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NOTES

GAME OVER! LEGAL RESPONSES TO VIDEO GAME VIOLENCE

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INTRODUCTION

Video games in America have replaced many traditional childhood pastimes as the leisure activity of choice. A stroll through the halls of a day care or a college dormitory demonstrates the strong presence these games have for the youth. Children are spending more hours and dollars on electronic entertainment than ever before. In fact, home video game use has steadily increased throughout the past decade from an average of nineteen hours a year per person in 1992 to a projected average of forty-four hours a year per person in 2001. Consumer spending by persons twelve and older on video games has similarly increased from an average of \$11.51 per person in 1992 to a projected \$19.49 per person in 2001,¹ supporting a video game industry of approximately \$10 billion in earnings every year.²

However, these statistics fail to provide the complete picture. Video game use is not evenly spread among all citizens. Rather, it is heavily concentrated on youths; 54% of children have both a television and video games in their bedrooms and the average child plays ninety minutes of video games every day.³ Addition-

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1. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 580 (1999) (table no. 920).

2. *Marketing Violence to Children: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 106th Cong. (2000), <http://www.senate.gov/~commerce/issues/telco00.html>. (last visited Oct. 15, 2001) (testimony of Donald E. Cook, M.D., FAAP, President, Am. Acad. of Pediatrics) [hereinafter *Marketing Violence*, 2000].

3. *Id.* But see *Marketing Violence*, 2000 (testimony of Douglas Lowenstein, President, Interactive Digital Software Ass'n, at 1) (the testimony of Douglas

ally, while there is disparity among estimates of the age composition of video game players, some experts have estimated that children comprise up to 60% of the video game audience.⁴ These facts, juxtaposed with recent high profile incidents of violence committed by children in schools,⁵ have prompted various governmental and private responses to combat the possible harmful effects of violent video games on children.

This Note examines the consensus regarding the effects of violent video games on children. Furthermore, this Note analyzes possible legislative and judicial remedies to this situation. Part I examines the problem of violent video games through an analysis of the effects on children and current video-game industry responses. Part II addresses possible governmental remedies on both federal and state levels. Part III examines one such response—Indianapolis General Ordinance No. 72-2000 and the recent Seventh Circuit opinion in *American Amusement Machine, Assoc. v. Kendrick*.⁶ Finally, this Note concludes by recognizing the threats posed by violent video games and theorizes why this danger and subsequent warnings go unheeded.

I. THE PROBLEM WITH VIOLENT VIDEO GAMES

This section begins by briefly detailing the history of the video game industry. From its small beginnings over two decades ago, to its current status in the electronic world, the video game industry has grown substantially in a relatively short period of time. This section also explores the relationship between violent content of video games and violent behavior of children. Evidence exists indicating a correlative and possibly a causal link between the two. Finally, this section concludes by determining that the video game industry has failed to adequately address this

Lowenstein and the statistics he provides indicate that children and adolescents are not the primary audience for video games. He states that 61% of all video game players are over eighteen years old and the average age of a video game player is twenty-eight. However, while these statistics indicate that more adults play video games than children, they do not indicate the relationship between the percentage of video-game playing adults compared to the percentage of video-game playing children.).

4. FED. TRADE COMM'N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES (Sept. 2000) app. D at 5, <http://www.ftc.gov/opa/2000/09/youthviol.htm> (last visited Oct. 15, 2001) [hereinafter *FTC Violence Report*].

5. These incidents include school shootings in Littleton, Colorado; Springfield, Oregon; Jonesboro, Arkansas; and Paducah, Kentucky.

6. 244 F.3d 572 (7th Cir. 2001), *cert. filed*, (Aug. 23, 2001).

link between violent game content and violent childhood behavior.

A. *History of Electronic Game Industry*

The electronic game industry is represented by the recent creation of a formal trade association known as the Interactive Digital Software Association (IDSA). Officially formed in April 1994, this association began as an industry response to proposed congressional action to a rising concern over the effects of violent video games on children. Its original purpose was to aid the development of self-regulation of video game violence under the threat of federal action.⁷ Shortly after the creation of the IDSA, the association created "an independent, third-party entity" which is today known as the Entertainment Software Rating Board (ESRB).⁸ The ESRB is responsible for developing and maintaining a rating system to inform parents of the content of various video games.⁹

The ratings system designed by the ESRB covers video games created for many different types of home-based video game systems. These include both cartridge-based (such as Nintendo 64) and CD based systems (such as the Sony Playstation). Furthermore, the ESRB also rates video games designed for personal computers on either a Microsoft Windows or a Macintosh operating system. Therefore, ESRB reviews virtually all video games on the market—all console based video games (those that function through a television) and the overwhelming majority of personal computer-based video games.¹⁰

The ESRB ratings system groups video games into six basic categories.¹¹ These categories include: (1) "EC" *Early Childhood*¹²

7. *FTC Violence Report*, *supra* note 4, app. D at 13–14.

8. *Id.* at 15 (quoting *Violence in Video Games: Hearing Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 103d Cong. 14 (1994) (statement of Douglas Lowenstein, President, Interactive Digital Software Ass'n)).

9. *FTC Violence Report*, *supra* note 4, at 36.

10. *Id.* at 37.

11. See generally *FTC Violence Report*, *supra* note 4, at 38–40; ENTMT SOFTWARE RATING BD., ESRB VIDEO & COMPUTER GAME RATINGS ABOUT RATINGS AND DESCRIPTORS, http://www.esrb.org/esrb_about.asp (last visited Oct. 15, 2001).

12. "Titles rated 'Early Childhood (EC)' have content suitable for children three and older and do not contain any material that parents would find inappropriate." ENTMT SOFTWARE RATING BD., ESRB VIDEO & COMPUTER GAME RATINGS ABOUT RATINGS AND DESCRIPTORS, http://www.esrb.org/esrb_about.asp (last visited Oct. 15, 2001).

(2) "E" *Everyone*¹³ (3) "T" *Teen*¹⁴ (4) "M" *Mature*¹⁵ (5) "AO" *Adults Only*¹⁶ and (6) "RP" *Rating Pending*.¹⁷ Furthermore, these rating icons are often accompanied by "descriptors" that provide additional content information regarding areas of interest to the consumer (such as violence, sexual themes, and language).¹⁸

According to Douglas Lowenstein, the president of the IDSA (the parent organization of ESRB), 9% of the over 7,500 titles ever rated by the ESRB have been designated as "M" for Mature.¹⁹ However, 70% of these 7,500 games qualify under the category of "E" for Everyone. In 1999 for example, 100 of the 1,500 video games released were rated "M" for Mature—just over 6%.²⁰ Not only are all video games rated by the ESRB, but the IDSA maintains various requirements for packaging, advertising, and marketing of such games. The rating icon is usually accompanied by the content descriptors during each of these periods.²¹

The necessity of such a rating system is apparent upon a stroll down any video game aisle of a toy store. Not only do the games themselves often contain violent media, but the advertisements and enticements on the packaging and promotional material assault the eyes with a barrage of violent messages. Some of the more egregious examples are the following games: *Carmageddon* claims it is "as easy as killing babies with axes;" *Point Blank* asserts that "it is more fun than shooting your neighbor's cat;" and *Die by the Sword* follows the motto, "Escape. Dismember.

