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FREE SPEECH & THE ENTERTAINMENT SOFTWARE ASSOCIATION: AN INSIDE LOOK AT THE CENSORSHIP ASSAULT ON THE VIDEO GAME INDUSTRY

Clay Calvert* & Robert D. Richards†

I. INTRODUCTION

The year 2005 found the video game industry in an increasingly familiar yet certainly uncomfortable position—tied to the whipping post of censorship and fighting off in courts across the country a spate of new laws restricting the access of children to video games.¹ The year 2004 ended with the governor of Illinois proposing legislation—legislation that ultimately, in a revised form, became law in 2005—targeting minors’ access to video games depicting images of violence² and claiming

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¹ This position is “increasingly familiar” because the video game industry has previously faced legislative initiatives. See generally 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 (2004) (describing and critiquing legislative initiatives from the year 2003 that targeted video games depicting images of violence or featuring violent content).

² See Clay Calvert, Censorship of Video Games Wrongheaded, CHI. TRIB., Dec. 28, 2004, at 21 (analyzing and criticizing “Illinois Gov. Rod Blagojevich’s call for state laws to crack down on the sale and distribution of video games depicting violence and sex to minors and to force retailers to label such games”); John Chase & Grace Aduroja, Governor Targeting Violent Video Games, CHI. TRIB., Dec. 16, 2004, at 1 (writing that “if Gov. Rod Blagojevich has his way, Illinois will be leading a national movement to outlaw the sale or rental to children of games like ‘Grand Theft Auto: San Andreas’”); P.J. Hufstutter, Illinois Seeks to Curb Explicit Video Games, L.A. TIMES, Dec. 16, 2004, at A1 (describing the legislative proposals of Illinois Gov. Rod Blagojevich made in December of 2004 and designed to “make it a crime for retailers to rent or sell such violent or sexually graphic material to minors, policing video games in much the same way as cigarettes and alcohol”).
that “[v]ideo game manufacturers and retailers are putting profits ahead of what’s best for our children.”  

The beginning of 2005 witnessed a bevy of similar initiatives across the United States. In fact, more than fifteen different bills targeting violent video and computer games were introduced in just the first two months of 2005 in over a dozen states, as


4. See H.R. 441, Reg. Sess. (Ala. 2005) (prohibiting the sale and rental of violent or sexually explicit video games to persons under the age of eighteen years); H.R. 1852, 85th Gen. Assem., Reg. Sess. (Ark. 2005) (providing that “[i]t is unlawful for any person having custody, control, or supervision of any commercial establishment to knowingly exhibit to a minor violent video games,” defining a violent video game as one “that is rated ‘M’ for mature by the Entertainment Software Rating Board,” and defining a minor as “any person under eighteen (18) years of age”); A.B. 450, 2005–06 Reg. Sess. (Cal. 2005) (providing that “[a] person may not knowingly sell, rent, distribute, send, cause to be sent, exhibit, or offer to distribute or exhibit by any means a violent video game to a minor,” and defining a minor as “any natural person who is 16 years of age or younger”); A.B. 1179, 2005–06 Reg. Sess. (Cal. 2005) (providing in relevant part that “[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor” and that “[e]ach violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white ‘18’ outlined in black”); S. 108, Gen. Assem., Jan. Sess. 2005 (Conn. 2005) (prohibiting the use of point and shoot video games in public arcades by individuals under the age of eighteen); S. 1148, 107th Reg. Sess. (Fla. 2005) (prohibiting the sale or rental of adult video games to persons under eighteen years of age and defining an adult video game as “any video recording of a game which contains representations or images of excessive violence, nudity or sexual conduct that is harmful to persons younger than 18 years of age, or criminal activity”); S. 105, 148th Gen. Assem. 2005–06 Reg. Sess. (Ga. 2005) (providing, in relevant part, that “[i]t shall be unlawful to sell, rent, or loan for monetary consideration to a minor any excessively violent video game or any video game containing material that is harmful to minors,” and defining an excessively violent video game as one that “taken as a whole, to the average person, applying contemporary state-wide standards, appeals to minors’ morbid interest in violence, that enables the player to virtually inflict serious injury upon human beings or characters with substantially human characteristics in a manner that is especially heinous, atrocious, or cruel, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors”); S. 106, 148th Gen. Assem., 2005–06 Reg. Sess. (Ga. 2005) (providing, in relevant part, that video game retailers “shall post a sign providing information to consumers about any video game rating system which appears on a video game offered by such retailer. The sign shall be posted in a conspicuous place within the portion of the establishment dedicated to the display or advertisement of video games”); H.R. 698, 419th Gen. Assem., Reg. Sess. (Md. 2005) (providing, in relevant part, that “a person may not knowingly sell, offer to sell, or rent to a minor a video game or computer game which has been given an official rating of ‘Mature’ or ‘For Adults Only’ or an equivalent rating by the video or computer game manufacturer or the entertainment software rating board”); S. 249, 93d Leg., 1st Reg. Sess. (Mich. 2005) (providing, in relevant part, that “[a] person shall not sell or rent a restricted video game to a person who is less than 17 years of age. As used in this section, ‘restricted video game’ means a video game rated AO (adults only) or M (mature) by the entertainment software rating board”); H.R. 1298 & S. 785, 84th Reg. Sess. (Minn. 2005) (providing, in relevant part, that “[a] person under the age of 17 who knowingly rents or purchases a restricted video game is guilty of a petty misdemeanor and is subject to a fine of not more than $25,” and requiring that “[a] person or entity engaged in the retail business of selling or renting video games from a location or structure with access to the public shall post a sign in a location that is clearly visible to consumers”); H.R. 390, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005) (requiring “all retailers and manufacturers of video games in this state . . . to label video games according to the ESRB rating system,” and mandating that all retailers “post signs explaining the ESRB video game rating system and provide ratings informational brochures on-site.” This section also prohibits the knowing sale or rental of video games “rated M (mature) or AO (adults only) by the entertainment software rating board . . . to any person under the age of seventeen”); A.B. 4357, 228th Leg. Sess. (N.Y. 2005) (providing, in relevant part, that “[n]o owner or operator of any premises where video games, including a violent point and shoot video simulator, are provided for entertainment shall permit a person under the age of eighteen to operate such violent point and
well as in the District of Columbia. For instance, in California, legislation was proposed in February 2005 that would impose up to a $1,000 fine on businesses and individuals that "knowingly sell, rent, distribute, send, cause to be sent, exhibit, or offer to distribute or exhibit by any means a violent video game to a minor." The originally drafted California legislation borrowed, in part, from the United States Supreme Court’s three-decade-old test for sexual obscenity in defining what constituted a so-called "violent video game." It also required violent games to carry a label that stated: "This

shoot video simulator." A violent point and shoot video simulator is defined as a "device that involves one or more individuals firing simulated weapons at a video screen which depicts human silhouettes, life-like representations of human beings or civilian transportation services, including, but not limited to, representations of cars, buses, trains, aircraft and commercial and residential structures," and that contains "realistic depictions of physical injury to a human silhouette or life-like representation of a human being and realistic depictions of blood, gore, mutilation, or dismemberment of such silhouettes or human beings"; A.B. 4464 & S. 2715, 228th Leg. Sess. (N.Y. 2005) (requiring the establishment of an advisory council on interactive media and youth violence, mandating that businesses “prohibit a person under sixteen years of age from playing or using any video game or interactive media device which as part of the use of such game, requires the player to use a model or toy replica of a gun, pistol, rifle or similar weapon which simulates firing ammunition," and requiring that ratings be affixed to video games sold or delivered in New York); S. 1635, 228th Leg. Sess. (N.Y. 2005) (requiring those who sell or rent video games to post an "Epilepsy Warning" which provides, in relevant part, that “medical research indicates a small percentage of the population may experience epileptic seizures or seizure-like symptoms when exposed to certain stimuli, including, without limitation, light patterns, flashing lights, or certain patterns of backgrounds on a television screen or video monitor"; S. 2710, 228th Leg. Sess. (N.Y. 2005) (providing, in relevant part, that "[n]o person, partnership or corporation shall sell or rent or offer to sell or rent to any person under the age of eighteen years any video game that has a rating containing racist stereotypes, derogatory language and/or actions toward a specific group or groups of persons"); S. 2711, 228th Leg. Sess. (N.Y. 2005) (providing, in relevant part, that "[n]o person, partnership or corporation shall sell or rent or offer to sell or rent to any person under the age of eighteen years any video game that has a mature or violent rating," and noting that such video games may include content "descriptive of, advocating or glamorizing commission of a violent crime, suicide, sodomy, rape, incest, bestiality, sadomasochism, any form of sexual activity in a violent context, or advocating or encouraging murder, violent racism, religious violence, morbid violence or the illegal use of drugs or alcohol"); S. 2, Reg. Sess. (N.C. 2005) (making it unlawful for a person to “sell, rent, or otherwise disseminate for consideration to a minor a video game that is harmful to minors if the person knows the character or content of the video game,” and requiring video game retailers to "post a sign that notifies consumers of any rating system created by the video gaming industry that is available to aid in the selection of a game. The sign shall be posted within the retail establishment or video arcade in a prominent area"); H.R. 866, 79th Leg. (Tex. 2005) (providing that “[a] person commits an offense if the person sells, rents, or otherwise transfers to a minor for money or other consideration a video game that contains violent or sexually explicit content,” defining “violent content” as “a graphic and realistic depiction of physical conflict and includes a depiction of: (A) decapitation; (B) bloodshed; (C) dismemberment; or (D) grotesque cruelty,” and requiring the posting of a sign by those selling video games that explains the rating system for video games); H.R. 1433, 79th Leg. (Tex. 2005) (including terms substantially similar to House Bill 866); H.R. 293, 56th Leg., Gen. Sess. (Utah 2005) (requiring retailers to “clearly label video games with their rating and to post a sign and provide information about the video game rating system”); H.R. 1366, 59th 1st Reg. Sess. (Wash. 2005) (requiring video game retailers to inform consumers about video game rating systems); H.R. 2178, 59th 1st Reg. Sess. (Wash. 2005) (allowing for personal injury or wrongful death actions “against a manufacturer or retailer of violent video or computer games if the manufacturer or retailer has distributed, sold, or rented a violent video or computer game to a person under the age of seventeen and the game was a factor in creating conditions that assisted or encouraged the person to cause injury or death to another person”).

