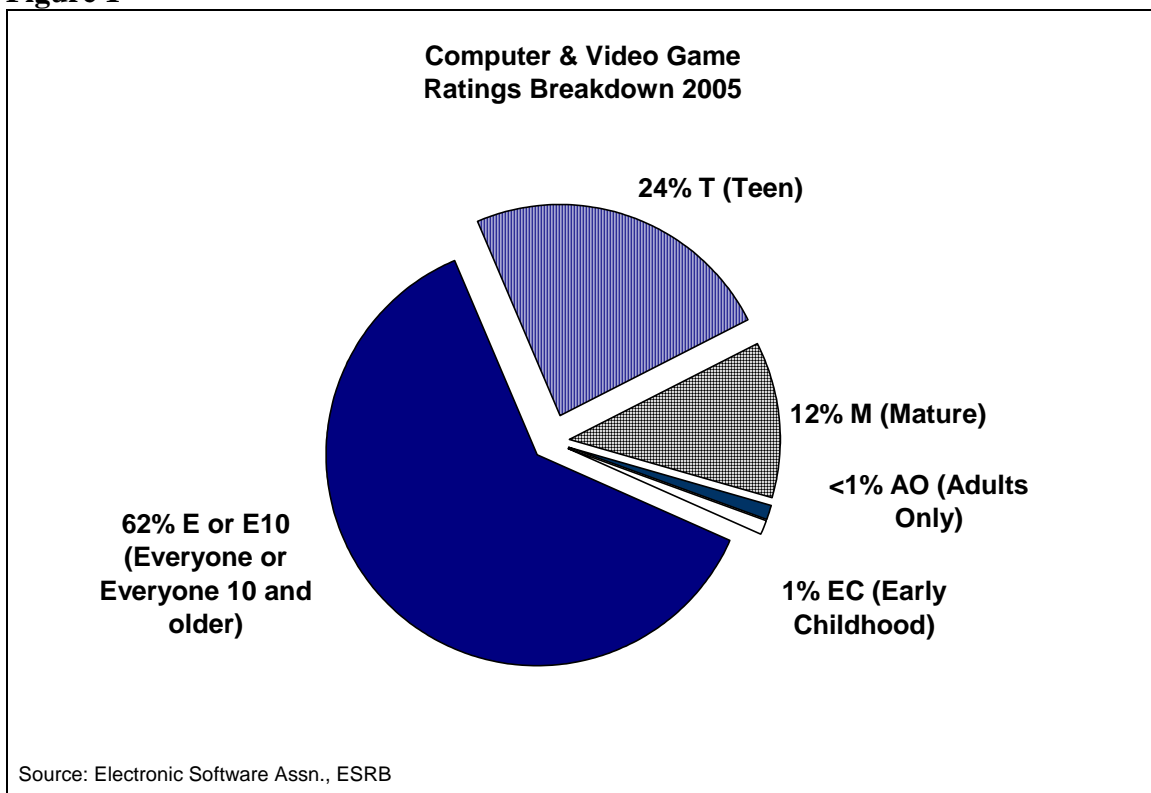
console unless the parent first entered a password. New handheld gaming systems, such as Sony’s PlayStation Portable, also contain similar parental controls.

Myth #2: The majority of video games contain excessively violent material, and many contain sexually explicit themes or images.

Reality: The vast majority of video games sold each year *do not* contain intense violence or sexual themes.

If the speeches of some lawmakers were any guide, the public would be led to believe that most video games are filled with explicit violence or sexual themes. This isn’t the case. In fact, as Figure 1 illustrates, less than 13 percent of all video and PC games reviewed by the ESRB in 2005 were rated “Mature” (M) or “Adults Only” (AO). (Less than 1 percent were rated Adults Only). Thus, over 87 percent of all games sold in 2004 were rated either “Early Childhood” (EC), “Everyone” (E), “Everyone 10 and older” (E10+), or “Teen” (T).

Figure 1



Similar results are seen when reviewing the top-selling video games sold over the last five years. The Progress & Freedom Foundation compiled the ratings for the top 20 video games and PC titles between 2001-2005 and, as Table 3 shows, found that over 80 percent of the most popular games were rated either “E” or “T”. Moreover, if one removes the various *Grand Theft Auto* and *Halo* titles (there have been multiple best-

selling versions of each game) from the annual Top 20 lists, the percentage of “M” rated games would fall significantly.

Table 3: Ratings Breakdown for Top 20 Video & PC Games (2001-2005)

	“E”	“T”	“M”
Top 20 Video Games (2001-2005)	58%	21%	21%
Top 20 PC Games (2001-2005)	30%	55%	15%
All Video and PC Games (2001-2005)	44%	38%	18%

Thus, policymakers cannot build the case for video game industry regulation on the contention that most games made today contain extreme violence or sexuality. While it is true that games rated “T” can include some violent content, it is typically not the sort of violence that would rise to a level of serious concern for most parents. (i.e., lightsaber fights in “Star Wars” games or boxing games).

Finally, some of the criticisms aimed at those games which do contain gore or graphic violence ignore the potential positive aspects of those games. Many news reports or congressional hearings focusing on violence in video games simply show a few looped sequences of blood or gore from a handful of games. No other context or information is provided about the nature or content of those games. Consider popular games such as *Resident Evil*, *Half-Life*, and *Metal Gear Solid*. It is true that these titles contain violent action, gunplay, and plenty of zombies, aliens or just plain bad guys. But it is also true that these games present the player with elaborate worlds to explore, mysteries to solve and puzzles to crack. They are enormously challenging and thought-provoking, especially when compared with much of the “passive” media content and “couch-potato fare” of the past. Many of these games even require the use of a “player guides” or “walkthrough manuals” to conquer various tasks or “levels.” Thus, as will be discussed at greater length in the conclusion, there may be positive (even educational) aspects associated with these cognitively challenging games. Regardless, the simplistic criticisms and generalizations some critics make about “violent” games often seemed based on an ignorance of what those games are really all about. Indeed, one wonders if any of the critics have bothered sitting down and playing some of these games on their own or with their children.²²

Myth #3: Proposals to restrict the sale or rental of “violent” video games to children can easily pass constitutional muster in the courts.

Reality: Every state law attempting to regulate video games in this fashion so far has been struck down as a violation of the First Amendment. The FEPA would likely be rejected as unconstitutional also.

Several state or local governments have already enacted legislation or ordinances dealing with the sale of video games to minors. And, as the Congressional Research

²² “Video games are most threatening to adults who have seen images of them but never tried to play them.” Gerald Jones, *Killing Monsters: Why Children Need Fantasy, Super-Heroes, and Make-Believe Violence* (New York: Basic Books, 2002), p. 173.

Service recently noted in a report to Congress, “every lower federal court that has ruled on such a statute has found it unconstitutional, or issued a preliminary injunction after finding that the law was likely to be found unconstitutional.”²³

The first major decision, *American Amusement Machine Association v. Kendrick*, was handed down by the United States Court of Appeals for the Seventh Circuit in March 2001.²⁴ The case dealt with coin-operated “arcade” games. The city of Indianapolis had passed an ordinance prohibiting anyone who operated more than five arcade games on their premises from allowing an unaccompanied minor to play games that would be considered “harmful to minors.” The ordinance also demanded that such games have warning signs on them and be partitioned or concealed from other games. Under the ordinance, “harmful to minors” was defined as game content “that predominantly appeals to minors’ morbid interest in violence or minors’ prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen years, lacks serious literary, artistic, political or scientific value as a whole for persons under” that age, and contains either “graphic violence” or “strong sexual content.”

In a unanimous 3-0 decision, the court struck down the Indianapolis ordinance as unconstitutional. Judge Richard A. Posner’s opinion for the court was a blistering tour-de-force that included a review of violence in literature throughout history. “Self-defense, protection of others, dread of the ‘undead,’ fighting against overwhelming odds—these are all age-old themes of literature, and ones particularly appealing to the young,” he noted. “To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it,” Posner argued. “People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”

Posner also addressed an argument many critics make about the interactive nature of video game making them different from previous forms of entertainment media.