13. "Titles rated 'Everyone (E)' have content suitable for ages six and older. These titles will appeal to people of many ages They may contain minimal violence, some comic mischief (for example slapstick comedy), or some crude language." *Id.*

14. "Titles rated 'Teen (T)' have content suitable for persons ages 13 and older. Titles in this category may contain violent content, mild or strong language, and/or suggestive themes." *Id.*

15. "Titles rated 'Mature (M)' have content suitable for persons ages 17 and older. These products may include more intense violence or language than products in the Teen category. In addition, these titles may also include mature sexual themes." *Id.*

16. "Titles rated 'Adults Only (AO)' have content suitable only for adults. These products may include graphic depictions of sex and/or violence. Adults Only products are not intended to be sold or rented to persons under the age of 18." *Id.*

17. "Product has been submitted to the ESRB and is awaiting final rating." *Id.*

18. ENTMT SOFTWARE RATING BD., ESRB VIDEO & COMPUTER GAME RATINGS, <http://www.esrb.org/esrb.asp> (last visited Nov. 22, 2000).

19. *Marketing Violence, 2000*, *supra* note 2 (testimony of Douglas Lowenstein, President, Interactive Digital Software Ass'n, at 2).

20. *Id.*

21. *FTC Violence Report*, *supra* note 4, at 39.

Massacre.”²² Although these flagrant cases stand out from the shelf of games, they are nonetheless indicative of the use of violence as a means to attract customers. Almost all the games rated “T” or “M,” for example, contain some element of violence. In fact, as of September 2000, 89% of the “M” rated games and 96% of the “T” rated games had violence-related content descriptors.²³ Therefore, these examples indicate, and statistics confirm, that a majority of “M” and “T” rated video games are violent.

B. *Relation Between Violent Video Games and Violent Behavioral Tendencies in Children*

Violent subject matter in an “M” or “T” rated video game is in itself not a problem. In fact, “M” and “T” rated games are the appropriate forum for such content. The problem, however, is that such games are very popular with children. In a Federal Trade Commission survey, 24% of children from eleven to sixteen years old included at least one “M” rated game when asked to state their three favorite video games. Furthermore, industry surveys performed in 1998 and 1999 reveal that 40% of the “M” rated video-game players are under eighteen years old.²⁴

This violent content in video games played by children does more than merely entertain. The endless hours children and teenagers spend perched in front of a television playing video games are not without proportional effects. As the average child spends three to four hours a day playing video games, this time devoted to electronic media is stolen from time which would have otherwise been spent doing other, more productive activities. A child playing video games is not interacting with others in the real world. Nor is he physically exercising his body. Rather, he remains in a sedentary position as he masters the art of “getting to the next level” and reinforces whatever subliminal message the video game manufacturer has elected to convey.²⁵ These concerns are not new, though. They are familiar worries. However, while many parents have been on guard against the obvious physical effects of the sedentary habit of continuously playing video games, few are aware of possible behavioral effects.

22. *Marketing Violence to Children: Hearing Before the Senate Comm. on Commerce, Science, and Transp.*, 106th Cong. (1999), <http://www.senate.gov/~commerce/hearings/hearin99.htm> (last visited Oct. 15, 2001) (testimony of Sen. Joe Lieberman) [hereinafter *Marketing Violence*, 1999].

23. *FTC Violence Report*, *supra* note 4, app. D at 5.

24. *Id.* at 47.

25. *Marketing Violence*, 1999, *supra* note 22 (testimony of Diane Levin, Ph.D., Professor of Education, Wheelock College, Boston, MA, at 5).

1. Evidence Indicating a Correlative Relationship Between Video Game Violence and Behavioral Tendencies

The extent of any relation between video game violence and real world violence among game-playing children is much debated. However, even those who refuse to acknowledge a causal relationship between media and violence do admit that there is some correlation between the two. Thon Mount, President of the Producers Guild of America, remarked after the Columbine school shooting, "[i]t is not that violent pictures *create* more violence, but the constant litany of gratuitous violence is destructive of the fabric of the culture because it lowers our threshold for sensitivity to the issue."²⁶ Furthermore, this relation between entertainment violence and actual violence prompted former Secretary of Education William J. Bennett to comment that, "[a]lmost no one, except for a few blinded by financial stakes, thinks that the popular culture is not having a coarsening effect on our kids. The evidence . . . is overwhelming."²⁷ Evidence of this relationship is not limited simply to popular opinion.

Several empirical investigations on the effects of violent video games link such games to children's behavioral tendencies. Such a correlation is evident as these studies assert that "a preference for violent games is correlated with adjustment problems and negative self-perceptions in some groups of children."²⁸ Furthermore, "real-life violent video game play is positively related to aggressive behavior and delinquency."²⁹ The extent, however, of this relationship is not as readily apparent.

Many studies caution against equating a correlational relationship to a causal relationship. The two are not the same. A correlation might simply be explained by realizing that violent individuals are attracted to violent video games. Therefore, "[c]orrelation is not causality, no matter how tempted one may

26. *FTC Violence Report*, *supra* note 4, at 2 (quoting Fay Fiore, *Media Violence Gets No Action from Congress*, L.A. TIMES, Nov. 20, 1999, at A1) (emphasis added).

27. *Marketing Violence, 1999*, *supra* note 22 (statement by William J. Bennett, Co-director, Empower America, former Secretary of Education, at 5).

28. *FTC Violence Report*, *supra* note 4, app. A at 12 (summarizing findings of Jeanne B. Funk, Ph.D.). See *The Impact of Interactive Violence on Children: Hearings Before the Senate Comm. on Commerce, Science and Transp.*, 106th Cong. (2000) (written testimony of Jeanne B. Funk, Ph.D.), reprinted at 2000 WL 11070123.

29. *FTC Violence Report*, *supra* note 4, app. A at 12. (summarizing findings of Craig A. Anderson and Karen E. Dill). See Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCHOL. 772 (2000) (providing complete findings of this study).

be to argue otherwise.”³⁰ Significant evidence, nevertheless, suggests that violent video games can function to increase aggressive behavior.³¹ Therefore, while the precise relationship between real-world violence and video game violence is not clear, many factors indicate that some type of connection does exist.

In fact, several authorities indicate that this relation might be somewhat similar to that between tobacco use and cancer among smokers. Just as not every smoker will develop cancer, neither will every video game obsessed child behave more violently. However, a direct correlation exists between tobacco use and cancer similar to the connection between playing violent video games and developing aggressive behavior.³² In fact, the relation between video games and violence might even be stronger. Tobacco use accounts for only 14% of lung cancer variance whereas exposure to video game violence during late adolescence is thought responsible for between 13% to 22% of variance in violent behavior.³³

Just as the public realization of the effects of tobacco use was a slow evolution, so too might be a similar awareness regarding violent video games. In fact, *Time* magazine concluded after a school shooting in Jonesboro, Arkansas, that “the debate [over media violence] is fast approaching the same point that discussions about the health impact of tobacco [were] some time ago—it’s over. Few researchers bother any longer to dispute that bloodshed on TV and in the movies has an effect on kids who witness it.”³⁴ Video game violence, therefore, like tobacco health, will likely soon be widely recognized, openly discussed, and popularly disfavored.