5. See Eric M. Weiss, D.C. Seeks Sales Ban On Violent Games, WASH. POST, Feb. 3, 2005, at B01 (describing a measure proposed in Washington, D.C. that would “limit the sale of such games as the Grand Theft Auto series, Halo 2 and Mortal Kombat. A store that sells the games to minors could lose its business license and face a fine of as much as $10,000”).


7. Compare id. with Miller v. California, 413 U.S. 15, 24 (1973). Under the originally drafted California statute, violent video games satisfy all of the following criteria:

(A) The game may be played using a portable electronic device or hand held gaming device using a television or computer, (B) Taken as a whole, to the average person, applying contemporary
game may not be sold to anyone under 17 years of age.\(^8\)

The bill’s sponsor, Assembly Speaker pro tempore Leland Y. Yee (D.-San Francisco/Daly City),\(^9\) has a proven track record of success in this area, and a substantially revised and amended version of Assembly Bill 450 sailed through the Assembly Judiciary Committee by an 8–0 vote in April 2005 in a hearing that featured a well-staged parade before the committee members of forty uniform-clad Girl Scouts from across the Golden State, each testifying on behalf of the legislation.\(^10\) That success is not surprising. In September of 2004, California Governor Arnold Schwarzenegger (R.) signed into law the Yee-sponsored Assembly Bill 1793 that requires video game retailers to “post a sign providing information to consumers about a video game rating system or notifying consumers that a rating system is available to aid in the selection of a game. The sign shall be posted within the retail establishment in a prominent area.”\(^11\)

Yee’s interest in the effects of violent content on minor game players is no doubt genuine and heartfelt. He holds a doctorate in child psychology from the University of Hawaii,\(^12\) and he served for eight years on the San Francisco Unified School District Board of Education.\(^13\) In an official press release trumpeting his new legislation, while referring to his success in 2004 with Assembly Bill 1793, Yee explained why he believes more legislation is needed:

Last session, we were quite successful in passing a bill that requires retailers to post a sign explaining the video game rating system. However, since that bill passed many new games have been introduced, like Manhunt and JFK Reloaded, which are even more violent and more realistic. Clearly, the video game industry is not concerned with the welfare of our children and thus it is imperative that we step in to prevent the

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statewide standards, the game appeals to minors’ morbid interest in violence, (C) The game enables the player to virtually inflict serious injury upon human beings or characters with substantially human characteristics in a manner that is especially heinous, atrocious, or cruel, and (D) Taken as a whole, the game lacks serious literary, artistic, political, or scientific value for minors.

A.B. 450, 2005–06 Reg. Sess. (Cal. 2005). In Miller, the Supreme Court held that the trier of fact must define obscenity by determining:

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

**Miller**, 413 U.S. at 24 (citations omitted).

8. See supra note 6.


11. CAL. BUS. & PROF. CODE § 20650 (Deering 2005).

12. See Biography, Speaker pro tempore Leland Y. Yee Web site, http://democrats.assembly.ca.gov/members/a12/bio.htm (last visited Mar. 5, 2005) (providing, in relevant part, that Yee “received his bachelor’s degree from UC Berkeley, and his master’s degree from San Francisco State University. After earning his doctorate in Child Psychology at the University of Hawaii, Dr. Yee worked in various mental health and school settings”).

13. See id. (providing, in relevant part, that “Dr. Yee spent eight years on the San Francisco Unified School District Board of Education where he fought to streamline bureaucracy, direct funds towards higher standards in core curriculum, update educational materials, reduce class sizes, and increase public access to school services”).
sale of these harmful games to our children.  

The game “JFK Reloaded” to which Yee refers deals with the assassination of President John F. Kennedy; the game certainly is offensive and no doubt repulsive to many people. In particular, the game allows players to take the perspective of assassin Lee Harvey Oswald “and fire away at a 3-D image of the presidential motorcade passing through Dealey Plaza in Dallas.”

But the constitutional problem with Yee’s access-limiting legislation is that it goes against both the First Amendment’s right of free speech—a right that generally protects offensive expression—and a steadily growing body of judicial precedent that protects minors’ rights to access violent video games. For instance, in 2001, Judge Richard Posner and a unanimous United States Court of Appeals for the Seventh Circuit declared unconstitutional an Indianapolis, Indiana, statute that sought “to limit the access of minors to video games that depict violence.” That setback for censorship advocates was followed up in 2003 by the United States Court of Appeals for the Eighth Circuit’s decision declaring unconstitutional, in violation of the First Amendment, a St. Louis County, Missouri, statute that made it “unlawful 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.” And then, in July of 2004, U.S. District Court Judge Robert Lasnik held both unconstitutionally vague and unsupported by sufficient evidence a Washington state law that restricted minors’ access to “video or computer game[s] that contain[] realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.”

15. See Jose Antonio Vargas, JFK Internet Game Assailed; Players Re-create Oswald’s Fatal Shots, WASH. POST, Nov. 23, 2004, at C01 (describing the game and quoting David Smith, spokesman for Sen. Edward Kennedy (D-Mass.), for the proposition that “[i]t’s despicable. We’re not commenting further”).
17. The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law ... abridging the freedom of speech, or of the press.” U.S. CONST. amend. I (emphasis added). The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment’s Due Process Clause to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925).
18. See Cohen v. California, 403 U.S. 15, 25 (1971) (protecting a person’s right to wear a jacket bearing the words “Fuck the Draft” in a public courthouse, and observing that it is “often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”). See generally Clay Calvert & Robert D. Richards, Free Speech And The Right To Offend: Old Wars, New Battles, Different Media, 18 GA. ST. U. L. REV. 671 (2002) (discussing the First Amendment’s protection of offensive speech in the context of some relatively recent cases and controversies).
20. Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954, 956 (8th Cir. 2003).
In baseball terms, that would be three up and three down for legislators targeting video games. But the censorship proponents refuse to go down that easily and, instead, they continue to stand at the legislative plate, taking political whacks at the video game industry. Perhaps they do this because video games are incredibly popular; the more they sell, the more attention they will attract from politicians, precedent be damned. And it certainly doesn’t hurt the cause when popular television shows like Law & Order: Special Victims Unit and 60 Minutes keep the issue in the public eye with episodes suggesting that video games cause crime. In addition, mainstream print-media gives much attention to lawsuits blaming video games for violence in society. It also doesn’t help the video game industry that there are zealous plaintiffs’ attorneys like Miami’s Jack Thompson, “a national critic of violence in video games,” who are ready and willing to sue the games’ manufacturers when real-life violence occurs. Finally there is the fact that protecting supposedly fragile children from supposedly dangerous media content just never goes out of style. What legislator, after all, can go wrong with voters and constituents by taking a stand against violence and, simultaneously, claiming to protect children from the supposedly harmful effects of media content? As Assembly Speaker pro tempore Leland Y. Yee told a newspaper reporter in announcing his most recent anti-video game bill, “these ultraviolent video games teach our children how to kill, how to maim and how to desecrate human beings. It teaches young boys how to abuse women, and it teaches young boys how to kill and maim police officers.”

As the legislative movement against violent video games gains momentum across the country, it is likely to pick up support from various groups and organizations. For instance, a Washington, D.C.-based organization called Peaceoholics has begun its own

22. See Matt Richtel, Game Sales Thrive Thanks to the Big Kids (In Their 20's), N.Y. TIMES, Dec. 27, 2004, at C1 (writing that “the video game industry is poised to enjoy a record-breaking holiday season,” and noting that the violent video game “Grand Theft Auto: San Andreas”—a favorite target of politicians—“sold more than 3.3 million copies in the last two months”).


24. See 60 Minutes: Lawsuit Claims "Grand Theft Auto" Trained Teen to Kill (CBS News television broadcast, Mar. 6, 2005) (focusing on a civil lawsuit involving the murder of three men in Alabama who were killed by an individual who claimed to have played the game “Grand Theft Auto” repeatedly for several months before the killings).