[T]his point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.

Video games can also possess these qualities, Posner concluded. Moreover, Posner found the city’s professed benefits to children of blocking their access to games to

²³ Henry Cohen, “Constitutionality of Proposals to Prohibit the Sale or Rental to Minors of Video Games with Violent or Sexual Content or ‘Strong Language,’” Congressional Research Service, U.S. Library of Congress, January 12, 2006, p. i.

²⁴ *American Amusement Machine Association, et al. v. Kendrick, et al.*, 244 F.3d 572 (7th Cir. 2001), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=7th&navby=case&no=003643>

be “entirely conjectural.” Indeed, Posner addressed the ambiguous studies that some pointed to as proof of a link between violent video games and youth aggression:

The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the interactive character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments. It is highly unlikely that they are more harmful, because ‘passive’ entertainment aspires to be interactive too and often succeeds. When Dirty Harry or some other avenging hero kills off a string of villains, the audience is expected to identify with him, to revel in his success, to feel their own finger on the trigger. It is conceivable that pushing a button or manipulating a toggle stick engenders an even deeper surge of aggressive joy, but of that there is no evidence at all.

Judge Posner’s unanimous Seventh Circuit decision would be followed two years later by an Eight Circuit Court of Appeals decision in *Interactive Digital Software Association v. St. Louis County*.²⁵ The decision held as unconstitutional a St. Louis county ordinance which sought to make it illegal for any person knowingly to sell, rent, or make available graphically violent video games to minors, or to “permit the free play of” graphically violent video games by minors, without a parent or guardian’s consent.

Writing for the unanimous 3-0 court, Judge Morris S. Arnold began by making it clear that video game creators and users *did* have unambiguous First Amendment rights at stake. Judge Arnold pointed out that the Supreme Court had read the First Amendment broadly enough to “shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”²⁶ Thus, Arnold held that “If the first amendment is versatile enough to [shield that speech from regulation] we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to a similar protection. The mere fact that they appear in a novel medium is of no legal consequence.”

The court also found that the County’s contention that there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health was “simply unsupported in the record.” Borrowing from a recent Supreme Court decision, the 8th Circuit concluded that “Where first amendment rights are at stake, ‘the Government must present more than anecdote and supposition.’”²⁷

²⁵ *Interactive Digital Software Association, et. al. v. St. Louis County, et. al.*, 329 F.3d 954 (8 Cir. 2003), <http://caselaw.lp.findlaw.com/data2/circs/8th/023010p.pdf>

²⁶ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995).

²⁷ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000).

The trend continued in *Video Software Dealers Association v. Maleng*.²⁸ In this U.S. District Court decision, Judge Robert Lasnik struck down a State of Washington bill that prohibited the rental or sale of computer and video games containing depictions of violence against law enforcement officers to anyone under 17 years of age. Judge Lasnik held that video game content was protected by the First Amendment and that “depictions [of violence] have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation.” He also criticized the vague nature of the enactment since it “failed to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so they he many act accordingly.” Finally, Lasnik held that, “the current state of research cannot support [the measure] because there has been no showing that exposure to video games that ‘trivialize violence against law enforcement officers’ is likely to lead to actual violence against such officers. Most of the studies on which defendants rely have nothing to do with video games, and none of them is designed to test the effects of such games on the player’s attitudes or behavior toward law enforcement officers. ... [N]either causation nor an increase in real-life aggression is proven by these studies.”

The themes developed in these three cases have been echoed in three recent decisions in Michigan (*ESA v. Granhom*), Illinois (*ESA v. Blagojevich*) and California (*VSDA v. Schwarzenegger*), all of which blocked the enactment of laws seeking to regulate video games. The themes running through all six of these decisions can be summarized as follows:

- ✓ video games are speech and are protected by the First Amendment;
- ✓ any attempt to regulate video games will be subjected to “strict scrutiny” (the highest degree of First Amendment scrutiny) by the courts;
- ✓ the criminal penalties contained in these legislative measures would likely have a “chilling effect” on video game expression; and
- ✓ the ambiguity of various terms found in these measures (especially “harm to minors”) result in them being unconstitutionally vague;
- ✓ the link between video games and aggressive behavior, or other forms of “harm to minors,” has not been proven scientifically.

Finally, it is also worth pointing out that most of these decisions were very strongly worded and showed no signs of the sort of indecisive or apologetic reasoning often seen in many other First Amendment decisions. For many of the same reasons, it is likely that the FEPA would also be ruled unconstitutional if enacted. The FEPA raises many other troubling legal and practical issues as well, which are discussed next.

²⁸ *Video Software Dealers Association, et. al. v. Maleng, et. al.*, 325 F. Supp.2d 1180 (Western Dist. Wash. 2004).

Myth #4: Regulatory proposals like the FEPA would not impose a burdensome regulatory regime but instead merely build on the industry’s voluntary ratings system.

Reality: The FEPA could derail the industry’s voluntary ratings scheme and necessitate the adoption of a federally mandated regulatory regime / ratings system. Moreover, it is unconstitutional for government to enshrine a private ratings scheme into law.

The irony of proposals like the FEPA is that its supporters castigate the video game industry for not doing enough to protect children, but then they propose co-opting the industry’s voluntary ratings system for their own ends. Again, the FEPA would make it illegal for any retailer to sell a video game rated M, AO or RP to a minor. Apparently, therefore, the lawmakers supporting the FEPA are willing to accept the industry’s voluntary ratings system, but believe that, as the bill states, “there is a need to enact legislation to ensure that the ratings system is meaningful.”

In their attempt to make the industry’s voluntary ratings system “meaningful,” however, lawmakers could instead make it far less meaningful. Worse yet, they might kill it entirely. After all, why would game developers continue to voluntarily rate their content if the threat of fines or prosecution looms overhead? Fearing such liability, there is a real risk that many in the industry would likely stop rating games altogether since there would be no penalty for refusing to label content. If this were to occur, parents and all game consumers would lose valuable information about the age appropriateness and content of the games that they are thinking of buying.

Of course, if enough game developers respond to the FEPA by abandoning voluntary ratings, lawmakers would likely allege “market failure” and propose a mandatory federal rating / labeling scheme to take its place. Government would be forced to: (a) enact its own ratings scheme or enshrine the ESRB’s system into law, (b) mandate that all game makers label their games using those new ratings, and, (c) impose legal penalties on game developers / retailers who fail to enforce the system in accordance with the new rules.

If this scenario unfolds, lawmakers will be making content-based determinations that would likely run afoul of the First Amendment. But even if the industry’s system remained in place as the basis of a new federal enforcement regime, as is envisioned in the FEPA, it would be unconstitutional for government to enshrine a private ratings scheme into law or use it as a trigger for legal liability. This is what several courts have held in past years after some state and local governments attempted to enact laws or ordinances based upon the MPAA’s voluntary movie ratings system.

For example, in *Borger v. Bisciglia* a U.S. District Court held that “[A] private organization’s ratings system cannot be used to determine whether a movie receives

constitutional protection.”²⁹ Similarly, in *Swope v. Lubbers*, the court held that “[t]he standards by which the movie industry rates its films do not correspond to the... criteria for determining whether an item merits constitutional protection or not.”³⁰ Roughly a dozen court cases have come to largely the same conclusion: Government cannot co-opt a voluntary, private ratings system for its own ends.³¹

There are two other provisions of the FEPA that raise serious constitutional concerns. The first is the requirement that the FTC contract with a private organization to evaluate the ESRB’s ratings system to determine if it remains “consistent and reliable over time” and to prevent “ratings slippage.” For such an evaluation to take place, however, it would likely require that someone in government define a baseline to determine whether “slippage” had occurred over time. The First Amendment concerns here are obvious since government would be dictating acceptable speech standards.