2. Evidence Indicating a Causal Relationship Between Video Game Violence and Behavioral Tendencies

The conviction with which so many researchers insist that video game violence is linked to childhood behavioral tendencies

30. *FTC Violence Report*, *supra* note 4, app. A at 13 (quoting *The Impact of Interactive Violence on Children: Hearings Before the Senate Comm. on Commerce, Science and Transp.*, 106th Cong. (2000) (written testimony of Jeffrey Goldstein, Ph.D., at 4), *reprinted at* 2000 WL 11069631).

31. *Id.* See Craig A. Anderson, Ph.D., *The Impact of Interactive Violence on Children*, 2000 WL 11070122, at 4–5.

32. *Marketing Violence*, 1999, *supra* note 22 (testimony of Daphne White, Executive Director, The Lion & Lamb Project, at 2).

33. Anderson, *supra* note 31, at 3.

34. *Marketing Violence*, 1999, *supra* note 22 (testimony of Col. Dave Grossman, Author, ON KILLING, at 12 (quoting *Toward the Root of Evil*, *TIME*, Apr. 6, 1998, <http://www.time.com/time/magazine/1998/jnt/980406/box2.html> (last visited Nov. 30, 2000))).

indicates that perhaps the relationship between the two might be stronger than just a correlation. This intellectual "leap" is a product of the realization that video games are a unique medium in the electronic media world—not only as they are interactive in nature, but also as they psychologically affect their players.

a. Video Games Are Different Than Other Electronic Media

While several scientific studies caution against the conclusion that there is more than a correlative relationship between video games and behavioral tendencies, a substantial body of evidence takes the additional step and indicates that this correlation might be strong enough to functionally qualify as a causal relationship. This portion of research regarding violence in video games mirrors and builds upon the large body of work already established regarding the effects of television violence.³⁵ However, while there are many similarities between violent video game and violent television exposure, the two are not completely analogous and therefore the scientific conclusions are not completely transferable.³⁶

Indeed, a significant body of thought stands behind the proposition that the interactive nature of violent video games has an *even more* detrimental effect on the behavioral tendencies of those who play them than does the passive nature of other electronic entertainment.³⁷ In a Senate committee hearing on "Children, Violence, and the Media," Senator Hatch even commented that "violent video games have an effect on children similar to that of violent television and film."³⁸ Furthermore, he acknowledged that video games may have an even "greater pernicious effect [as] violent actions performed in playing video games are more conducive to children's aggression."³⁹

Intuitively, this assertion makes sense. A child watching television is passive and subjected to the imagination of another who has created the entertainment. A child playing video games, however, can repeatedly play out his violent fantasies as often and as morbidly as he wishes—limited only by the ever-expanding technological boundaries of the game he is playing.

The unique interactive nature of video games has prompted several organizations to specifically address these games' violent

35. Anderson, *supra* note 31, at 3.

36. *Id.*

37. *Id.* at 5.

38. SENATE COMM. ON THE JUDICIARY, 106TH CONG., CHILDREN, VIOLENCE, AND THE MEDIA 3 (Sept. 14, 1999), <http://www.senate.gov/~judiciary/mediavio.htm> (last visited Oct. 15, 2001) [hereinafter *Children, Violence, and the Media*].

39. *Id.*

content. In a joint statement on the impact of video game violence on children, the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychological Association, American Medical Association, American Academy of Family Physicians, and American Psychiatric Association all declared that the negative effects of interactive entertainment such as video games "may be significantly more severe than that wrought by television, movies, or music."⁴⁰ Recognizing that additional study is still needed in this area, these organizations nevertheless concluded that "viewing [electronic] violence may lead to real life violence."⁴¹ Furthermore, not only is video game violence possibly more detrimental than other forms of entertainment violence, but the joint statement also concluded that in some children there is a causal connection between media violence and aggressive behavior. The joint statement noted the following:

At this time, well over 1000 studies—including reports from the Surgeon General's office, the National Institute of Mental Health, and numerous studies conducted by leading figures within our medical and public health organizations—our own members—point overwhelmingly to a *causal connection between media violence and aggressive behavior in some children*. The conclusion of the public health community, based on over 30 years of research, is that *viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children*.⁴²

This causal connection between media violence and aggressive behavior is a result not only of the interactive nature of video games, but also of the psychological effects subliminally conveyed through the games.

b. Video Games Psychologically Condition Children

Several factors peculiar to the video game industry lend credence not only to the notion that interactive video games are more detrimental than other forms of media, but also to the idea that a causal relationship between such games and children's behavioral tendencies exists.⁴³ Lieutenant Colonel Dave Grossman, a recognized expert on the psychology of killing, takes the

40. AM. ACAD. OF PEDIATRICS, JOINT STATEMENT ON THE IMPACT OF ENTERTAINMENT VIOLENCE ON CHILDREN, CONGRESSIONAL PUBLIC HEALTH SUMMIT 2 (July 26, 2000), at <http://www.aap.org/advocacy/releases/jstmtvec.htm>.

41. *Id.*

42. *Id.* (emphasis added).

43. See generally LT. COL. DAVE GROSSMAN, ON KILLING (1996).

causal relationship argument one step further and asserts that not only do video games teach children to enjoy violent acts, but they also teach children how to perform these acts.⁴⁴

Grossman analyzes this "virus of violence" through a determination of motivations for increased levels of violence.⁴⁵ Regarding increasingly violent behavior in children, he concludes that "there is only one new variable . . . [which is] violence in the media being presented as entertainment for children."⁴⁶ The effect of this new variable is a form of psychological conditioning upon children.⁴⁷

Every species of animal on this planet, according to Grossman, "has a hardwired resistance against killing their own kind."⁴⁸ Furthermore, "[e]very healthy human being . . . has this innate violence immune system."⁴⁹ Humans do not naturally tend toward violence. This aversion is well-documented and recognized by military strategists who have studied the innate tendency to avoid killing. This phenomenon was not completely recognized until Army Brigadier General S.L.A. Marshall studied for the first time exactly what soldiers do during battle. Surprisingly, the answer was not "killing." In a study of perhaps the most violent activity possible—war—very few soldiers admitted a readiness to shoot one another. In fact, only 15% to 20% of individual riflemen studied were able to fire at an exposed enemy. The difficulty that trained soldiers faced when firing at another person demonstrates an innate aversion toward killing. Recognizing this "fatal" weakness in battle, the United States Army quickly solved the problem and brought what has been termed the "firing rate" from the initial level of 15% to 55% during the Korean War and over 90% during the Vietnam War.⁵⁰

How did the U.S. Army solve this "problem"? The solution was to apply psychological conditioning through a process that successfully trains soldiers to overcome their innate resistance to killing. The Army, however, is not the only organization to employ this psychological process. This military technique is strikingly similar to the video game industry's consistent marketing of violence to children. Through a process of brutalization, classical conditioning, operant conditioning, and role modeling,

44. *Marketing Violence*, 1999, *supra* note 22 (testimony of Col. Dave Grossman, Author, ON KILLING, at 1).