25. See Tuesday TV: Tonight, NEWSDAY (N.Y.), Feb. 8, 2005, at B23 (noting that the program Law & Order: Special Victims Unit ran an episode in 2005 in which “[t]eens re-enacting a video game are the prime suspects in the brutal rape and murder of a prostitute”); Sunday, WASH. POST, Mar. 5, 2005, at C07 (describing a 60 Minutes episode in March of 2005 featuring a segment that takes “a look at whether a violent video game caused an 18-year-old to murder three people”).

26. See Leo Standora, ‘Grand Theft’ Game Maker Sued in Slays, DAILY NEWS (N.Y.), Feb. 16, 2005, at 42 (describing a $600 million lawsuit claiming that “[t]he ultraviolent video game ‘Grand Theft Auto’ is to blame for a teenager’s bloody rampage that killed two Alabama cops and a dispatcher”).

27. Stephen Hudak, Teen Can Stand Trial in Girl’s Murder, PLAIN DEALER (Cleveland, Ohio), Sept. 16, 2003, at B3.

28. See Families Sue Over Grand Theft Auto–Like Shootings, ST. PETERSBURG TIMES (Fla.), Oct. 27, 2003, at 4E (describing Thompson’s representation of the plaintiffs in a $246-million civil lawsuit “filed against the designer, marketer and a retailer of the video game series Grand Theft Auto by the families of two people shot by teenagers apparently inspired by the game”).

form of sartorial protest against violent video games: the creation of "a T-shirt with an X on it. The T-shirt comes in black, gray and white, but the X is red on all three. It's a big red X on a scene from Grand Theft Auto, the hit video-game series." The group's founders also stage protests outside of stores that sell video games, utilizing slogans like "Best Buy is selling San Andreas! Best Buy is selling poison to our children!" San Andreas refers not, in this case, to a major earthquake fault line in California, but rather to a video game called "Grand Theft Auto: San Andreas." It was the "top title in the United States in 2004, with 5.1 million units sold" and it allows players, at least virtually speaking, "to steal cars, kill cops and pick up prostitutes." The game was the Peaceoholics' object of both attention and scorn in early 2005, as the group "mailed letters to 11 stores in the Washington area—Best Buy, Blockbuster, Target and Wal-Mart, among others—demanding that they stop selling San Andreas in 30 days. The group didn't hear back, so it sent another round of letters: two of them were hand-carried, the rest were sent by certified mail." Given the timeliness and importance of the topic, this article takes an in-depth and inside look at the recent and current legal controversies surrounding the censorship of violent video games. In particular, the centerpiece of the article is an exclusive interview and dialogue-analysis, conducted by the authors in Washington, D.C., in March of 2005, with Douglas Lowenstein, president of the Entertainment Software Association (hereinafter "ESA"). Lowenstein has held this position since the ESA was founded in 1994 under its original name, the Interactive Digital Software Association. According to its Web site, the ESA is:

exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the $7.3 billion in entertainment software sold in the U.S. in 2004, and billions more in export sales of U.S.-made entertainment software.

As the head of the ESA, Lowenstein frequently finds himself the public point person for the legal disputes surrounding the video game business. He provides official commentary on the industry's perspective for newspapers across the country, including the Washington Post, Sacramento Bee, Boston Globe, and St. Louis Post-

31. Id. at C04.
32. Cha, supra note 23.
33. Id.
34. Vargas, supra note 30.
37. Douglas Lowenstein, Op-Ed., Industry Polices Its M-Rated Videos, SACRAMENTO BEE, Apr. 17, 2004, at B7 (arguing against video game legislation in an op-ed commentary, and contending that "[i]nstead of opening the door to legislation that violates the First Amendment, perhaps we should trust parents—96 percent of whom say that they pay attention to the content of the games their kids play—to decide what books their children can read, what music they should enjoy, what movies to see and what games they can play").
Never before, however, has Lowenstein sat down for an in-depth discussion, in the academic context of a law journal article, of the legal issues surrounding the video game industry and, in particular, the assault against video games with violent storylines and plots.

In this article, Lowenstein discusses and addresses a wide range of issues, including:

- the reasons why video games are such a popular legal target today for politicians and legislators;
- the argument asserted by many people that video games cause real-life violence and therefore laws targeting the games are necessary;\(^{40}\)
- the steps the video game industry and the ESA often take to address legislative attacks against their products;
- the reasons why the First Amendment guarantee of free speech should protect the content of video games depicting violent images or featuring violent storylines; and,
- the common types of laws and legislative initiatives targeting video games.

Part I of this article describes the setting for the interview, the procedures used by the authors for both taping and transcription, and the steps taken to preserve editorial objectivity and autonomy.\(^{41}\) Next, Part II sets forth the interview, including three separate sections, each on a different topic or theme; each section, in turn, is prefaced with introductory material before providing a question-and-response format for the remarks of Lowenstein.\(^{42}\) Finally, Part III analyzes Lowenstein’s comments and provides the authors’ conclusions.\(^{43}\)

### II. THE SETTING

The interview took place on Friday, March 18, 2005, at what was then the Entertainment Software Association’s headquarters on the sixth floor of a Washington, D.C., office building on Connecticut Avenue near DuPont Circle (the office has since moved to 7th Street in northwest Washington, D.C.). The ESA’s office lobby reflects its high-tech, core business—video games. Four television sets hang down from the

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40. This is an argument popular among politicians now proposing measures that crack down on minors’ access to video games. For instance, California Assemblyman Leland Yee, sponsor of Assembly Bill 450 described earlier in this article, was quoted in April 2005 in the SACRAMENTO BEE for the proposition that “there is a plethora of studies that demonstrate that there are harmful effects to children relative to these kinds of ultraviolent video games.” Alexa H. Bluth, No Mercy for Cruel Games, SACRAMENTO BEE, Apr. 9, 2005, at A3.

41. See infra note 44 and accompanying text.

42. See infra notes 45–64 and accompanying text. A copy of the signed verification form by Douglas Lowenstein affirming the accuracy of his comments is on file with this law journal.

43. Infra notes 65–86 and accompanying text.
ceiling against a cardinal painted wall, each attached to a different video game apparatus like Playstation 2 and Nintendo Game Cube. Copies of magazines with titles such as *Gamestar* lie on a waiting area table.

The walls of Douglas Lowenstein’s corner office are bedecked in an eclectic mix of political, music and sports memorabilia and artwork. A signed and numbered version of a bright, blue-and-gold print by artist Roy Lichtenstein called “Oval Office” hangs on one wall, while another features a picture of Lowenstein with a man who used to occupy the real-life workspace depicted in the Lichtenstein piece, President Bill Clinton. The political material fits in well with one of Lowenstein’s former jobs; he worked in the mid-1980s as legislative director for Howard Metzenbaum, the former Democratic U.S. Senator from Ohio. Politics aside—or, perhaps, reflective of it—a large, colorful poster advertising a series of October 1980 shows by the Grateful Dead at Radio City Music Hall in New York City hangs on another wall. There’s also an autographed picture of former Baltimore Orioles’ baseball star Cal Ripken on a wall, a plastic-encased ticket stub from a Stanley Cup hockey game on his desk, and a number of aging, black-framed photographs Lowenstein took during his world travels.

The interview lasted approximately eighty minutes. It was recorded on two different audiotapes that were later transcribed by a professional secretary and then reviewed by the authors. The authors made minor changes in syntax, but did not alter the substantive content or meaning of Lowenstein’s comments. Some of the questions and responses were then reordered to reflect the themes and sections in Part II of this article, and other portions of the interview were deleted as extraneous or redundant.

A copy of the revised transcript was then forwarded to Lowenstein in April of 2005. Lowenstein returned to the authors in late April 2005 the transcript with minor syntactical revisions—the authors input all of these changes—and a signed separate statement verifying that the transcript, with those changes, accurately reflected his remarks. A copy of his verification is on file with this law journal.

Importantly, Lowenstein exercised absolutely no editorial control over either the conduct of the interview or the content of this article. He did not, in fact, review the article itself before it was submitted to this journal. Lowenstein only reviewed the raw interview transcript.

For purposes of full disclosure and the preservation of objectivity, it should be emphasized that neither of the authors of this article has ever been an employee of the ESA. Furthermore, the authors are neither members of the ESA nor do they contribute to it financially.

III. THE INTERVIEW

The interview portion of this article is divided into three sections. Section A focuses on the reasons why the video game industry finds itself under severe legislative attack today; the explanations and grounds stretch from what Lowenstein describes as a generational gap between game players and law makers to the release in late 2004 of the

über-violent and offensive game, “JFK Reloaded.” Section B then centers on the strategies, tactics and responses employed by the ESA and the industry to counter some of the common arguments and attacks against it, such as those centering on the claim that viewing video game violence leads to real-life violence. Finally, Section C concentrates on the ramifications of the battles now being waged; contextualizing potential harms such as self-censorship within the larger framework of the reasons why, from Douglas Lowenstein’s perspective, the government must refrain from regulating the content of video games.