Less obvious, but nonetheless just as real, are the potential implications of the FEPA’s requirement that the FTC conduct an investigation into embedded or hidden game content that can be accessed by key-stroke combinations or passwords to determine if this effects the accuracy of the ESRB’s voluntary ratings and whether this rises to the level of an “unfair or deceptive act” punishable by the agency. Practically every game produced today has some hidden content embedded within it. Indeed, such hidden content is one of the real attractions of some games to many players. But this hidden content would rarely have any impact on the initial ratings assignment by the ESRB. Nonetheless, as mentioned, the ESRB now requires that game developers divulge hidden content when games are rated. But government oversight of the hidden code or content features of video games could have a serious chilling effect on that speech. Thus, some of the extra content that consumers enjoy most might be self-censored or eliminated entirely if game developers fear legal liability or other regulatory repercussions.

Myth #5: There is a direct correlation between the rise of violent video games and the decline of various social / cultural indicators.

Reality: No such correlation has been proven. Indeed, almost every social / cultural indicator of importance has been improving in recent years and decades even as media exposure and video game use among youth has increased.

It has already been shown that the vast majority of video games do not contain excessively violent or sexually explicit themes. Still, many industry critics claim that

²⁹ *Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wis. 1995).

³⁰ *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983).

³¹ *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968); *Drive in Theaters v. Huskey*, 305 F. Supp. 1232 (W.D.N.C. 1969); *Engdahl v. City of Kenosha* 317 F. Supp. 1133 (E.D. Wis. 1970); *Motion Picture Association of America v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970); *State v. Watkins*, 191 S.E. 2d 135 (S.C. 1972); *Watkins v. South Carolina*, 413 U.S. 905 (1973); *Potter v. State*, 509 P.2d 933, (Okla. Ct. Crim. App. 1973); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3d Cir. 1988); *Gascoe, Ltd. v. Newtown Township*, 699 F. Supp. 1092 (E.D. Pa. 1988).

increased exposure to video games has created a generation of degenerate or dangerous youth. For example, in their book *Stop Teaching Our Kids to Kill*, Lt. Col. Dave Grossman and Gloria DeGaetano rhetorically ask: “Are our children, socially marginalized and psychologically weakened, the indicator group for the level of violence in our society? Are they the canaries in our coal mines? Unfortunately, the answer is yes.”³² Like other critics, Grossman and DeGaetano then go on to claim that scholarly literature and experiments have established a clear link between violently themed video games and aggressive behavior in children.

In reality, however, no such link has been clearly established in the “scientific” literature on this subject. The literature is ambiguous at best and perhaps even leans against the “causal hypothesis” that media violence leads to aggressive behavior. Psychologist Jonathan L. Freedman conducted the most comprehensive review of all the major literature on this subject for his book *Media Violence and Its Effect on Aggression: Assessing the Scientific Evidence*. He concluded that “the results do not support the view that exposure to media violence causes children or anyone else to become aggressive or to commit crimes; nor does it support the idea that it causes people to be less sensitive to real violence.”³³ Freedman collected and reviewed all the laboratory experiments, field experiments, longitudinal studies, and other studies employing mixed methodologies. He concluded that “not one type of research provided the kind of supportive evidence that is ordinarily required to support a hypothesis. Not one found 90 percent supportive or 80 percent supportive or 70 percent supportive or even 50 percent. In fact, regardless of the method used, fewer than half the studies found results that supported the [causal] hypothesis—sometimes considerably fewer than half.”³⁴

While these findings relate to television and movie violence, they would seem to have some bearing on the debate over video game violence. Indeed, the FTC’s first report on the marketing practices of entertainment companies noted that early research relating to video games was generally inconclusive. “[M]ost researchers are reluctant to make definitive judgments at this point in time about the impact of violent electronic games on youth because of the limited amount of empirical analysis that has so far taken place. Although some surveys of the literature lean toward seeing a detrimental effect from playing violent video games, others are more skeptical. As additional research becomes available, these technical assessments may change.”³⁵ In other words, contrary to claims made by some critics, no clear link between video games and real-world aggression or violence has been established.

It is possible, however, to at least analyze the claim that there is a correlation between general exposure to video games and declining cultural indicators. Data is

³² Dave Grossman and Gloria DeGaetano, *Stop Teaching Our Kids to Kill* (New York: Crown Publishers, 1999), p. 17.

³³ Jonathan L. Freedman, *Media Violence and Its Effect on Aggression: Assessing the Scientific Evidence* (Toronto: University of Toronto Press, 2002), pp. x-xi.

³⁴ *Ibid.*, pp. 200-201.

³⁵ *Marketing Entertainment Violence to Children*, Federal Trade Commission (2000), Appendix A, p. 13, <http://www.ftc.gov/reports/violence/appendicesviorpt.pdf>.

readily available on many cultural indicators of concern and can be plotted against increasing childhood exposure to media and video games.

When undertaking such an analysis, however, it is vitally important to recall that one of the first rules of statistical analysis is that correlation does not necessarily equal causation. While some cultural / social indicators have indeed worsened in the post World War II period, that does not necessarily prove that exposure to “indecent” or “excessively violent” media programming are the root causes. “[B]ecause two phenomena are both disturbing and coincident in time does not make them causally connected,” notes Dr. Stuart Fischhoff of the Media Psychology lab at Californian State University in Los Angeles.³⁶

What is most interesting about some of the claims made by proponents of the causal hypothesis, however, is that they choose to ignore certain variables, or randomly end their surveys for other data sets in the early 1990s. It may be the case that they have not bothered to update their research since that time. Alternatively, these critics could be choosing to intentionally ignore the stunning reversal of many of these social indicators over the past few decades since it does not fit their thesis about media causing social harms. Consider, for example, the reversal of various cultural trends over the past decade:

- Juvenile murder, rape, robbery and assault are all down significantly over the past decade. Overall, aggregate violent crime by juveniles fell 43 percent from 1995-2004.³⁷ (Figure 2)
- There are fewer murders at school today and fewer students report carrying weapons to school or anywhere else than at any point in the past decade.³⁸ (Figures 3 & 4)
- Alcohol and drug abuse among high school seniors has generally been falling and is currently at a 20-year low.³⁹ (Figure 5)
- Teen birth rates have hit a 20-year low in 2002 and fewer teens are having sex today than they were 15 years ago.⁴⁰ (Figure 6 & 7)
- High school dropout rates continue to fall steadily, as they have for the past 30 years.⁴¹ (Figure 8)

³⁶ Quoted in Jones, *Killing Monsters*, p. 28.

³⁷ Federal Bureau of Investigation, *Crime in the United States*, various years, available at <http://www.fbi.gov/ucr/ucr.htm#cius>

³⁸ National Center for Education Statistics, *Indicators of School Crime and Safety, 2004*, available at <http://nces.ed.gov/pubs2005/2005002.pdf>

³⁹ The University of Michigan, *The Monitoring the Future Study*, various years, available at <http://monitoringthefuture.org/>

⁴⁰ Center for Disease Control, *Teenagers in the United States: Sexual Activity, Contraceptive Use, and Childbearing, 2002*, available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_024.pdf

⁴¹ U.S. Census Bureau, *Current Population Survey*, available at <http://www.census.gov/population/socdemo/school/tabA-5.pdf>

- Teenage suicide rates rose steadily until the mid-1990s and then began a dramatic decline.⁴² (Figure 9)
- The divorce rate has fallen steadily since 1990, from 5 divorces per 1,000 citizens to 3.9 in 2004.⁴³ (Figure 10)

These results do not conclusively rule out a link between exposure to games and violent acts or promiscuous sexual behavior. But they should at least call into question the “world-is-going-to-hell” sort of generalizations made by proponents of increased media regulation who all too often make casual inferences about the relationship between media exposure and various social indicators.

Such a causal relationship is even more dubious today since all Americans, especially youngsters, are surrounded by a much wider variety of media than ever before. Even though television viewing has gone down slightly in recent years, it has been due to the rise of other media substitutes that command the attention of children, including the Internet, cell phones and video games. Overall, therefore, it appears that children are “consuming” as much, if not more, media than ever before. A 2000 Annenberg Public Policy Center survey on *Media in the Home* found that children spend almost 6½ hours using media each day.⁴⁴ And the Kaiser Family Foundation’s *Generation M* study also found youngsters spend about 6½ hours consuming media but that because they are “masters of multitasking” they actually manage to pack 8½ hours of media exposure into that 6½ hours of time.⁴⁵ Despite this, all the cultural indicators of concern commonly mentioned by media or video game industry critics have seen encouraging reversals from past decades. One would think that if gaming was really leading to increased aggression among youth it would start showing up in some of these indicators.