45. *Id.* at 3.

46. *Id.* at 4.

47. *Id.*

48. *Id.* at 4–5.

49. *Id.* at 5.

50. *Id.*

the Army teaches soldiers killing⁵¹ and video games likewise teach children violence. “[K]ids are learning to kill and learning to like it”⁵²

The removal of the natural aversion to killing is not the only relevant and concerning issue. Grossman notes that “[a] hundred things can convince someone to WANT to take a gun and go kill, but only one thing makes them ABLE to kill: practice, practice, practice.”⁵³ Therefore, even if children are psychologically able to kill, they must have the physical ability to do so. Not only must one have the desire, but the skill is also necessary. The development of this ability is facilitated by video games and demonstrated by Grossman’s analysis of a recent school shooting in Paducah, Kentucky.

In Paducah, a fourteen-year-old boy stole a gun from his neighbor, fired several practice rounds, and then took it to school. He assaulted a high school prayer group as it was dispersing and in the midst of a crowd of screaming people, hit eight children with exactly eight shots. Five of these shots were in the victims’ heads and three were in their upper torsos.⁵⁴

According to Grossman, FBI data indicates that trained law enforcement officers only average 20% accuracy in real world situations. This fourteen-year-old boy was 100% accurate—a dubious accomplishment not found in military or law enforcement history. Where did he learn to shoot a gun? His father provided Michael with a point-and-shoot video game at home. Such an accomplishment, according to Grossman, is a real-world example of the causal relationship between violent video games and violent behavior. At the most, video games cause children to disregard their natural aversion to killing while at the very least they train children in the art of killing. Either alternative is unacceptable.⁵⁵

There is something uniquely sinister in the idea that children’s games are adversely affecting the young minds of their players. Childhood is somehow now violated by the once innocent notion of a “game.” Not only have children been perverted by this practice, but so too has the medium of games by which this message is transmitted. Violent messages are being smuggled into children’s minds. Electronic entertainment such as movies, television shows, music, and video games are forms of art,

51. *Id.* at 6.

52. *Id.* at 9.

53. *Id.* at 1.

54. *Id.* at 5.

55. *Id.*

and “[p]eople of religious faith have been involved in music, art, literature and architecture for thousands of years because [they] know from experience that these things shape the soul.”⁵⁶ Children spending hours perched in front of video games do not walk away completely unaffected. “[W]hat we hear and what we see . . . *forms us inside*.”⁵⁷ Popular culture invades the heart in a manner unexpected. Socrates observed that “musical training is a more potent instrument than any other, because rhythm and harmony find their way into the inward places of the soul, on which they mightily fasten, imparting grace.”⁵⁸ So, too, does the modern art form of a video game, with its compilation of graphic designs, musical scores, complex storylines, and well-developed characters, work its way to the “inward places” of the children’s souls to distort their natural values and teach them to love and do violence.

C. *The Electronic Game Industry Does Not Adequately Address the Issue*

1. FTC Report

Recognizing the possible dangers of such repetitive childhood exposure to violence, former President Clinton and Congress requested that the Federal Trade Commission (FTC) and the Department of Justice study whether various electronic media industries market and advertise violence to children.⁵⁹ This request produced a report from the FTC intended to answer two questions: “Do the industries promote products they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience? And are these advertisements intended to attract children and teenagers?”⁶⁰ Upon analyzing three primary segments of the entertainment industry—motion pictures, music recording and video games—the FTC concluded that “the answers are plainly ‘yes.’”⁶¹

56. *Marketing Violence*, 1999, *supra* note 22 (testimony of Most Reverend Charles J. Chaput, O.F.M., Cap., Archbishop of Denver, at 1).

57. *Id.* (emphasis added).

58. *Marketing Violence*, 1999, *supra* note 22 (statement by William J. Bennett, Co-director, Empower America, former Secretary of Education, at 4) (quoting PLATO, THE REPUBLIC, BOOK III: THE ARTS IN EDUCATION, *available at* <http://www.utm.edu/research/iep/text/plato/rep/rep-3.htm> (last visited Oct. 15, 2001)).

59. *See generally* *FTC Violence Report*, *supra* note 4.

60. *Id.* at i (executive summary).

61. *Id.*

The FTC observed that “nearly all the game companies contacted have marketed violent M-rated games to children”⁶² With access to the various companies’ marketing documents, the FTC reports that of the 118 violent M-rated games analyzed during the study, eighty-three games (70%) were targeted to children under seventeen. Sixty of these games had one or more marketing plans that expressly included children under seventeen in the target audience. Furthermore, marketing documents obtained for twenty-three other M-rated video games indicate marketing plans implicitly aimed at children—including intentions to advertise in television shows or magazines with audiences predominately made up of children.⁶³

By specifically targeting children, video game companies blatantly disregard industry standards. One particularly egregious example recognized the existence of parental efforts to limit children’s exposure to violence, yet nevertheless continued to target children. The plan stated the following (pay particular attention to the final two italicized lines):

Although Nintendo 64 purchasers space a large range in terms of age (6–34 years old), we recommend approaching the middle segment of this group because: [The game] has an M rating, which 1) may discourage parents from buying the game, and 2) hinder clearance of a commercial airing in shows primarily for children under 12. However, the younger the audience, the more likely they are to be influenced by TV advertising Therefore, the *recommended media target audience is: Males 12-17—Primary Males 18-34—Secondary.*⁶⁴

While recognizing the duty not to advertise M-rated video games to children, this marketing nevertheless expressly targeted children. This discovery by the FTC is not an isolated occurrence.

Another marketing plan indicated a likewise duplicitous approach and stated that the target market is “Males 17–34 due to M rating (*the true target is males 12–34*).”⁶⁵ The contradictory nature of this sentence which declares one target audience in the first clause, and then immediately declares another “true” target in the second clause parallels the likewise contradictory nature of the video game industry itself—it is an industry intended for children’s amusement and dependent upon children for profits, yet

62. *Id.* at 45.

63. *Id.*

64. *Id.* at 46 (emphasis added).

65. *Id.* at iv (emphasis added).

simultaneously harms its very base of support with violent messages.

This marketing of violence, explicitly demonstrated by the marketing plans of various companies, is also evident in the application of such plans. Video game companies take advantage of children's natural inclination to want what they ought not have. Every child wants to grow older and become more "adult." Teenagers desire M-rated games more appropriate for adults; children want T-rated games more appropriate for teenagers. Recognizing this natural childhood tendency, companies have developed a marketing term that betrays their true intentions. Children between the ages of eight and twelve are nicknamed "tweens."⁶⁶ And video game companies persistently pursue this target audience. Therefore, places which should be safe haven for children—toy store aisles, cartoon television shows, G-rated movies, child-oriented magazines, and even schools—are often the innocent forums in which inappropriate subject matter is present.⁶⁷

2. Video Game Industry Response

While the responsibility to protect children from inappropriate entertainment falls squarely on the shoulders of the video game industry, the industry argues that the obligation is not solely theirs. As the FTC indicates, "the game rating system appears to be helpful to those parents who actually use it."⁶⁸ Thus, parents can take a greater role in monitoring the activities of their children. However, this is not to say that the opportunity for greater parental involvement mitigates any aspect of the duty on behalf of the video game industry to not provide violent entertainment to children. Such an assertion is dangerous.