A. Video Game Industry Under Siege: Politics as Usual

Just before the start of the holiday shopping season in late 2004, David Walsh, founder of the National Institute on Media and the Family, stood alongside Senator Joseph Lieberman (D.-Conn), Senator Herb Kohl (D.-Wis.) and Representative Betty McCollum (D.-Minn.) as he unveiled the Ninth Annual MediaWise Video Game Report Card, a document that alerts parents to electronic games they should avoid for their children and grades the entertainment software industry for its efforts in shielding minors from inappropriate content. The report gave the industry a C-minus for “ratings education” and a grade of “D” for “retailers’ enforcement” of age-related designations and accused the industry of sending “double messages” to parents about the effect of video games on their children.

That same week, a Scottish company called Traffic Management made available for purchase on the Internet a video game called “JFK Reloaded,” allowing players “to get behind Lee Harvey Oswald’s sniper rifle and recreate” the assassination of former president John F. Kennedy. The release of the report and the controversial game fueled the political metabolism of those in search of an issue that would grab headlines and popular support from an outraged constituency. Shortly thereafter, the governor of Illinois stepped up to the plate to take a swing at the video game industry.

A host of other lawmakers also have gotten a turn at bat. The irony is, as Douglas Lowenstein points out in this section, that “JFK Reloaded” was not made by any mainstream producer in the video game industry, and it is even not available for sale in retail outlets in the United States because it is an online game.

Lowenstein further notes that before the release of the game, which a spokesman for Senator Edward Kennedy (D.-Mass.) called “despicable,” things were quieting down on the legislative front, thanks to some recent successes in the courts. In this section, he talks about why the video game industry has resurfaced as a ripe target of

46. Id. (“[T]he video game industry says parents should use the ratings, but denies violent video games affect children.”).
47. Tom Zeller, Jr., A Sure-to-Be Controversial Game Fulfills That Expectation Fully, N.Y. TIMES, Nov. 29, 2004, at C7 (noting that “[O]n television and in print, historians and campaigners against media violence pilloried the game . . .”)
48. Blagojevich, supra note 3.
49. See supra note 4 (collecting state initiatives).
50. Zeller, supra note 47.
attack for politicians on every level of government. With this in mind, this section now
.turns to the interview.

QUESTION: Why, in your opinion, are video games such a popular target for the
legislative wrath of politicians?

LOWENSTEIN: Video games are new media, so it's partly generational. We have
people in the political power structure in this country today who typically are in their
40s, 50s and 60s. They're just outside the video game generation and are, instead, part
of the passive media generation. As has been the case in past eras, the generation in
power tends to react with hostility to the media of the younger generation coming
behind them. So, I think that's part of it—it's just a visceral reaction to something new
that is not of their world.

But I think there are other reasons. It would be intensely naive not to acknowledge
that some of the content in games is offensive to people. You don't have to be a
nattering nabob of negativism to say, "Gosh, that's awful. I don't like that. Why do
they have to make that?" Obviously, you could say the same thing about lots of media,
but the fact that this is a new form of media—interactive in nature—causes some people
to viscerally react and conclude that it can't be good and, in fact, must be worse than
anything else they've seen. In that sense, it's a reaction to what they see.

QUESTION: There are a number of bills cropping up this year targeting video
games. The year 2005, in fact, began with legislation proposed in more than a dozen
states across the country. Do you foresee a time when such efforts will eventually fade
away or become few and far between? If so, why?

LOWENSTEIN: Well, I do, but when that happens is a little hard to say. I think it
will fade away for the reason I was talking about earlier, partly because the attacks are
generational. It's amazing when you think about rock-and-roll music today. If you go
to the Rock-and-Roll Hall of Fame in Cleveland, right at the beginning, there are all
these great quotes from people who were talking about how this music was a
communist plot to destroy America. Today the music that I grew up with, which was
all about drugs and sex and, to some degree, violence, is viewed with great benign
admiration, and yet it created tremendous outrage and disgust at another time.

That's part of what happens with this. The gaming generation is growing up. The
average age of game players is 29. I run into more and more people in government and
the media who are gamers. As they take the tools of power in this country, they will
have a greater comfort level with the media they grew up with and those kinds of
attacks will begin to dissipate at some point. How quickly does that take place? I don't
know.

I hope the other thing that hastens that, beyond the generational shift that I was
talking about, is that the courts will continue to be resolute in striking down these kinds
of statutes. Then, at some point, legislators will say they have better things to do with
their time and, more importantly, with the taxpayers' money. We received almost
$350,000 in legal recoveries from the state of Washington for its failed legislation.

QUESTION: Really?

LOWENSTEIN: It is public record, and we received somewhat less than that in St.
Louis County from its failed attempt to regulate. This is not an inexpensive place for
local government to go. They do have better things to do with their money, so I hope
that common sense prevails in more places as well.

QUESTION: Are there particular lobbying organizations or activist groups that often call for or support video game legislation? Perhaps a group akin to the Parents Television Council's efforts to lobby the FCC on broadcast indecency issues? If so, what are these groups and what are their typical tactics?

LOWENSTEIN: Actually, I don't think there's a single group behind this. We are seeing a little bit more coordination. The Interfaith Council on Corporate Responsibility, for instance, has been more visible and more outspoken. We're not running into them a lot at the state and local level, so I'm not clear whether they have activists that are encouraging people to introduce these bills. It may be a more subtle kind of effect than a very organized, state-by-state campaign.

Quite frankly, I think that much of what this wave of legislation was triggered by was the very unfortunate product that came out at the end of last year called "JFK Reloaded." It got a tremendous amount of publicity, but was not made by anybody in the mainstream video game industry. The irony is, of course, that it's not even available for sale at retail outlets, so none of these bills would actually touch it.

QUESTION: Was it from Scotland and a company called Traffic?

LOWENSTEIN: Yes, and it outraged me and a lot of other people that the makers would exploit that kind of tragedy for this kind of purpose. The game triggered a lot of interest from the governor of Illinois who got a huge amount of national publicity out of it. And politicians are followers—headlines are the crack cocaine of politicians. A lot of people just jumped on this and said, "Wow, this is a winner."

In truth, things were quieting down. The Washington state lawsuit was a powerful signal—a bill that people thought they had carefully crafted to pass constitutional muster got slapped down in no uncertain terms.

QUESTION: Is the phenomenon of blaming video games for real-life problems unique or is this part of a larger media blame game?  

LOWENSTEIN: You should talk to people like Karen Sternheimer at USC who has written a great book on that issue called, It's Not the Media. She's a sociologist there. I think there's certainly a blame game that goes on here. People look for scapegoats. If you lose a loved one to some tragedy, you want an explanation. You want to find something simple and somebody that you can hold accountable for this tragedy.

People aren't holding the gun manufacturers accountable for it. They may not want to hold certain individuals accountable for it. They don't want to hold as responsible the deep-seeded problems we have with mental health in this country—untreated mental health, particularly among kids.

Look at teen suicide rates and tell me we have a bigger problem with video game

51. See generally Clay Calvert, Framing and Blaming in the Culture Wars: Marketing Murder or Selling Speech?, 3 VAND. J. ENT. L. & PRAC. 128, 129 (2001) (describing the media blame game as "nothing new" and contending that "ongoing battles against violence and for control of media content have tried to shape popular teen culture for decades").


violence than teen suicide. I don’t think so. What are we doing about that? What are we doing about not treating mental health problems with kids? What are we doing about bullying in schools which demonstrably has a much greater impact on violence among kids than any video game ever will?

But those problems are much harder to solve. It’s a lot easier to say, “Let’s go sue the video game companies and try to get $100 million out of those guys. It will make us feel better that we’ll have gotten somebody to pay for this horrible crime.” I understand the desire to have that sense of closure and vindication, but I don’t think it’s going to really get us to solve the problems that have caused youth violence in this country.

QUESTION: Is that what it really boils down to? Feel-good legislation and feel-good lawsuits?

LOWENSTEIN: Again, I always want to be careful about questioning people’s motives. I had an uncle who was shot dead in his law office twenty-plus years ago by a guy who got a handgun, was mentally deranged and gunned him down. So I have a pretty good sense about how desperate you are to find somebody to blame and, frankly, how vindictive you can feel toward, in this case, even somebody who was mentally ill. So I don’t really like getting into questioning or challenging people’s motives for those kinds of things.

Certainly, a lot of the legislation is politically inspired by people who feel it’s an easy target and it’s good public relations. When people knowingly and willfully propose bills that they are virtually certain are unconstitutional, what they are essentially doing is saying, “I want to do this because it’s going to get me good press, will make people feel good and I don’t have to worry about the fact that when the court strikes it down a year later, nobody will remember.” To me, that’s just irresponsible and it’s a waste of people’s money that ought to be spent on more important things.

Every dollar that we spend and every dollar that states or local governments spend to defend these lawsuits could be spent on helping people. Every single dollar could be spent on educating consumers, violence programs in schools or all sorts of things that really make a difference in the lives of kids. Instead, it’s just going to a bunch of lawyers. When people do that with their eyes open, I think that’s really a pretty cynical use of the political process.