This suggests that the relationship between media usage and cultural / social indicators is far more complicated than many previously thought. At a minimum, it suggests that there are likely many other factors that effect child development beyond media usage or exposure to video games.⁴⁶ As the Federal Trade Commission concluded

⁴² Center for Disease Control, U.S. Center for National Health Statistics, *National Vital Statistics Report*, various years, available at <http://www.cdc.gov/nchs/fastats/suicide.htm>

⁴³ Center for Disease Control, U.S. Center for National Health Statistics, *National Vital Statistics Report*, various years, available at http://www.cdc.gov/nchs/data/nvss/divorce90_04.pdf

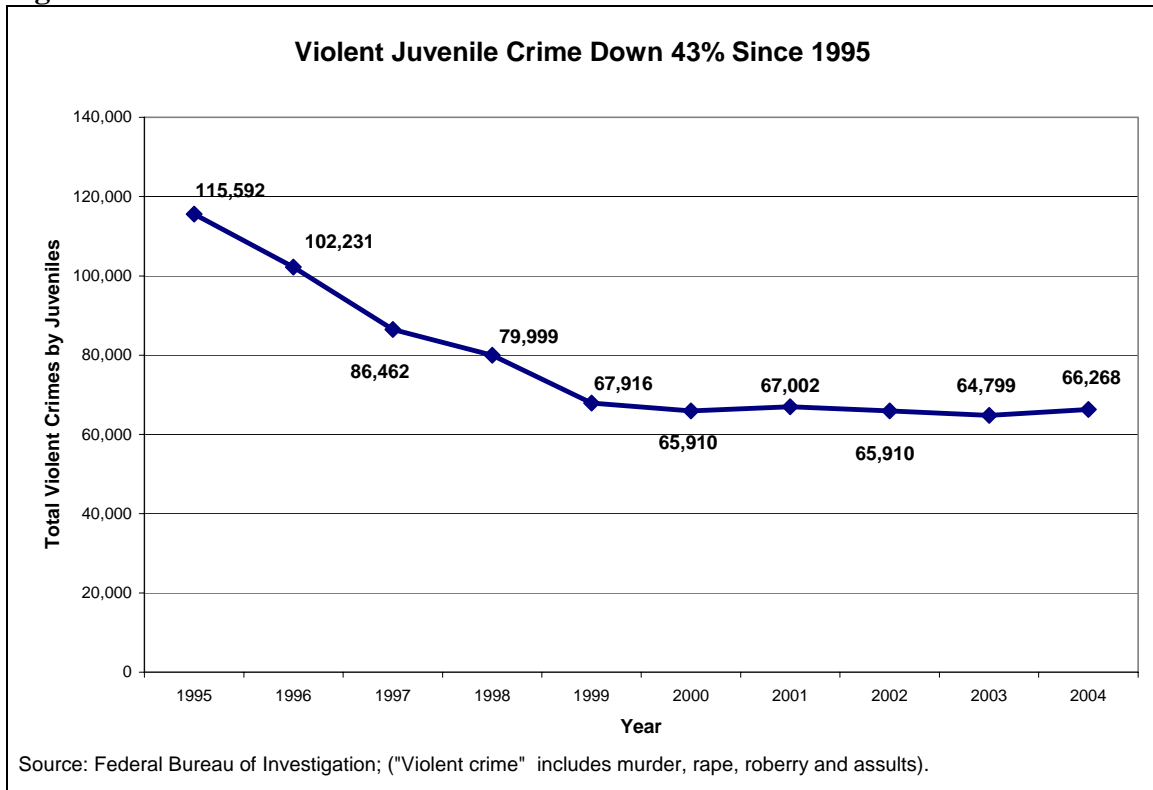
⁴⁴ *Media in the Home, 2000*, Annenberg Public Policy Center, June 26, 2000, http://www.annenbergpublicpolicycenter.org/02_reports_releases/report_2000.htm

⁴⁵ *Generation M: Media in the Lives of 8-18 Year-Olds*, Kaiser Family Foundation, March 2005, p. 6, <http://www.kff.org/entmedia/entmedia030905pkg.cfm>

⁴⁶ For a broader discussion of these issues, see Karen Sternheimer, *It's Not the Media: The Truth about Pop Culture's Influence on Children* (Boulder, Colorado: Westview Press, 2003). Sternheimer argues that “the claim that video games create the *desire* to actually kill a live human is not supported by the evidence. If this were the case we would see far more of the millions of video game users becoming violent instead of an extreme minority.” Sternheimer, *It's Not the Media*, p. 110. Even the Children’s Media Policy Coalition, a collection of groups and associations that favor more government regulation of “excessively violent” media, has noted that “no reputable scientist has ever suggested that media violence is the only cause of even the most important cause of aggressive behavior. To the contrary, the general

in a 2000 review of the literature on this issue: “Most researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes, and violence.”⁴⁷

Figure 2



consensus is that it requires a convergence of many personal and environmental factors to elicit serious aggressive behavior.” “Reply Comments of the Children’s Media Policy Coalition,” *In the Matter of Violent Television Programming and Its Impact on Children*, Federal Communications Commission, MB Docket No. 04-261, 2004, p. 9.

⁴⁷ *Marketing Entertainment Violence to Children*, Federal Trade Commission (2000), Appendix A, p. 1, <http://www.ftc.gov/reports/violence/appendicesviorpt.pdf>. Later in that same study, the FTC elaborated on this point: “Another important area of apparent agreement among diverse groups of observers is an increasing recognition that the media-aggression relationship is a complex one that involves a number of mediating influences. Broader research into the causes of youth violence has identified interacting risk factors, such as genetic, psychological, familial, and socioeconomic characteristics. Severe antisocial aggressive behavior appears to occur most often when more than one of these factors is present. The typical profile of a violent youth is one who comes from a troubled home, has poor cognitive skills, and exhibits psychological disorders such as anxiety, depression, and attention deficit hyperactivity. This configuration of risk factors makes attempts to isolate the independent effect of media violence difficult, because media violence can operate through many of the risk factors described above.” *Ibid.*, pp. 9-10.