While it is true that parents must take responsibility for their children's behaviors, "[i]t has suddenly become common to blame parents for what has happened to some of America's children."⁶⁹ The responsibility does not fall solely on the shoulders of parents, however. Fighting against a 6.1 billion dollar industry,⁷⁰ "parents have an uphill battle every day to teach their own

66. *Marketing Violence*, 1999, *supra* note 22 (statement by William J. Bennett, Co-director, Empower America, former Secretary of Education, at 6).

67. See *FTC Violence Report*, *supra* note 4, at 47–53.

68. *Id.* at 41 (emphasis added).

69. *Marketing Violence*, 1999, *supra* note 22 (testimony of Daphne White, Executive Director, The Lion and Lamb Project, at 1) (alteration in original).

70. *Marketing Violence*, 2000, *supra* note 2 (testimony of Douglas Lowenstein, President, Interactive Digital Software Ass'n, at 1).

values to their children.”⁷¹ Furthermore, the tendency to place all responsibility for protecting children on the shoulders of the parents and relieving the video game industry from accountability is unnecessarily individualistic. Such blame assumes that so long as parents take responsibility for their children, violence will be avoided. However, the tragedy of childhood violence brings such a proposition into serious question. If, somehow, ninety-nine percent of parents did take complete responsibility and prevented their children from committing violent acts, this would do nothing to inhibit the remaining one percent of parents’ children who are the perpetrators of violent acts. No matter how much a parent protects his child from the electronic assaults of the media, physical assaults from other children remain a constant threat. This is a threat that the industry must counteract. It must therefore take an active role and protect those children whose parents do not.⁷²

II. SOLUTIONS TO THE PROBLEM OF MARKETING OF VIDEO GAMES TO CHILDREN

This section focuses on possible solutions to the problem of video game violence. It begins by detailing past and current efforts the video game industry has made towards the goal of self-regulation. Next, it examines possible federal, state, and local government actions. These government actions may serve to either aid the industry in its goal of self-regulation, or to allow the state to take direct control over the industry.

A. Industry Self-Regulation

The industry has made various efforts to mitigate the harmful effects of violent video games. However, in its recent report on the video game industry, the FTC seriously questioned the effectiveness of current industry self-regulatory efforts.⁷³ While the video game industry must take a more active role in preventing the marketing of violence to children, self-regulation is a difficult concept to employ effectively. The temptation to “cheat” is strong. In order to maintain an effective system of self-regulation, the FTC concludes the following must exist: (1) “comprehensive ratings or labels that provide parents with meaningful information about the nature, intensity, and appropriateness for

71. *Marketing Violence*, 1999, *supra* note 22 (testimony of Daphne White, Executive Director, The Lion and Lamb Project, at 1).

72. *Id.*

73. *FTC Violence Report*, *supra* note 4.

children of depictions of violence . . . ;"⁷⁴ (2) "clear and conspicuous disclosures of the rating or label—with related age and content information—on packaging and in advertising . . . ;"⁷⁵ and (3) "sales and marketing policies that are consistent with the ratings or labels; industry-wide participation; and mechanisms to ensure compliance."⁷⁶

In order to accomplish this goal of effective industry self-regulation, the FTC offers three specific actions the electronic entertainment industry in general (and the video game industry specifically) must take. First, the "[i]ndustry should establish or expand codes that *prohibit target marketing and impose sanctions* for violations."⁷⁷ While video game industry regulations are currently more effective than both the motion picture industry and the music recording industry, widespread violations of the video game industry's code of conduct indicate weaknesses. Second, the "[i]ndustry should improve self-regulatory system compliance at the retail level."⁷⁸ This retail level is where children (or their unaware parents) obtain access to violent games. Policies limiting or barring children from purchasing such games would effectively curtail this problem. Finally, the "[i]ndustry should *increase parental awareness* of the ratings and labels."⁷⁹ Often, especially in electronic mediums where many parents feel their children are more knowledgeable than they, parents simply defer to their children's judgment without realizing the potential for harm.

Implementation of these three FTC proposals would likely reduce the amount of violence marketed to children. However, the FTC does not advocate leaving the maintenance of such proposals completely to the industry. Rather, it asserts that continuous public oversight is necessary to ensure that compliance is actively monitored and sanctions are consistently applied.⁸⁰

Such oversight is necessary to preserve a system of industry self-regulation. However, the superiority of such a system is not established. Many arguments favor self-regulatory systems over government control. Some of the most common are the following: a video game manufacturer is more likely to have a greater familiarity with its product than would a governmental agency; self-regulation is more flexible than governmental regulation; self-regulation provides greater incentive for compliance as indi-

74. *Id.* at 53.

75. *Id.*

76. *Id.*

77. *Id.* at 54 (emphasis added).

78. *Id.* at 55.

79. *Id.* (emphasis added).

80. *Id.* at 56.

vidual companies are more likely to view such self-imposed rules as reasonable; self-regulation places the economic burden of such a regime on the industry rather than the government; and self-regulation avoids difficult constitutional issues (such as the First Amendment guarantee of freedom of speech).⁸¹

However, while self-regulation provides many advantages, there are nevertheless many drawbacks as well. The difficulty of enforcement is a principle weakness in such a system. Many concerns center around this central theme. Such a system may induce companies to "subvert regulatory goals to [meet their] own business goals."⁸² An "[i]ndustry may be unwilling to commit the resources needed for vigorous self-enforcement." Or, "self-regulatory frameworks may unravel because of cheaters."⁸³ A self-regulatory system has significant weaknesses, therefore, which may prevent it from accomplishing its stated goal or even maintaining some semblance of authority. The current failure of the video game industry to adhere to its own standards regarding marketing, advertising, and selling inappropriate video games to children demonstrates this inherent limitation of self-regulation. The most effective solution may be some other form of regulation.

B. Possible Legislative Action

1. Federal Action

a. Legislative Action to Alleviate Anti-Trust Concerns

One often stated deficiency of self-regulation is that it "can facilitate anticompetitive conduct."⁸⁴ When several separate companies agree on a uniform manner of conducting business, "this type of agreement inherently raises antitrust issues" and such agreements "have sometimes been challenged by the government under antitrust laws."⁸⁵ Citing this concern, Senator Orrin Hatch, Chairman of the Senate Committee on the Judiciary and a member of the Senate Committee on Commerce, Science, and Transportation, has repeatedly called for "a very limited amendment to . . . antitrust laws [which] would clarify that the respective industries can cooperate to develop and

81. See Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 715-16 (1999).

82. *Id.* at 717.

83. *Id.* at 717-18.

84. *Id.* at 718.