QUESTION: What do you think of an attorney like Jack Thompson who seems to be on a personal courtroom crusade against the video game industry?

LOWENSTEIN: Well, I’ll leave it to others to comment on Mr. Thompson. I think the courts so far have found his legal efforts quite wanting and I don’t expect that to change. Beyond that, I don’t really engage in public discussion about Mr. Thompson.

B. Navigating the Rising Tide of Legislation: Strategies & Tactics

The Entertainment Software Association unquestionably has a full plate. Sales of computer and video games last year reached a record $7.3 billion in the United States. As a result of the burgeoning popularity of electronic games, the trade organization

spends considerable time fighting video game piracy throughout the world, working to protect the investment made by large creative teams whose latest design will bring enjoyment to millions of game players.\textsuperscript{55} Lately, however, the ESA has been forced to devote a great deal of attention and resources to combating another threat to the video game industry—one that comes from town halls and state houses across the country. As lawmakers have sought to make political hay by publicly lashing out at the video game industry and trying to force manufacturers and retailers to curb popular games that feature violence, the ESA has had to respond to the threats through intensive lobbying efforts and legal challenges.

In this section, Douglas Lowenstein discusses how the industry is prepared to challenge any legislative initiatives that will tread upon the creative rights of game software designers. He talks about how legislative aides, who typically are younger and more in tune with video game technology than the lawmakers they serve, provide useful assistance in delivering the message that video games are protected expression, particularly in light of the fact that no scientific evidence has ever revealed a causal link between playing violent video games and behaving violently in society. Finally, Lowenstein describes how he came to work for the ESA.

\textbf{QUESTION:} How does the industry address the argument that video games are different from other forms of media and should receive less First Amendment protection because they are interactive and allow players to control the action?

\textbf{LOWENSTEIN:} I don’t think it matters if the speech is interactive or passive. I think the test of whether it doesn’t deserve constitutional protection has to be based on science and the law. Certainly to date, the courts have not found the science compelling enough to justify overcoming the First Amendment protections. While people may think and believe in their gut that it must be worse and more harmful because it’s interactive, the most independent science that I’ve seen simply doesn’t support that position. That doesn’t mean the games are for everyone. As I say, it’s understandable that people react that way to it, but it’s not supported by the research.

\textbf{QUESTION:} Do you think some of the legislative aides on Capitol Hill who usually are in their twenties or thirties play any role in helping to get your message across?

\textbf{LOWENSTEIN:} Yes, they do. We have lots of relationships on the Hill with both staff and members. I meet now, more often than ever before, with members of Congress who are familiar with games, whether they are players themselves or whether they play with their kids.

I met with a conservative Republican senator earlier this week who talked openly about how his son wants all these shooting games, and he’s not bothered by it. He told me, “I watch what he plays. We get the ratings. My wife and I argue all the time. I think he could play some of these mature-rated games. I don’t see a problem with them.”

I think there is more awareness, and certainly the staffers are good messengers to their bosses. In some ways the message they’re delivering is, “Do you think I’m a bad or deviant individual? I’m handling all of your judiciary, healthcare and environmental issues, and you seem to have confidence in me. And guess what? I play these games.”

\textsuperscript{55} \textit{Id.}
So they can be assets. I have said often that in fifteen years the President of the United States will have grown up playing "Grand Theft Auto."

QUESTION: Does the ESA ever counsel or advise companies that manufacture video games to avoid particular types of content or story lines?

LOWENSTEIN: No. We haven't. I'm not sure that's an appropriate role for a trade association. I have my own standards and my own morality, but I'm no more in a position to impose that on our members than I would want the government to impose that on our members. I can tell people my honest assessment of the consequences of creative decisions they make for the industry and make sure they have what I think is good information to make good business decisions. Nonetheless, I'm no more in a position to impose my morality on them than the government or religious groups or anyone else would be.

QUESTION: Taking that one step further, how do you feel about the fact that the voluntary ratings for video games that were developed by the Entertainment Software Rating Board are now being turned against the industry through incorporation directly into legislative initiatives—essentially transforming these voluntary ratings into law?

LOWENSTEIN: On one level, I think it's rather ironic that some critics attack the accuracy of ESRB ratings while others turn around and say, "Your ratings are so helpful that we want to give them the force of law." On another level, my understanding of the jurisprudence in this area is that, while it might be flattering that they want to give our ratings the force of law, government cannot cede its power to private entities, which essentially is what's happening here. I guess it's the ultimate compliment to the success of our self-regulation, but I don't think it's constitutional at the end of the day.

QUESTION: How aggressive is the entertainment software industry in challenging video game restrictions in court? Is there a threshold level of restriction that a state or a municipality must meet before the industry responds, or is the industry determined to challenge any and all restrictions on either content or access?

LOWENSTEIN: The answer is probably that we will challenge any and all restrictions on content and access. I'm hedging only because I don't know what "any and all" really means. Everything we've seen so far would rise to a challenge. There have been some proposals, such as the California signage bill, that we did not take a position on and did not challenge in court. So certainly there are proposals that we have not opposed and, in fact, could support. There are things that we would countenance if we believe they are constitutionally sound. If somebody came up with a way to address their access concerns that didn't raise constitutional questions, I would look at it.

QUESTION: What are some of the typical or common legislative approaches or regulatory strategies when it comes to regulating video games? It seems, for instance, that some states try to legislate access to minors. Others require warning signs and other signage. And some do a combination or something altogether different. Can you provide some examples that illustrate the typical approaches, if there is such a thing as a typical approach?

LOWENSTEIN: The typical approach is a bill that seeks to ban the sale of games based on the presence of what would be defined in the statutes as realistic violence against realistic-looking figures. In addition, sexual content would be regarded as problematic. That's the general nature of most of the attacks.
Now, there are nuances as well. Some of them would attempt to use the ESRB ratings as the standard and would prohibit the sale of games based on ratings. Others are more general in terms of trying to define the type of content that you couldn’t sell. There have been some proposals that would establish state rating services where the state would assume the responsibility for rating content.

Another one that we’re seeing occasionally would be a tax on content. So the state would impose a tax on violent video games, and then the funds would be used for some responsible public health purpose. That’s starting to pop up in a few places. Those are the main forms.

QUESTION: How do you respond to the common assertion that video games depicting images of violence cause real-life violence in society?

LOWENSTEIN: My response is to look at the science and to point out that the courts that have examined the science have been quite dismissive of those who make these claims. It’s not just a question of a bunch of industry hacks gathering around and circling the wagon. If you look at the specific decisions, whether it’s Judge Posner’s decision or Judge Lasnik in Washington or the appellate court in St. Louis County that has looked at this, they’ve all been quite dismissive of the claims that have been put forth as compelling science.

More and more people are reaching the same conclusion—the quality of science that tends to support the anti-video game perspective is very weak and doesn’t support the legislation. The notion that games cause crime or violent behavior is just completely unsubstantiated by any credible research and, quite frankly, defies common sense.

We have this tendency in society to shift accountability and responsibility away from the individual. If young people commit crimes in this country, it would be a lot more surprising if they didn’t have video games in their lives than if they did because a lot of kids play video games. But you might also find potato chips and Cocoa Puffs as a common denominator, and I guess there are some people who blame that as well.

Ultimately, the notion that a video game causes people to act completely outside the societal standards that they fully know and understand is just completely ridiculous on its face. The notion that some kid in a police station steals a gun off the cop, shoots three people and then steals a police car, and the only way they thought about breaking the law was by playing a video game is just ridiculous. And the notion that they didn’t know what they were doing was right or wrong is equally ridiculous.

Our view is that people ought to be held accountable for their actions. That’s what the criminal justice system ought to do, and trying to shift responsibility for that to the media they consume is just looking for scapegoats.

QUESTION: Certainly, the video game legislation seems popular with the general public because these efforts to link the games to societal violence plays well with the public. What is the industry doing in terms of its own media campaigns to counter that adverse publicity?

LOWENSTEIN: We, as an industry, are proactively doing a number of things to raise awareness about ratings, the demographics of the industry and the range of content in the industry. In our media efforts, we emphasize our key message that, according to the Federal Trade Commission, eighty-three percent of the time parents are involved in the
purchase and rental of the games. This is the dirty little secret that politicians don’t want to touch because it’s a lot easier to point the finger at the video game industry and retailers than it is to point the finger at parents who are either not doing their jobs or they just don’t agree with the view that these things are harmful.

I know plenty of parents who buy their kids violent video games and the kids are just fine and the parents are not worried about it at all. So I don’t want to suggest that you are a bad parent if you buy this game. We try to get information like that out there just to raise people’s awareness. It is absolutely an inescapable fact that if twelve-year-old Johnny has “Grand Theft Auto,” he probably got it from mom and dad, and I’ve not seen a law yet that deals with that problem.

QUESTION: What you’re saying is that only seventeen percent of the time would a minor be buying the game on his or her own.

LOWENSTEIN: A minor would only be buying a game seventeen percent of the time—eighty-three percent of the time, an adult is making the purchase. Actually our numbers are even higher. We show that over ninety percent of the time the actual purchaser is an adult.