Figure 3

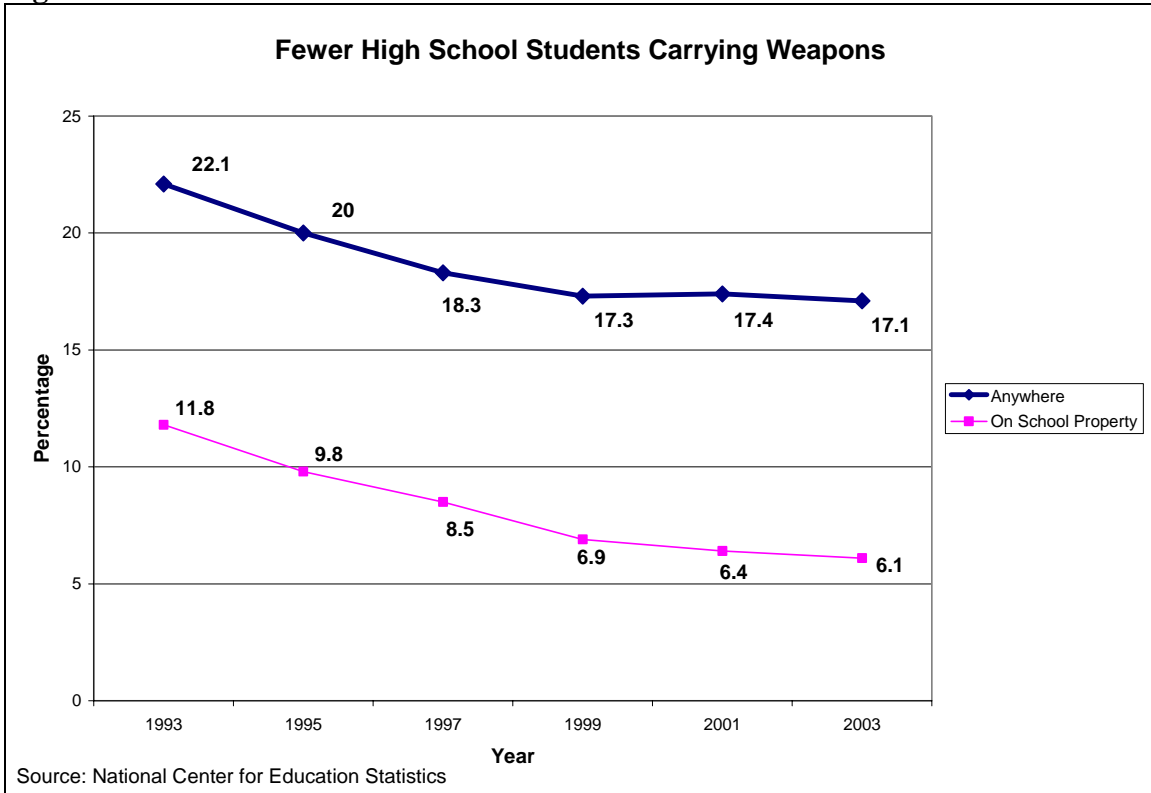


Figure 4

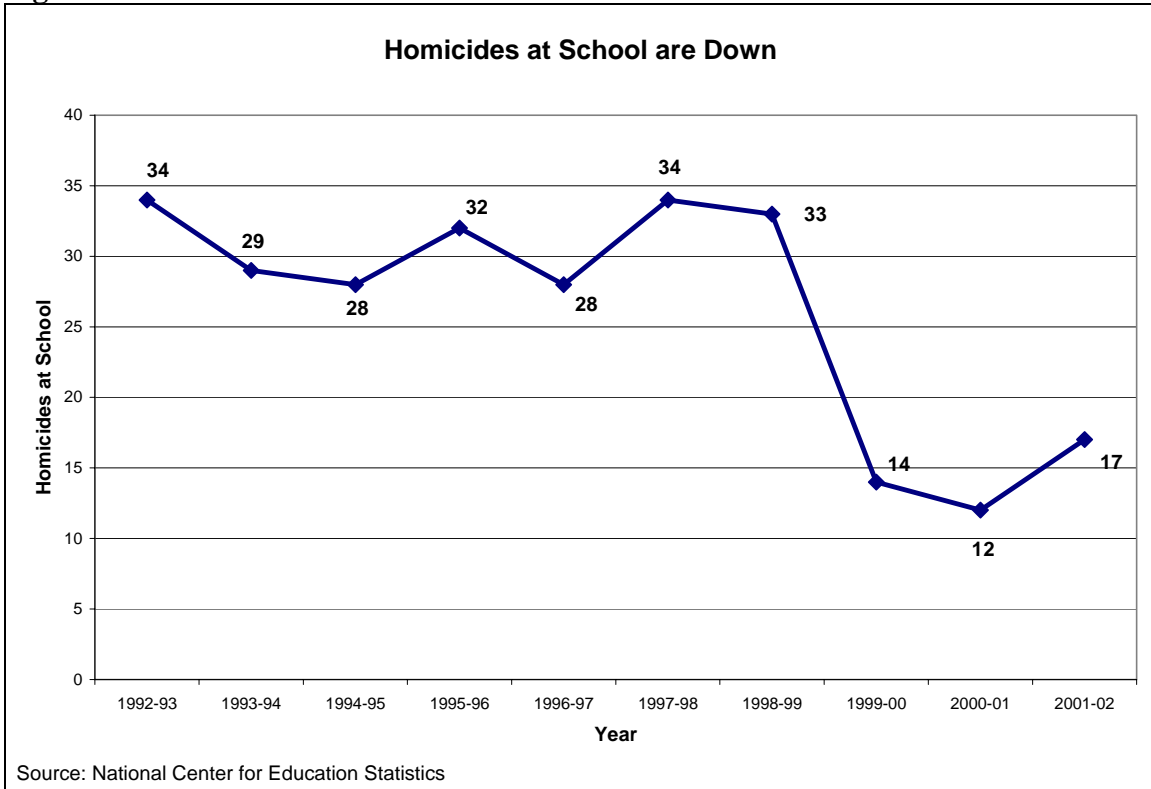


Figure 5

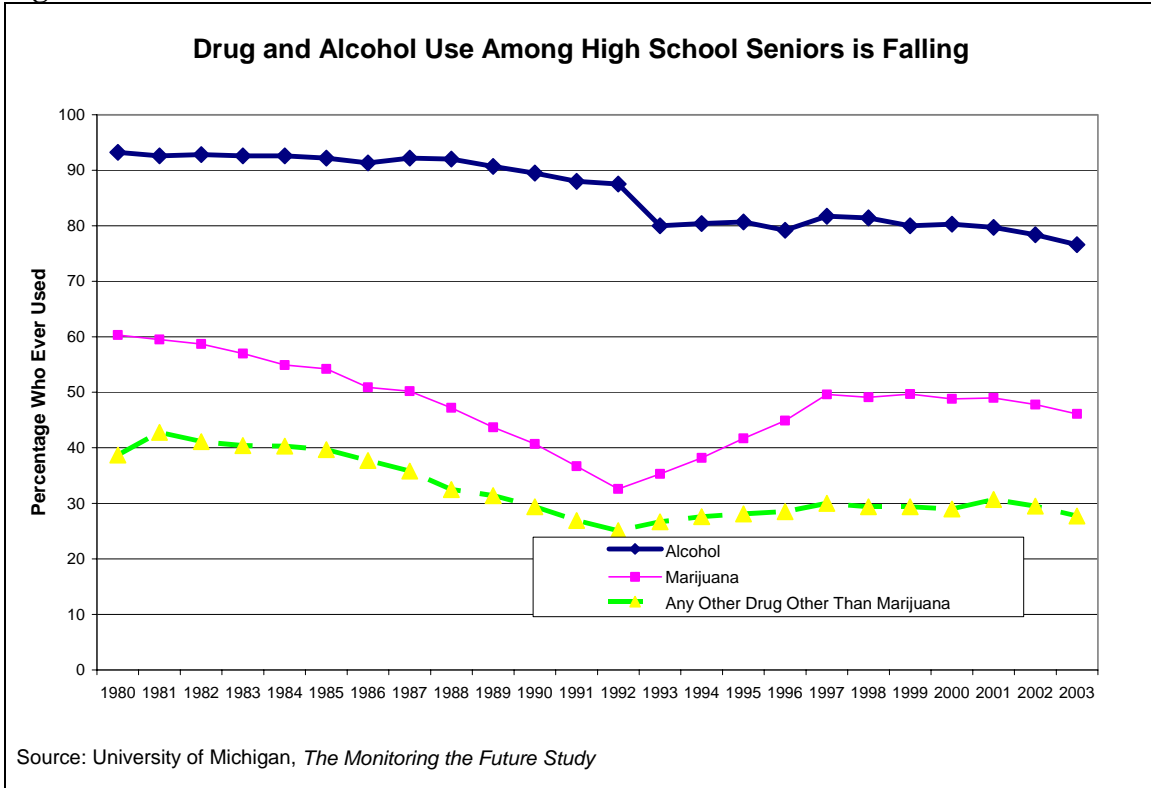


Figure 6

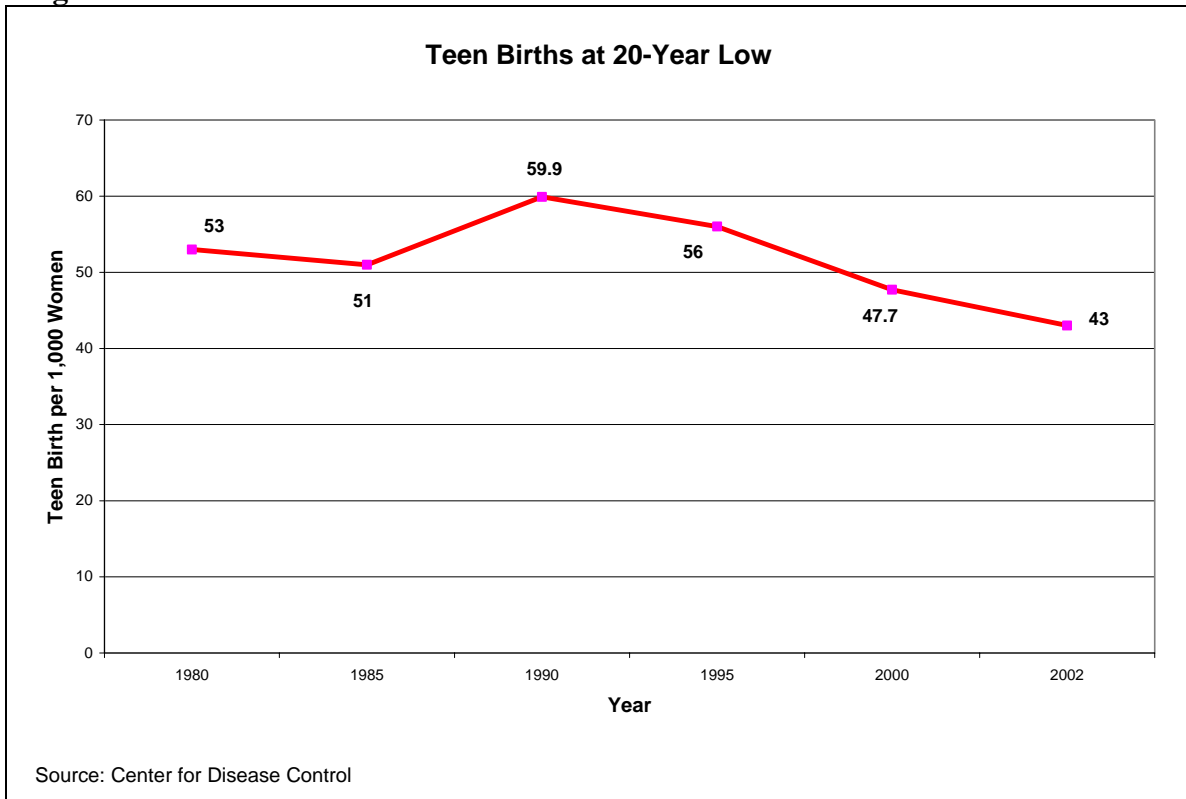


Figure 7

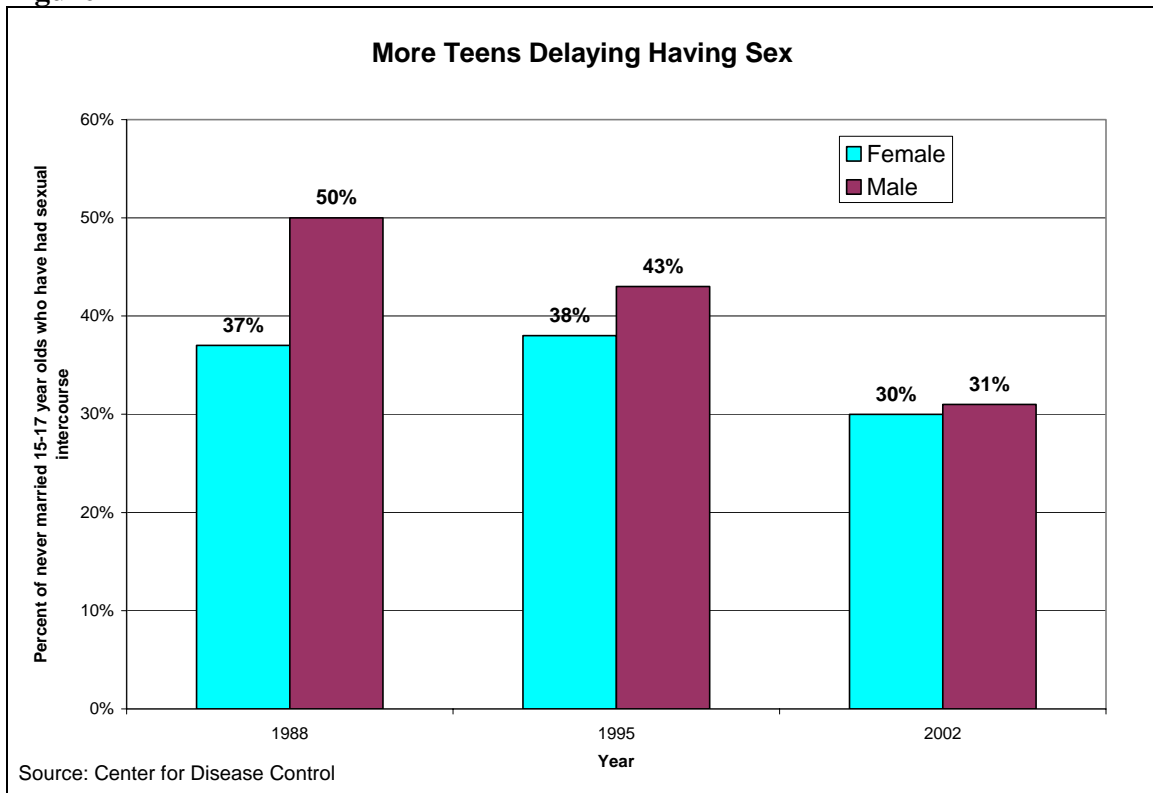


Figure 8

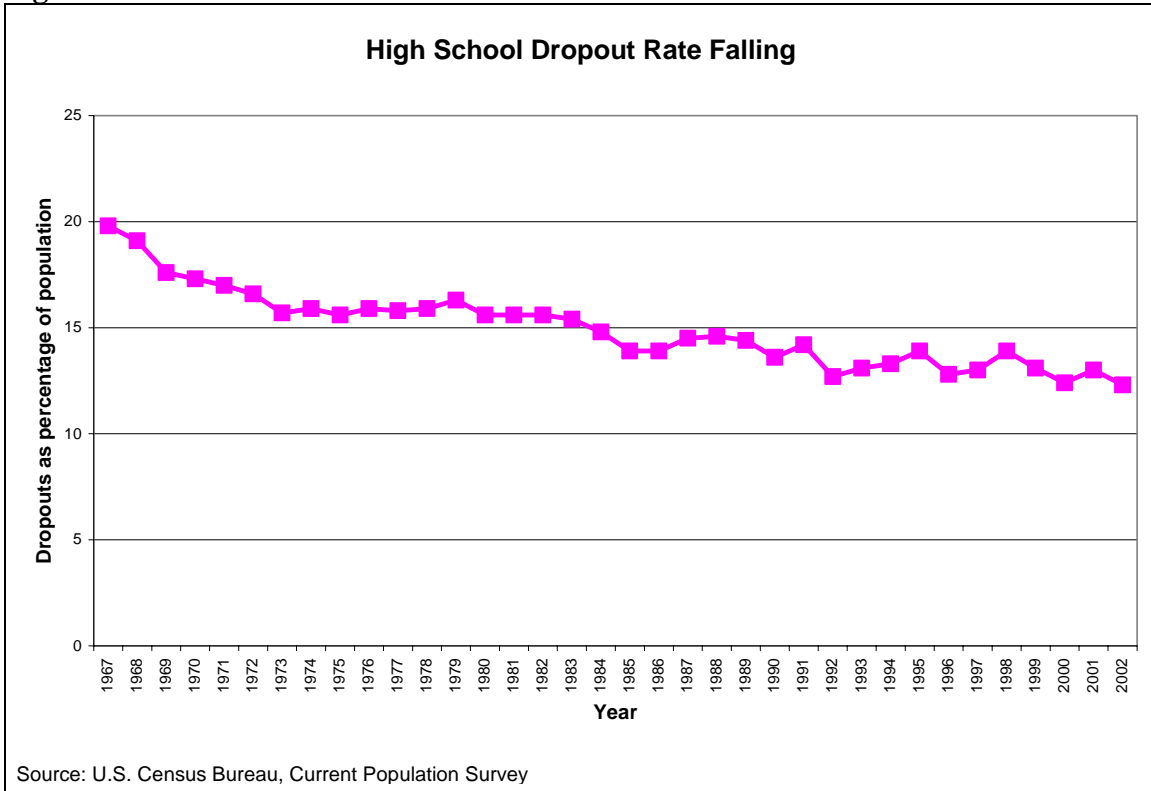


Figure 9

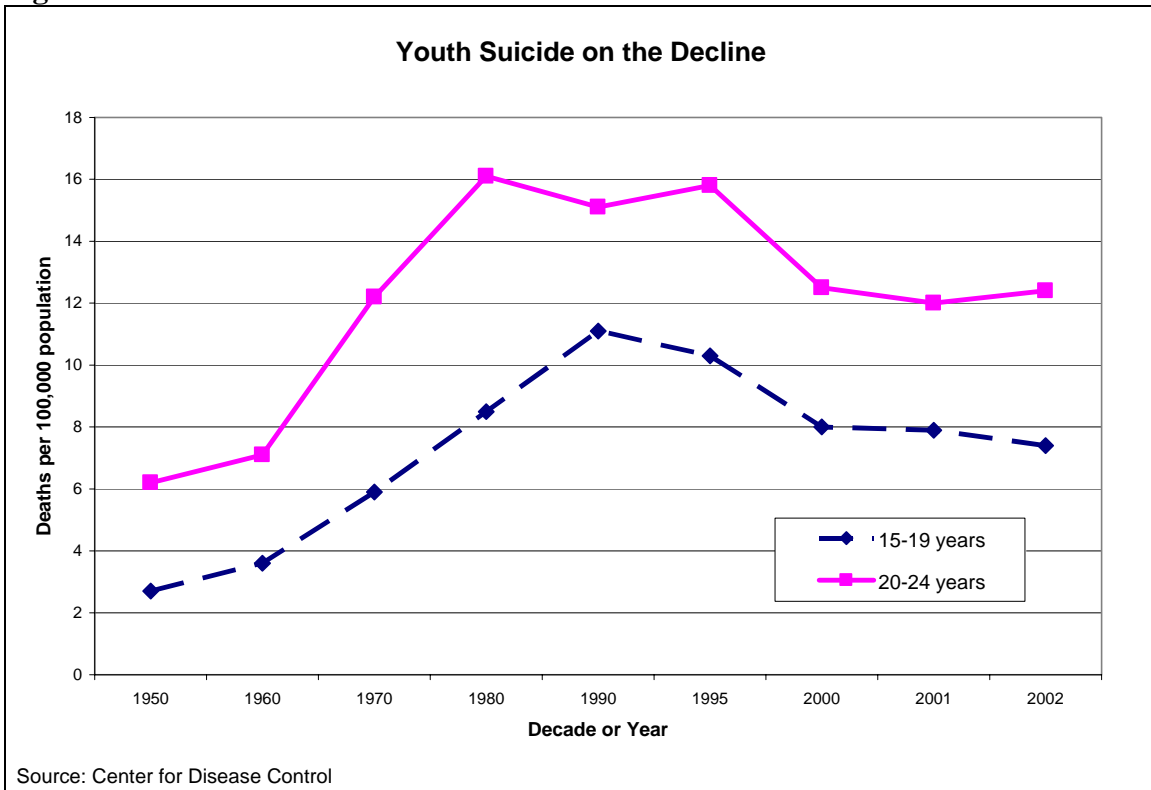
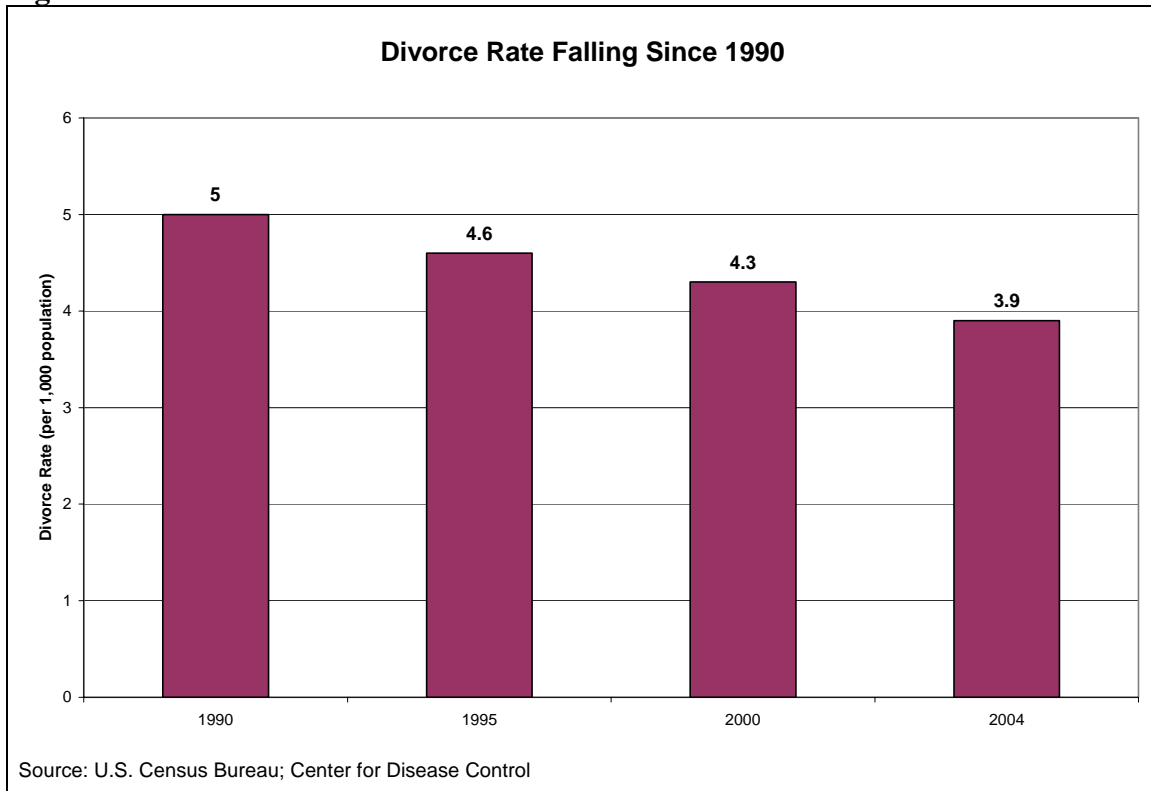


Figure 10



Myth #6: Video games have no social benefits or educational value and they reflect a new, inordinate societal preoccupation with violent entertainment.

Reality: Video games might have beneficial effects—especially of a cathartic nature—that critics often overlook. Regardless, violent themes and images have been part of literature and media for centuries.

The notion that video games reflect a new, inordinate societal preoccupation with violent entertainment is a myth. In his new book *Savage Pastimes: A Cultural History of Violent Entertainment*, Harold Schechter meticulously documents the prevalence of violent fare throughout the history of art and entertainment. Schechter notes that even “the supposedly halcyon days of the 1950s” were replete with violent fare, much of it aimed at children. “[T]he fact is that—contrary to popular belief—there was a shockingly high level of sadistic violence and gore in some of the most popular commercial entertainments of the 1950s.”⁴⁸ Mickey Spillane’s best-selling “Mike Hammer” novels were a prime example.⁴⁹ “Even the most vehement critics of contemporary popular culture would be hard-pressed to find anything in today’s mainstream mass entertainment as alarming as the gore-drenched, gun-worshipping fantasies that Spillane and his

⁴⁸ Harold Schechter, *Savage Pastimes: A Cultural History of Violent Entertainment* (New York: St. Martin’s Press, 2005), p. 137.