85. *Id.* at 719.

enforce responsible guidelines without any fear of liability under the current antitrust laws.”⁸⁶

FTC Chairman Robert Pitofsky recognized these concerns as well. Self-regulation’s many benefits can be lessened by the threat of antitrust legislation. However, Pitofsky does not view this threat as a complete bar to a regulatory system. One method of avoiding this potential threat is to create *voluntary* standards. Pitofsky indicated that “there is virtually no antitrust risk when parties to a self-regulatory regime simply announce general guidelines that ought to apply, or announce such standards and refer departures to enforcement agencies like the FTC, but do not agree to adhere, directly or indirectly, to these standards.”⁸⁷ The obvious weakness with voluntary requirements, however, is that they would be even less authoritative than the current system. Therefore, while a voluntary requirement exception might solve the antitrust problem, it would create an additional enforcement problem.

There is, however, a way to impose mandatory standards on an industry-wide basis through a system of self-regulation. Pitofsky recognizes that the United States Supreme Court determined the following:

[W]here standards are “based on the merits of objective expert judgments and [are adopted] through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition,” participants in the standard-setting process may not be liable for any possible exclusionary effect of the standard.⁸⁸

Therefore, Pitofsky asserts that antitrust concerns may not be an issue if the mandatory guidelines are objective, clear, and unbiased.⁸⁹ However, if the regulation includes “[a]ttempts to impede competition on the merits, and without strong justification,” it will likely not be justified.⁹⁰ Concerns over possible antitrust litigation are nevertheless valid and may function to curb development of a more effective system of self-regulation.

86. *Marketing Violence*, 2000, *supra* note 2 (testimony of Sen. Orrin G. Hatch, Senate Comm. on Commerce, Science, and Transp., 106th Cong., at 3).

87. Robert Pitofsky, Self Regulation and Antitrust 6 (Feb. 18, 1998) (transcript, available at <http://www.ftc.gov/speeches/pitofsky/self4.htm>) (last visited Oct. 15, 2001).

88. *Id.* at 8 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500–01 (1988)).

89. *Id.*

90. *Id.* at 9.

b. Legislative Action to Encourage a Uniform Rating System

Antitrust problems are not the only bar to a system of self-regulation. Although such a system may eventually be an effective method of monitoring the marketing of video game violence to children, there is much evidence that the current rating system framework on which this system takes place is confusing. As many parents vainly attempt to simply keep up with the technological innovations, the *content* of such technology remains a mystery. Furthermore, the proliferation of separate rating systems for the various mediums of electronic entertainment (motion picture, television, music, video game) confuses rather than educates. Recognizing this problem, Senator Hatch asserts that the various entertainment industries ought to be "encouraged to develop and implement a universal rating system."⁹¹ Furthermore, he acknowledges the need for congressional action to encourage such a system and to discourage any "obstacles that would prevent these industries from designing and implementing such a system."⁹²

The legislation to which Senator Hatch's statements refer is the Media Violence Labeling Act of 2000. Introduced on May 2, 2000 by Senator John McCain, this bill "provide[s] for the development, use, and enforcement of an easily recognizable system in plain English for labeling violent content in audio and visual media products and services, and for other purposes."⁹³ The bill is currently being considered by the Senate Committee on Commerce, Science, and Transportation.⁹⁴

This proposed act alleviates the antitrust problem inherent in requiring various companies to develop uniform guidelines. Therefore, it states that "[t]he antitrust laws shall not apply to any joint discussion, consideration, review, action, or agreement between or among manufacturers and producers . . . for purposes of developing a joint proposal for a system for labeling"⁹⁵ Furthermore, the intent of the act is twofold: to ensure the public is adequately informed of the content of the material to be purchased so that its appropriateness for minors may be judged; and to assure the public that a uniform system of label-

91. *Marketing Violence, 2000*, *supra* note 2 (testimony of Sen. Orrin G. Hatch, Senate Comm. on Commerce, Science, and Transp., 106th Cong., at 14).

92. *Id.*

93. Media Violence Labeling Act of 2000, S. 2497, 106th Cong. (2000).

94. *Id.*

95. *Id.* at § (3)(A).

ing the content of various electronic media is accurate and consistent so that its appropriateness for minors may be judged.⁹⁶

Additionally, this proposed act calls for the implementation of a uniform single labeling system to ensure parents are adequately informed about the explicit content of the music, movies, and video games their children listen to, watch, and play. Not only would such a system protect the children, but it would serve as another safeguard to prevent various companies from surreptitiously marketing their violent products. Under the Media Violence Labeling Act, parents will be able to function as an additional barrier between the entertainment and the children.

2. State Action

Although Congressional action would likely be effective and prudent, such legislation does not preclude individual states from contributing to the effort. There are currently few examples of state action against video game manufacturers. Furthermore, those states that do take action often do not address the entire problem. One example of a state legislature's concern is a Washington legislative finding which recognizes the state's duty to protect public health and safety from various forms of electronic media, specifically including video games "to the extent that" this media is "conductive to increased violent behaviors, especially in children"⁹⁷ Furthermore this statute asserts that, "the state has a duty to protect the public health and safety."⁹⁸

While this Washington state legislative action is a step in the right direction, it falls short of adequately addressing the issue. The legislature does not explicitly recognize the existence of a correlative or causal relationship between real world and media violence. What it does do is to say that "to the extent" that such a relationship exists, the state has a duty of care. This remaining factual question will prove to be the basis of extensive future liti-

96. *FTC Violence Report*, *supra* note 4, app. G. at 4.

97. WASH. REV. CODE § 19.188.010 (2000). The legislature stated the following:

The legislature finds that, to the extent that electronic media, including television, motion pictures, video games, and entertainment uses of virtual reality are conducive to increased violent behaviors, especially in children, the state has a duty to protect the public health and safety.

Many parents, educators, and others are concerned about protecting children and youth from the negative influences of the media, and want more information about media content and more control over media contact with their children.

98. *Id.*

gation. This legislative finding in Washington illustrates the tentativeness that many legislatures are demonstrating across the nation.

Several other states have attempted to pass legislation intended to limit children's access to video games. State legislatures are reluctant to take action. Of the ten bills introduced across the nation in 1999, none passed.⁹⁹ Alabama attempted to prohibit the selling, leasing or renting of video games to minors and to require the state attorney general to provide ratings of video games.¹⁰⁰ Arkansas introduced a bill that would have prohibited any public exhibition of a violent video game. Additionally, this legislation would have established public service programs to educate teachers and parents.¹⁰¹ Florida attempted to create a "Children's Protection From Violence Act" to bar any public exhibition of violent video games to children.¹⁰² Minnesota introduced two bills intended to develop a ratings labeling system for video game arcades, to restrict the access of children to video games, and to establish various public awareness programs.¹⁰³ Pennsylvania attempted to establish a rating system to prohibit children from accessing certain video games. Also Pennsylvania attempted to create a new criminal offense—"selling or furnishing violent interactive video games to minors."¹⁰⁴ Finally, Washington considered another bill that would direct the state department of health to prepare a report regarding the most effective ways parents can guard against the detrimental effects of violent video games.¹⁰⁵ None of these bills were enacted.