Even if you assume that seventeen percent of the time there are kids walking around with forty-nine bucks in their pocket to buy a video game regularly—not once a year but routinely—only sixteen percent of the 200 and something plus video games sold on a unit basis were rated “Mature.”

The notion that these kids are only buying mature-rated games is false on this basis as well. That kid with $49 may just as well walk in and buy “Madden Football” or any one of a number of top-selling games that virtually have no violent content or minimal violence like “Spider Man II,” perhaps teen-rated games that people don’t seem to have as big a concern about.

It’s not even that seventeen percent of the time they’re buying inappropriate games and walking out of the stores with them because there’s no support for that argument. This is why the sting operations are the height of intellectual dishonesty. Nobody questions the fact that it is possible for minors to buy games even though the retailers have these voluntary programs in place—they deserve a lot of credit for trying to put these programs in place—and we’re pleased that they’re doing that. I think the results are getting better and better, and they need to continue to improve. The retailers accept that fact. But there’s a big difference, however, between what’s theoretically possible and what happens in the real world, and in the real world parents and adults buy most of the games. If you send a bunch of kids out there in a sting operation, are they going to be able to buy games? Yes, they will.

QUESTION: Like minors buying cigarettes at the corner store?

LOWENSTEIN: Yes. It isn’t going to work sometimes. It’s like sending kids into R-rated movies. Twenty to thirty percent of the time, kids are getting into R-rated movies—we all know that. If you set out to prove that it’s possible for minors to buy games, you’ll succeed. But there is a world of difference between what happens in the sting and what happens in the real world. In fact, in some of these stings, they don’t send out an eleven-year-old kid; they send out sixteen-year-old kids.

QUESTION: Who look like they could be seventeen?

LOWENSTEIN: Who look like they could be seventeen. Now you could argue that’s
no excuse because when the game scans and it says check for ID, the clerk should check. Of course, we're dealing in a retail and mass merchandise environment. We're dealing with fifteen or sixteen cashiers from age fifteen to seventy, some of whom have worked there full time, part time, trained, less trained, turnover, so we're going to have defects in the system. It's never going to be 100 percent effective.

QUESTION: You mentioned earlier that things were quieting down until "JFK Reloaded" came on the scene, and this producer was really out of the mainstream but has now focused the attention on the mainstream industry. The adult entertainment industry has similar issues. There are some people who are out on the fringes and now their extreme work product is shifting the focus back to the mainstream producers. What is the industry response when someone out of the mainstream creates a product like a "JFK Reloaded"? Does the industry say, "We're all in this together. We've got to embrace these people," or does it shy away from them?

LOWENSTEIN: It depends on the circumstances. In that case, I was quite outspoken in expressing my views when asked what I thought about this game. I found it contemptible and it was not something that was a product of the mainstream industry. A few years ago I heard about some game that a terrorist had put up in the Middle East in which you could play the role of a jihadist killing Israelis. He coded a video game and put it up. Blaming us for the "JFK Reloaded" is like blaming us for that.

It's like blaming a book publisher because somebody puts a book together on how to make an atomic bomb and sells it on the Internet. People should not say, "Oh, see the American book-selling industry is a really disgusting industry because they publish books like that." We can't be responsible and accountable for everything that goes out under the label "video game." The industry shouldn't be blamed for such things. That doesn't mean there's not plenty of things that people find controversial in what we do, but I'd rather deal with that than be accountable and responsible for things that are just wholly illogical to attribute to us as an industry.

QUESTION: On the social science side of the issue, there seems to be a couple of different professors—Professor Craig Anderson at Iowa State University, for instance—who are often used as experts or whose research is cited repeatedly in these cases. Are there individuals out there essentially on the other side of the spectrum or is the only research being done to show the harmful effects?

LOWENSTEIN: It's always hard to do research to prove a negative and a lot of people have told me that that kind of stuff doesn't get published.

QUESTION: In other words, you need results.

LOWENSTEIN: Right. Results. It's difficult to say, "I studied all this and nothing happened." Okay, there's nothing to publish. I don't purport to say that it's happened hundreds and hundreds of times because I don't know and perhaps it's not all that common. Nonetheless, what tends to get published is the negative research.

It is important to look at what the most independent people who have looked at that research have concluded about that science and that would be the courts. Professor Anderson's research has been put forward by every locality out there, and every court that's looked at it has said it's quite wanting.

On the positive side, there are people looking at the issue of games and crime and taking a hard look at all the research that purports to show that games are harmful. The
state of Washington's Department of Health has probably done some of the best work in this area where it looked at all the other research and issued an analysis of it, finding it to be quite unpersuasive.

QUESTION: How did you become involved with ESA?

LOWENSTEIN: I was a reporter for eight or nine years and then went to work on Capitol Hill. When I left the Hill after five years, I began working in a couple of private-sector jobs doing public-policy consulting and strategy—things of that sort. In that last firm where I was before here, we did a lot of work with entertainment companies, from MTV to Nickelodeon, and in the course of that we were retained by Electronic Arts—a major video company—to work on more corporate-positioning issues. This is back in 1993.

At the time that we began to talk about things we might do for EA, the first wave of anti-video game proposals began to hit and the industry came together to begin to think about how to organize itself to respond. That was in late 1993 or early 1994.

Out of that came a decision to hire somebody in Washington to help to figure out how they should respond to Senator [Joe] Lieberman. Since we had already been doing some work with EA, although not on that issue, I got to know some of the people in the industry and was eventually asked to represent the industry at large. That eventually led to their decision to create a ratings board and a trade association, and that's when they asked me to run the trade association.

QUESTION: You've been head of it the whole time?

LOWENSTEIN: Yes.

QUESTION: When did that start officially?


QUESTION: Is that when the ESA was formed at that time?

LOWENSTEIN: It was IDSA at the time—the Interactive Digital Software Association.

C. Ramifications for Free Expression and the Need for Vigilance

In this section, Douglas Lowenstein initially addresses the possibility of self-censorship in the development of video games that might occur today due to public outcry and legislation. He then looks at how attacks on the video game industry are related to and may affect different forms of entertainment content such as music, and he considers other forms of controversial content in American culture such as sexually explicit expression and pornography. Finally, Lowenstein speculates about the future of efforts to crack down on violent video games, and he concludes by articulating his own philosophy and beliefs about why the government should refrain from regulating the content of video games.

It is on this last topic—the reasons why Lowenstein believes the government should butt out of speech regulation—that he gets to the heart of why the First Amendment protection of free expression exists. As Lowenstein states, "We protect the speech that we find most objectionable, not the speech that we all agree with. That's why we allow Neo-Nazis to march in Skokie, Illinois." The analogy is particularly striking. Among some segments of society, including many legislators, violent video
Free Speech and the Entertainment Software Association

games like “Grand Theft Auto” are demonized as an evil almost akin to Nazism, causing violence, destruction and death. Of course, it was Judge Richard Posner who raised a slightly different variation of this point and comparison in striking down an Indianapolis ordinance restricting minors’ access to video games. Posner, in describing the adverse consequences of shielding minors from expressive content, wrote that “[t]he murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion.”

Lowenstein freely admits that not all of the games produced are to his taste or liking, but he also is not willing to impose or foist his sense of taste or morality on others, as the censorship advocates would do. Lowenstein’s belief on this point mirrors the sentiment of the United States Supreme Court more than thirty years ago in Cohen v. California that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”

Lowenstein’s views also reflect those of defense attorney Paul Cambria who makes a large part of his living defending a very different but equally controversial form of expressive content—adult magazines and sexually explicit videos. Cambria frequently tells jurors in closing arguments in obscenity cases, “Let you be you and me be me. That’s how our society works.” Unfortunately for Douglas Lowenstein, the forces of censorship just won’t let the video game industry be.

**QUESTION:** Can you point to any instances of self-censorship of content in the video game industry—examples where content was changed or altered because of complaints, negative public opinion or lawsuits?

**LOWENSTEIN:** I don’t know of instances where negative publicity or lawsuits caused the company to change the content of a game.

It’s important to note that it takes two to three years to make a game now. We’re talking about design teams of 100 people, from animators to story writers to music composers to engineers to a whole variety of other crafts. So, if you start off in March of 2005, you begin a two-year journey. It takes until March of 2007 to release the game.

When you’re making creative decisions all along the way, you may or may not be influenced by events that are going on around you. But people don’t know what you are doing, and it’s only at the point in time when the game is ready to launch that there could be a public outcry over it. At that point the game is two to three years in development, with $10 million to $20 million worth of money sunk into it. You can’t suddenly change it from a violent anti-terrorist game into a benign walk in the park. That just can’t be done.

Obviously, there are cases where the people creating content are making those

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56. Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).
58. Id. at 25.
creative decisions based on their perception of the political environment, and that could go both ways. They could decide to push the envelope more or they might decide to be more measured because they want to avoid a particular type of controversy when the product comes out.

QUESTION: When a game like "JFK Reloaded" comes into the market, it’s not typically from a mainstream company. Is that the case?