⁴⁹ Between 1895 and 1955, seven of the top fifteen best-selling books published in the United States were Mickey Spillane novels. Noted in *ibid.*

publisher dished out for the delectation of millions of ordinary American readers in the supposedly halcyon days of the 1950s,” argues Schechter.⁵⁰ He also recounts the extraordinary gore of “pulp” comics during that decade, which were often replete with macabre, masochistic scenes.

Schechter also notes the top-rated television program of 1954, Disney’s *Davy Crockett* series, “contained a staggering amount of graphic violence,” including scalplings, stabbings, “brainings,” hatchet and tomahawk blows, and so on. The series finale takes place at the Alamo and contained, in Schechter’s opinion, a “level of carnage [that] remains unsurpassed in the history of televised children’s entertainment.”⁵¹ (Incidentally, the show aired Wednesday nights at 7:30 to target the elementary school crowd.)

Perhaps it is the case then, as Judge Posner suggested in the *Kendrick* case, that nothing much has really changed throughout the history art and entertainment. Many people—including many children—clearly have a desire to see depictions of violence. They might even imagine themselves to be role-playing or living out fantasies in the imaginary worlds created by authors, television and radio programmers and entertainers, and even video game developers. One need only read the works of Shakespeare to realize that this instinct is deeply ingrained in the human psyche. How many knives have been plunged into how many backs during the countless renditions of Shakespeare’s most revered works on stages over the past five centuries? And some of his plays—*King Lear*, *Macbeth*, and *Titus Andronicus*, in particular—contain scenes of extreme violence, murder and even mutilation. Yet, the works of Shakespeare are probably available in almost every library and school in America.

Could it be the case, then, that violent entertainment—including violent video games—actually might have some beneficial effects? From the Bible to *Beowulf* to Batman, depictions of violence have been used not only to teach lessons, but also to allow people—including children—to engage in sort of escapism that can have a therapeutic effect on the human psyche. It was probably Aristotle who first suggested that violently themed entertainment might have such a cathartic effect on humans. Aristotle used the term *katharsis* when discussing the importance of Greek tragedies, which often contained violent overtones and action. He suggested that these tragedies helped the audience, “through pity and fear effecting the proper purgation of these emotions.”⁵² Aristotle spoke highly of tragedies that used provocative or titillating storytelling to its fullest effect:

Tragedy is an imitation not only of a complete action, but of events inspiring fear or pity. Such an effect is best produced when the events come on us by surprise; and the effect is heightened when, at the same time, they follow as cause and effect. The tragic wonder will then be greater than if they happened of themselves

⁵⁰ *Ibid.*, p. 139.

⁵¹ *Ibid.* pp. 24-5.

⁵² Aristotle’s *Poetics*, (translated by S. H. Butcher), Part VI, <http://classics.mit.edu/Aristotle/poetics.1.1.html>

or by accident; for even coincidences are most striking when they have an air of design. We may instance the statue of Mitys at Argos, which fell upon his murderer while he was a spectator at a festival, and killed him. Such events seem not to be due to mere chance. Plots, therefore, constructed on these principles are necessarily the best.⁵³

Again, what Aristotle believed was important about such tales was precisely that they help give rise to a heightened sense of “tragic wonder” that helped us purge away or balance out similar passions brewing in the human psyche.⁵⁴ One might just as easily apply this thinking to many of the most popular video games children play today, including those with violent overtones. That’s exactly what Gerald Jones does in his book *Killing Monsters: Why Children Need Fantasy, Super Heroes, and Make-Believe Violence*:

One of the functions of stories and games is to help children rehearse for what they’ll be in later life. Anthropologists and psychologists who study play, however, have shown that there are many other functions as well—one of which is to enable children to pretend to be just what they know they’ll *never* be. Exploring, in a safe and controlled context, what is impossible or too dangerous or forbidden to them is a crucial tool in accepting the limits of reality. Playing with rage is a valuable way to reduce its power. Being evil and destructive in imagination is a vital compensation for the wildness we all have to surrender on our way to being good people.⁵⁵

This echoes Judge Posner’s opinion in the *Kendrick* case that “To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”

Steven Johnson’s provocatively titled book *Everything Bad is Good For You: How Today’s Popular Culture is Actually Making Us Smarter*, makes another argument in favor of looking at video games in a new light. Johnson argues that video games are growing increasingly sophisticated and offer players a “cognitive workout” that is far more stimulating, rewarding and even educational than much of the media content they were force-fed in the past.⁵⁶ Specifically, Johnson notes, modern games—including those with violent content—require children to analyze complex social networks, manage resources, track subtle narrative intertwinings, and recognize long-term patterns.⁵⁷ Similar arguments are made by James Paul Gee, a Professor of Reading at the University of

⁵³ *Ibid*, Part IX.

⁵⁴ For a broader discussion of the catharsis debate from Plato and Aristotle on down to the modern “media effects” psychologists and social scientists, see Marjorie Heins, *Not in Front of the Children: ‘Indecency,’ Censorship and the Innocence of Youth* (New York: Hill and Wang, 2001), p. 228-253.

⁵⁵ Jones, *Killing Monsters*, p. 11

⁵⁶ Steven Johnson, *Everything Bad is Good For You: How Today’s Popular Culture is Actually Making Us Smarter* (New York: Riverhead Books, 2005), p. 166.

⁵⁷ Steven Johnson, “Watching TV Makes You Smarter,” *The New York Times Magazine*, April 24, 2005, p. 59.

Wisconsin's School of Education, in his new book *What Video Games Have to Teach Us About Learning and Literacy*.⁵⁸

Such thinking will undoubtedly remain controversial—perhaps even outlandish—to some. But the history of art and entertainment has always been filled with its share of controversies in terms of its impact on culture and society. Indeed, one generation's trash often becomes a subsequent generation's treasure. Sculptures, paintings and works of literature widely condemned in one period were often praised—even considered mainstream—in the next.⁵⁹

So too for video games. “The opposition to gaming springs largely from the neophobia that has pitted the old against the entertainment of the young for centuries,” noted *The Economist* magazine last summer. Video games are likely to remain the target of scorn by many critics today simply out of a misplaced fear of the new and unknown.⁶⁰ This modern form of artistic expression offers society a decidedly different way of enjoying visual entertainment, and one that many fear could have a corrupting influence on our youth. In another generation or two, however—after the first few generations of gamers have grown—it is likely that society will grow far more comfortable with video games. In the short term, the challenge is to ensure that government doesn't act on its worst tendencies in seeking to stifle history's latest form of interactive story-telling.

Conclusion

Video games are now part of the fabric of American society. They are a growing force in our multi-media landscape and our broader economy. Clearly, however, the increasing popularity of electronic gaming concerns many, especially those of older generations, who did not grow up with the same sort of interactive electronic images dancing across their television or computer screens.

Proposals to regulate video games, however, are being driven by a variety of myths and hypothetical fears that should not serve as the basis of government intervention and content controls. Self-regulation is working. The industry has created a comprehensive ratings and labeling system that offers parents and consumers extensive information about game content. While the enforcement of this scheme at the point-of-sale isn't perfect, it is improving and certainly represents a less-restrictive means of

⁵⁸ James Paul Gee, *What Video Games Have to Teach Us About Learning and Literacy* (New York: Palgrave, 2003).

⁵⁹ As *The Economist* magazine editorialized in the summer of 2005: “Novels were once considered too low-brow for university literature courses, but eventually the disapproving professors retired. Waltz music and dancing were condemned in the 19th century; all that was thought to be ‘intoxicating’ and ‘depraved’, and the music was outlawed in some places. Today it is hard to imagine what the fuss was about. And rock and roll was thought to encourage violence, promiscuity and Satanism; but today even grannies listen buy Coldplay albums.” “Breeding Evil?” *The Economist*, August 6, 2005, p. 9.

⁶⁰ “Video games are most threatening to adults who have seen images of them but never tried to play them.” Jones, *Killing Monsters*, p. 173.

addressing this issue than would a convoluted and likely unconstitutional federal regulatory regime.