Successful regulation of violent video games is difficult even on the state level. As the debate over the relationship between media violence and children's behavioral violence continues, so too will the debate over the appropriate method of state legislative action.

99. Kelly Anders, *Marketing and Policy Considerations for Violent Video Games*, 18 J. PUB. POL'Y & MKT 1, at 6 (1999).

100. *Id.* (House Bill 726).

101. *Id.* at 6-7 (Senate Bill 925).

102. *Id.* at 7 (House Bill 225).

103. *Id.* (House Bills 2394 and 2395; Senate Bills 2171 and 2172).

104. *Id.* at 7-8. (House Bills 1509 and 1672; Senate Bill 960).

105. *Id.* (House Bill 1315).

3. Action at the City Government Level

a. *Indianapolis, Indiana Passes an Ordinance*

While the federal government and various state governments have debated and studied possible legislative responses to video game violence, the City of Indianapolis, Indiana has passed an ordinance that uniquely targets the violence found in arcade-style video games. Recognizing the dangers of "a culture steeped in violence,"¹⁰⁶ Bart Peterson, Mayor of Indianapolis, Indiana, proposed a city ordinance¹⁰⁷ designed to restrict children under eighteen from playing explicit video games.¹⁰⁸ The ordinance, which passed unanimously, contains a twofold requirement: (1) businesses must label all arcade video games that contain graphic violent or sexually explicit content *and* (2) businesses must erect partitions around such video games so that children are not able to view them.¹⁰⁹ Asserting that this law is the "first of its kind in the nation," Mayor Peterson believes that such an ordinance "enables parents—not video game marketers—to decide whether their children should play a particular game."¹¹⁰

b. *Video Game Industry Responds to Ordinance*

The video game industry is not in favor of this ordinance. American Amusement Machine Association (AAMA), a trade industry group representing over 120 manufacturers, suppliers, and distributors of coin-operated video game machines,¹¹¹ responded to the ordinance by filing suit in *American Amusement Machine Ass'n v. Kendrick*.¹¹² The AAMA, in federal district court, moved for a preliminary injunction, asserting that violent video games are forms of expression protected by the First Amendment to the United States Constitution¹¹³ and a local government may not restrict minors' access to video games based upon

106. *Marketing Violence, 2000*, *supra* note 2 (testimony of Bart Peterson, Mayor, Indianapolis, Ind., at 1).

107. See Appendix for text of statute.

108. INDIANAPOLIS, IND., REV. CODE OF THE CONSOLIDATED CITY OF INDIANAPOLIS AND MARION COUNTY § 831-1 (2000).

109. *Marketing Violence, 2000*, *supra* note 2 (testimony of Bart Peterson, Mayor, Indianapolis, Ind., at 2).

110. *Id.* at 3.

111. *FTC Violence Report*, *supra* note 4, app. D at 14.

112. 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev'd and remanded*, 244 F.3d 572 (7th Cir. 2001).

113. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

their graphic violence contents. The district court denied the preliminary injunction.¹¹⁴

In the district court ruling, the court stated that while video games may be entitled to some amount of First Amendment protection, such an entitlement does not bar regulation.¹¹⁵ Furthermore, the court decided that the plaintiff is unlikely to prove that an ordinance may not restrict children's access to such video games for three reasons: Indianapolis has demonstrated legitimate concerns regarding the effects of violent video games on children;¹¹⁶ there is no principled constitutional difference between sexually explicit material (which may be regulated) and graphic violence (at issue) as each issue pertains to children;¹¹⁷ the ordinance is narrowly drafted to meet the potential harm and does not infringe upon other persons' First Amendment rights.¹¹⁸

Therefore, the court determined that the plaintiffs failed to demonstrate that they are "reasonably likely to succeed on their claims that the Indianapolis Ordinance violates the First Amendment or is unconstitutionally vague."¹¹⁹ Postulating that "[i]t would be an odd conception of the First Amendment and 'variable obscenity' that would allow a state to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses . . . but [to] give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission,"¹²⁰ the court observed that the law affords a greater degree of protection and a lesser degree of First Amendment freedom granted to children.

c. United States Court of Appeals Issues Ruling

The Seventh Circuit, however, overruled denial of the injunction of the ordinance.¹²¹ In its opinion regarding this procedural issue, the court hinted how it might rule on the ultimate question of whether the ordinance itself is constitutional. In fact, the court indicated that it was "tempt[ed] . . . to treat this as if it

114. See *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1291 (7th Cir. 1996) (providing appropriate analysis for preliminary injunction).

115. 115 F. Supp. 2d at 952.

116. *Id.* at 963.

117. *Id.* at 973.

118. *Id.* at 978.

119. *Id.* at 981.

120. *Id.*

121. *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 122 S.Ct. 462 (2001).

were an appeal from a final judgment in favor of the defendants."¹²² This opinion provides an indication of how the Seventh Circuit might rule on the constitutionality of the ordinance.

The court begins by asserting that "[v]iolence and obscenity are distinct categories of objectionable depiction."¹²³ While there may be some similarities between the policy behind obscenity law and the policy behind the Indianapolis ordinance, "in general the concerns are different."¹²⁴ Obscenity "generally is not believed to inflict temporal harm."¹²⁵ The basis for regulation of obscenity is the offensiveness of the material. However, such is not the case for violence. The motivation behind this ordinance against video game violence is not based on an offensive nature of the material, but rather upon the "belief that violent video games cause temporal harm by engendering aggressive attitudes and behavior, which might lead to violence."¹²⁶ According to the court, these are two distinct concerns that require different treatment.

The analysis continues to explore the differences between obscene and violent speech. The court notes that, "the fact that obscenity is excluded from the protection of the principle that government may not regulate the content of expressive activity (as distinct from the time, place, or manner of the activity) neither compels nor forecloses a like exclusion of violent imagery."¹²⁷ If obscene speech does not enjoy significant First Amendment protection, this does not necessarily mean violent speech is similarly situated.

Therefore, any speech restriction the Indianapolis ordinance contains must overcome the substantial First Amendment protections guaranteed to violent speech. Indianapolis must therefore present a "compelling and not merely plausible" basis for the ordinance.¹²⁸ Despite the interests stated by Indianapolis, the court determines that such interests are not sufficiently compelling.

The court made this decision after analyzing several factors weighing against the ordinance. First, children have important

122. *Id.* at 574.

123. *Id.*

124. *Id.*

125. *Id.* at 575.

126. *Id.* The court recognizes, but does not discuss, the opposing view held by Catherine A. MacKinnon. This view holds that the basis for obscenity law should not be solely grounded in its offensive nature, but also in its likelihood to incite men to commit attacks against women.

127. *Id.* at 574.

128. *Id.* at 576.

First Amendment rights and society has important interests in allowing children to maintain those rights. Comparing this situation to Nazi Germany's denial of free speech to children, the court notes that in order for children to mature into informed adults, "they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise [of voting]." ¹²⁹ Therefore, the state cannot find support for a compelling interest based solely upon the fact that the persons shielded from the speech are children.