LOWENSTEIN: That certainly was the case there, but there are controversial games that mainstream companies put out.

QUESTION: Right.

LOWENSTEIN: There’s been a lot of publicity about a few of them recently, but those companies are making creative decisions within their own bubble. What’s influencing those choices are not things that I’m necessarily privy to. It certainly could be concern about negative media and political reaction or it could be calculated to generate negative media and political reaction. I think there are forces on both sides that are pushing and pulling people one way or the other.

I do know that companies have rejected content and game options that people have presented to them, saying, “No. We’re not going to publish it.” Again, how often that happens is impossible for me to document because companies are looking at ideas all the time and they are setting their own guidelines and standards about the kind of publisher they want to be and the kind of content they are going to be associated with.

The same is true with movie studios that might make certain decisions about their brands. Publishers make those decisions, too. Now, that product may go on to somebody else who doesn’t have the same standards, but there is independent decision-making by some publishers not to produce certain kinds of content, in part, for political or value reasons.

The other thing that happens is in the ratings process. The ratings board issues a rating based on what has been submitted by the company. I know that there are instances, more frequent now than in the past, where companies are given ratings that they don’t want. So they are saying, “Well, how do we need to change the content to get a mature rating instead of an adults-only rating?” That’s a process that goes on that I’m not part of and don’t really know very much about, but the ratings board is in the middle of that.

QUESTION: The entertainment software industry is not the only form of media to implement voluntary ratings. Movies, television, recorded music all have used the voluntary systems as well. What type of strategic alliance, if any, is the entertainment software industry forming with these other producers to combat efforts that are designed to restrict either access or content?

LOWENSTEIN: We certainly work with the other industries on an as-needed basis to gather and secure support for our efforts to oppose bills that are restrictive. I think that these other industries have and recognize a very direct stake in what’s happening here because media are all combined.

For instance, the music publishing industry is increasingly dependent on the video

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60. For instance, background on the Motion Picture Association of America’s voluntary movie rating system can be found online from that organization’s web site at http://www.mpaa.org/movieratings (last visited Apr. 11, 2005).
game industry for getting music out to consumers. More and more major artists are clamoring to be in video games as a way to get their music out to all their audiences. The relationship between the film industry and the game industry is ever more linked as licenses pass back and forth and studios recognize the economic potential of the game franchises. So regulating the game industry is increasingly seen as a threat to any content because all those media forms are merging together.

We work closely with them in trying to present the common alliance on these First Amendment issues. The movie industry particularly has been through this for years, and to some degree they have had their fight the last couple of decades. Maybe they’ve emerged into the sunlight that we want to be in sometime in the not too distant future, but they haven’t forgotten and they never take lightly threats to free expression.

**QUESTION:** If legislative efforts to restrict the content of video games, at some point, were to survive constitutional scrutiny, would you expect to see similar restrictions placed on other media content?

**LOWENSTEIN:** That’s a good question. There is an obvious inconsistency when people in politics talk about how we’re protecting the young people. I conjure up this notion that a 12-year-old kid can go into Wal-Mart or Best Buy and can buy *Natural Born Killers* or *Texas Chainsaw Massacre*, but he can’t buy “Resident Evil” or a Tom Clancy video game rated M. It is difficult for people to get their arms around the logical consistency of that position, which is something that the judge in Washington pointed out.

On the one hand, you would think that the video game industry would be just the tip of the iceberg if people were intellectually consistent. I’m not sure people are terribly intellectually consistent. Part of that goes to the point I was making at the very beginning of the interview because people in their 40s, 50s and 60s are comfortable with passive media. They’ve come to terms with it. There may be movies out there they think are disgusting but, for whatever reason, they’ve sort of grown up on them and they’ve accepted them as part of the culture.

Video games aren’t there yet. People are more willing to accept the notion that music is expression than they are that games are expression. They hate the lyrics but everybody understands that somebody’s written something that has sound and words associated with it, and that’s always been protected speech. I don’t think people necessarily see games that way. They don’t see all those elements that go into it.

**QUESTION:** They focus on the conduct. Do they see it more as conduct because the players are using controllers?

**LOWENSTEIN:** Exactly. There’s not an understanding that, if you take a typical video game, everything that we regard as expressive content is built into a game. Then you add interactivity. But you have original music, scripts, storyboards, drawings and animation, along with any number of other art forms that we clearly acknowledge individually as artistic expression. Yet people have a hard time getting their arms around that fact and believe that if you put it all into a video game it somehow loses something.

Around this office there are shots of video games that were part of an art exhibit that the Los Angeles County Museum of Art staged last year called “Into the Pixel,” which is video game art. I defy you to look at that and tell me it’s not artistic
expression, but that’s hard for people to get their arms around. If you took these shots out of the game and hung them all in an art gallery, people would come and say, “Wow, that’s really beautiful.” But when you put them in the video game, they say, “Well, that’s just a game.”

QUESTION: Do you see parallels with the adult entertainment industry which, during the 1990s, mainstreamed significantly to the extent today where we see Hustler Hollywood stores located throughout the country, the whole Jenna Jameson phenomenon where everybody would recognize that name, and the content is very popular? It’s reached the stage where there are a few prosecutions here and there, but it’s accepted more and more increasingly. Do you see a parallel type of a situation with video games, without regard to the underlying substantive content?

LOWENSTEIN: I don’t know. I think this country has a love-hate relationship with sex. There may be parallels in terms of how, over time, video games will become accepted, but I think if that happens, it’s going to be more for the reasons I was talking about earlier.

I don’t really know why porn has become more accepted within the culture and why it’s more mainstreamed. Maybe it’s the same thing. I think in our case it will be more of a gradual generational evolution that will just cause a lot of the hostility to dissipate and people will accept that these are a very core part of the culture.

A lot of the real criticism of games is focused on access. So if you want to look for maybe the silver lining right now it’s that people are not trying to say you can’t make games no matter how contemptible they might feel about some of the content. They are slowly accepting the fact that it is a protective form of expression and the battle is over whether there’s a harmful-to-minors element here that justifies trumping the First Amendment protections. Plus, I don’t think people accept porn as something that we want to give to kids either.

QUESTION: In fact, sometimes we see that question phrased as, “Well, we don’t allow minors access to Hustler and Playboy in a store, so why should we allow minors access to a video game that depicts violence?”

LOWENSTEIN: The answer is because courts have consistently and clearly ruled that violence is protected speech whether it’s detective magazines, movies or music lyrics.

It would be incredibly difficult to determine what kind of violence would be considered covered. How do you distinguish between a video game where there is very graphic violence of troops being killed storming Normandy Beach and violence in a game that some people might find less historically based? It’s the same argument as Saving Private Ryan versus the Texas Chainsaw Massacre. People in the courts have certainly recognized over a long period of years that making distinctions between


63. The original Texas Chainsaw Massacre, which was remade in 2003, has been described as “the famed low-budget bloodfest of 1974.” Neil Genzlinger, Organized Terror (The Fictitious Kind), N.Y. TIMES, Oct. 31, 2004, at Section 13, 4. When the original movie came out, “audiences were shocked by its brutal and unrelenting violence” that “had the look and feel of a grisly home video.” Nick Chordas, Movie Review The Texas Chainsaw Massacre, COLUMBUS DISPATCH (Ohio), Oct. 17, 2003, at 7D.
violent expression is fundamentally impossible. Moreover, if you read the Posner decision, one of the points he talks about is not only is it folly to try to shield kids from violence but it may not be a good idea.

QUESTION: His point was that if you raise your kids in an intellectual bubble, they will be ill-equipped to face the real world once they reach the age of majority.64

LOWENSTEIN: Exactly.

QUESTION: So far the efforts to restrict video games ultimately have been unsuccessful in court, as we’ve been talking about during this interview. As more and more lawmakers seek to impose restrictions, do you expect that pattern to continue or is it just going to eventually bubble up to the point where you’re going to see courts accepting some of this?

LOWENSTEIN: I don’t predict what happens in the courts. I hope not. Obviously, not every judge is bringing the same legal analysis and personal morality to every case. I think you always look at this with some understanding that things change. After all, we used to tolerate segregation in this country and now it’s unconstitutional. I don’t know how the culture will evolve. I don’t know how the courts will evolve on this issue. We will deal with it as it comes. For now, in three separate circuits, the courts have been resoundingly clear on this and hopefully that pattern will continue. If it doesn’t, we’ll deal with it at the time.

QUESTION: Why should the government at the local, state and federal level refrain from regulating the content of video games?

LOWENSTEIN: It comes down to a simple proposition for me, which is not a very politically attractive proposition. Games are protected expression. Government has no business regulating artistic expression. The definition of art is not whether the government or I like it, or whether the church likes it. Rather, the question is: Does it have the elements of creativity? And video games unquestionably do. To tolerate a restriction on the creative expressive rights of video game creators to me is a very dangerous thing for this country, and it is a principle worth fighting for. It is not always a fun principle to fight for. In a lot of ways, it’s not a principle that’s very popular. But if the government can say, “You can’t sell games that depict violence that we in government find objectionable,” then why can’t you have, at another time in another moral environment, the government saying, “You can’t sell games that depict homosexual lifestyles. Or you can’t sell games that depict anti-war sentiments.” The list goes on and on and on.

That’s the whole essence of what we protect. We protect the speech that we find most objectionable, not the speech we all agree with. That’s why we allow Neo-Nazis to march in Skokie, Illinois. I find that pretty disgusting, but I think that the benefit of having that right far outweighs not having it and that’s the principle we’re championing

64. See Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001). The opinion states that:

Since an eighteen-year-old’s right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

Id.
here.

**QUESTION:** Even from your position at the ESA, you might not agree with or like all of the content in all the video games, is that correct?

**LOWENSTEIN:** I don’t like all the content in all the games. I’m a human being like anybody else. I have my own morality and my own standards, whether in books, movies or video games. There’s stuff out there that I don’t particularly care for and that I wouldn’t and don’t bring into my home. There are things that I wish weren’t made because I don’t think it ennobles the culture and I don’t think it ennobles the art form. That’s my personal view. It’s not my job to defend people’s creative choices. It is my job to defend their right to make those creative choices, and that’s a distinction that’s sometimes rather painful to carry.

**IV. CONCLUSION**

In the 1990s, as the Internet exploded in popularity, lawmakers felt compelled to rein in the proliferation of websites that showcased adult entertainment, fearing that such materials were harmful to minors. Despite strong-willed efforts by Congress to restrict the popular new media form, civil liberties groups fervently opposed such attempts, as did courts (including the U.S. Supreme Court) that considered the attempts and ultimately led to their demise. The legislative and judicial wrestling that marked efforts to regulate the Internet at the end of the last millennium seems painfully similar to what is happening now with the latest popular new media form, computer and video games.

At the forefront of the current battle to keep video games free of restrictions is the Entertainment Software Association, under the stewardship of Douglas Lowenstein. An erstwhile reporter and legislative aide to former U.S. Sen. Howard Metzenbaum (D.-Ohio), Lowenstein has put to significant service the media relations and political skills he learned earlier in his career to answer journalists’ inquiries and fend off legislation designed to clamp down on the industry he and the ESA represent.

As Lowenstein noted several times during the interview, it is largely the novelty of video game technology driving the current national debate over whether minors should be shielded from violent content prevalent in several popular games. Lawmakers, the vast majority of whom are on the far and graying side of forty, are not familiar or comfortable with the gaming technology. As Lowenstein observed, “the generation in power tends to react with hostility to the media of the younger generation coming in behind them.”

This generational tension leads to controversy. Where there is controversy, there are also headlines—what Lowenstein wryly calls “the crack cocaine

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65. See Child Online Protection Act, 47 U.S.C. § 231 (2000) (prohibiting any person from knowingly “in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors”).
66. See Reno v. ACLU, 521 U.S. 844, 849 (1997) (striking down, on First Amendment grounds, a portion of the Communications Decency Act that was designed to protect children from exposure to sexually explicit content on the Internet); Ashcroft v. ACLU, 542 U.S. 656, 706 (2004) (holding that a district court judge did not abuse discretion in issuing a preliminary injunction against the enforcement of the Child Online Protection Act).
67. See supra Part II.A.
68. Id.
of politicians"—drawing lawmakers to introduce bills to curb access by minors to these games.

The ESA estimates that more than fifty such legislative initiatives were on the table in states and municipalities across the country in 2005, including Washington, D.C. The chorus of officials nationwide that hopes to ban violent and sexually explicit video games may, indeed, emerge as the next family-friendly government initiative. As Lowenstein mentioned throughout the interview—and as he is depending on—the move to halt video game sales carries a high constitutional price tag that even eager lawmakers may not be able to afford.

Every piece of legislation to date regulating violent video games ultimately has failed when challenged in the federal courts. Though not a lawyer, Lowenstein boiled down the legal analysis to its core terms—one that he concedes "is not a very politically attractive proposition. Games are protected expression." Essentially, video games have expressive elements in that they contain story lines, just like movies and books. And sometimes those story lines are violent—again, just like movies and books. And just as movies and books are protected by the First Amendment, so too are video games. In fact, as Lowenstein pointed out, all of these expressive elements are combined in the video game: "[Y]ou have original music, scripts, storyboards, drawings and animation, along with any number of other art forms that we clearly acknowledge individually as artistic expression."

Accordingly, to place restrictions on violent video games, the government will need to prove that the games cause harm to the minors who play them, thus providing them with a compelling interest to protect those youngsters. So far, such evidence remains elusive. Social science research on the topic has never shown a causal link between playing violence on a screen and behaving violently in society. As the Seventh Circuit U.S. Court of Appeals noted in striking down an Indianapolis ordinance limiting minors' access to violent video games, "[t]he grounds must be compelling and not merely plausible." Contrived and artificial academic laboratory experiments, in other words, simply cannot be generalized to real-world situations and thus lack external validity.

Those states and municipalities looking to regulate violent video games have relied upon research that merely shows aggressive feelings encountered when playing violent games, but "[t]he studies do not find that video games have ever caused anyone to commit a violent act..." Moreover, they have not demonstrated that the interactive component of the game leads to aggressive feelings as opposed to the exposure itself to

69. Id.
70. See, e.g., Eric M. Weiss, D.C. Seeks Sales Ban on Violent Games; Williams, Fenty Back Limits for Minors, WASH. POST, Feb. 3, 2005, at 1 (describing D.C.'s legislative initiative and a news conference by D.C. Mayor Anthony A. Williams at which he referred to the video game "Grand Theft Auto" as "a horrible game for kids to be using").
71. See supra Part II.C.
72. Id.
73. Id.
75. Id. at 578 (citing unfavorably Craig A. Anderson & Karen E. Dill, Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life, 78 J. PERSONALITY & SOC. PSYCH. 772 (2000)).
graphic violence. As Lowenstein observed, "every court that’s looked at it has said it’s quite wanting." While proving a negative (that the games are not harmful) may not be an attractive proposition for researchers, some social scientists have broken down the results put forth by those seeking restrictions and found them “to be quite unpersuasive,” which gives Lowenstein hope for the future.

The lack of evidence proving harm is only one of the hurdles state and local governments must overcome to enact constitutionally sound video game restrictions. Even if a direct causal connection to real-world violence could be found—and that is not likely to happen—how are violent video games different from violent movies? If a minor who plays a violent game is at risk, surely he or she must be in similar peril when watching a movie. Singling out the game industry for restriction while movies go unregulated will raise other constitutional problems. These constitutional problems will be based on such an under-inclusive and definitively inefficacious remedy.

From Lowenstein’s perspective, much of the problem boils down to the definition of violence. During the interview he observed and queried, “How do you distinguish between a video game where there is very graphic violence of troops being killed storming Normandy Beach and violence in a game that some people might find less historically based?” Parsed differently and more bluntly, there is no recognized and agreed upon definition of violence, in stark contrast to the Supreme Court’s three-decade-old and well-accepted definition of “obscenity.”

So why waste time creating measures that cannot withstand a constitutional challenge? Lowenstein believes it comes down to an issue of accountability and responsibility. Society tends to shift blame away from individuals and onto industries that produce violent expression. As he pointed out, “It’s a lot easier to say, ‘let’s go sue the video game companies and try to get $100 million out of those guys. It will make us feel better that we’ll have gotten somebody to pay for this horrible crime.’”

While Lowenstein is hesitant to ascribe ill motives to those who push for restrictions, he is certain that time is better spent encouraging parents to take a peek at what electronic games their children are playing. After all, he observed that the government’s own figures report that “83 percent of the time parents are involved in the purchase and rental of the games.” Calling this statistic “the dirty little secret that politicians don’t want to touch,” Lowenstein notes that it is much more politically expedient “to point the finger at the video game industry and retailers than it is to point the finger at parents who are either not doing their jobs or they just don’t agree with the view that these things are harmful.”

For now, Lowenstein understandably hopes that courts will continue to strike down legislative attempts to restrict violent video games. Although he is reluctant to predict

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76. Id. at 579.
77. See supra Part II.B.
78. Id.
79. See supra Part II.C.
80. Id.
82. See supra Part II.A.
83. See supra Part II.B.
84. Id.
what will happen in the future, he is confident that, as the younger generation takes the reins of power, the fear generated by this new form of media will dissipate and legislative efforts will dwindle. But if politicians like Assemblyman Leland Yee in California continue to trot out young Girl Scouts in committee hearings to cloak legislation in a patriotic flag\footnote{See supra note 10 and accompanying text (describing how forty Girl Scouts testified on behalf of Yee's bill in April 2005).} and work to assemble broad-based coalitions between the likes of the Girls Scouts of America and the American Academy of Pediatrics,\footnote{See Alexa H. Bluth, No Mercy for Cruel Games, SACRAMENTO BEE, Apr. 9, 2005, at A3 (writing that, in support of his 2005 bill in California, Yee "has assembled a new, broader coalition of supporters for the measure that includes the Girl Scouts of America, the state Parent Teachers Association and the American Academy of Pediatrics").} Lowenstein's desired result may not be so readily obtained.