Second, the court notes that censorship of violence cannot be a compelling interest because such expression has always been part of society. "Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low." ¹³⁰ If the state were able to censor this speech from children, "it would leave them unequipped to cope with the world as we know it." ¹³¹ Violence has always been present early in children's lives with the fairy tales of Grimm, Andersen, and Perrault and any modern regulation against such expression is inconsistent with society's tradition.

Finally, the court recognizes the possibility that violent video games are a unique form of speech, but ultimately concludes that this speech contains an "'ideology,' just as books and movies do." ¹³² Many video games that would have violated the ordinance have a plot and, arguably, tell a story. Some of the video games even contain a "feminist" content, despite being marketed primarily to boys. Therefore, these games are tools for conveying the speaker's ideology.

Furthermore, responding to concerns over the uniqueness and interactive nature of video games, the court asserts that "this point is superficial, in fact erroneous," as all forms of literature are interactive. ¹³³ Readers often identify with the characters in books just as a video game player might identify with his character in the game. The court continues to note that there is no proof that "video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere." ¹³⁴ Furthermore, various studies that indicate the existence of some connection between violent video games and violent behavior "are not evi-

129. *Id.* at 577.

130. *Id.*

131. *Id.*

132. *Id.* at 578.

133. *Id.* at 577.

134. *Id.* at 578-79.

dence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments.”¹³⁵

d. *Critical Analysis of Kendrick Opinion*

*American Amusement Machines v. Kendrick*¹³⁶ showcases many of the dilemmas surrounding legal responses to violent video games. The court declines to accept psychological studies indicating the correctional and causal effects of such violence and it refuses to allow the government to label any regulation of this speech as a compelling interest. The denial of a causal or even a correlative relationship between violent video games and violent behavior explains the policy reasons underlying the *Kendrick* decision—the court simply does not view *Carmageddon*, *Point Break*, or *Die by the Sword* any differently than *Hans and Grettel* or *Goldilocks*. This reasoning is mistaken.

There are several problems evident in the *Kendrick* opinion. First, the court does not adequately rationalize its disparate treatment of obscene and violent speech. Although the obscenity exception to the First Amendment protection of speech has its roots in speech that is sexual in nature, this does not necessarily prevent an expanded application. Violent speech raises many of the same concerns as obscene speech—the two are closely related. The origins of the basic obscenity exception began with *Miller v. California*¹³⁷ when the Supreme Court considered whether sexual material sent through the mail could be restricted by the state. Here, the Court determined that in order for the state to regulate obscenity, the “conduct must be specifically defined by the applicable state law, as written or authoritatively construed.”¹³⁸ Furthermore, such legislation “must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”¹³⁹ This rule defines the scope of the obscenity exception to the First Amendment.

In order to treat violent speech similarly to obscene speech, the court should look at the *reason* for the obscenity exception to the First Amendment. The *Kendrick* opinion superficially ana-

135. *Id.* at 579. The court cites Craig A. Anderson and Karen E. Dill who were both previously cited in this note. See *supra* note 29.

136. 244 F.3d 572 (7th Cir. 2001).

137. 413 U.S. 15 (1973).

138. *Id.* at 24.

139. *Id.*

lyzes this issue, but the rationale behind the obscenity exception is not as simple as the court indicates. According to the court, "offensiveness is the offense" for which an exception exists to combat.¹⁴⁰ However, offensiveness is perhaps only an initial motivation. The rationale for obscenity laws goes beyond the simply offensive nature of the material. The Supreme Court, in *Paris Adult Theatre v. Slaton*¹⁴¹ indicated other possible policy rationales behind laws aimed at restricting obscenity. It determined that "[a]lthough there is no conclusive proof of a connection between antisocial behavior and obscene material," a legislature "could quite reasonably determine that such a connection does or might exist."¹⁴² Furthermore, the Court stated that, "a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'"¹⁴³ *Kendrick* directly contradicts the United States Supreme Court's stated rationale for the obscenity exception. The policy behind this exception is not simply limited to the offensive nature of obscene speech. Another valid objective is that anti-obscenity laws might be legitimately aimed at the possibility of limiting subsequent violent behavior. A state has the power to determine that this is a legitimate governmental interest. The Washington State legislative finding is an example.¹⁴⁴ There are no underlying policy differences between the amounts of protection afforded to the two types of speech.

If the courts, however, do not wish to allow violent speech to become part of a general "obscenity" category, there is an alternative method by which the Indianapolis ordinance could still be determined constitutional. Upon determining that video game speech is a protected form of First Amendment expression, the court in *Kendrick* applies a modified version of "strict scrutiny." Strict scrutiny is the method of analysis the court must use when it examines a state action which limits a form of fully protected expression. While such scrutiny necessitates a consideration of whether there is both a compelling state interest and whether the law is narrowly tailored to meet that interest, the court in *Kendrick* decided that the former did not exist and consequently did not even consider the validity of the latter.

This determination is mistaken. Several factors indicate that the Indianapolis ordinance should pass a strict scrutiny examina-

140. 244 F.3d at 575.

141. 413 U.S. 49 (1973).

142. *Id.* at 60-61.

143. *Id.* at 61 (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957)) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

144. WASH. REV. CODE § 19.188.010 (2000). See *supra* note 97.

tion. First, the Supreme Court has determined that the state does have a compelling interest to regulate the effects of obscene speech on behavior.¹⁴⁵ Therefore, it would be only one additional intellectual step to infer that the state ought to be able to regulate non-obscene violent speech that has a similarly detrimental effect on behavior.

Second, the court in *Kendrick* was wary of the "danger of allowing government to control the access of children to information and opinion."¹⁴⁶ This rationale, however, is severely short-sighted. Even speech that qualifies as "obscene" under the Court's current analysis does not include any work that is of "serious literary, artistic, political, or scientific value."¹⁴⁷ If violent speech as a whole were to be included in this category, it would nevertheless remain protected if it was of any value. Therefore, the court's stated concern that regulation of video games might cause children to be "raised in an intellectual bubble"¹⁴⁸ is unfounded.

The court's third stated reason to deny a compelling state interest in regulation of violent video games considers the court's "tradition" argument: violence has always been and always will be part of society; therefore, the state cannot maintain a compelling interest to regulate against it. This assertion is flawed on two grounds. First, the mere presence of a tradition is not a sufficient enough reason alone to deny the existence of a compelling interest against violence. Status as a "tradition" does not automatically equate to legitimacy. Second, an examination of tradition indicates it is not necessarily as the court asserts.

The regrettable fact that at times society has demonstrated extremely violent tendencies does not provide a basis to the assertion that a state cannot attempt to diminish the violence. Furthermore, the violent expression the court highlights—*The Odyssey*, *The Divine Comedy*, *War and Peace*, *Dracula*, *Dirty Harry*, and Edgar Allen Poe—is of a drastically different nature than the video games the ordinance seeks to affect. A comparison between these diverse mediums of entertainment demonstrates more differences than similarities. Despite the court's characterization of literature and film as interactive mediums, no book or movie is as interactive as a video game. Briefly recognizing to this point, the court quips that "[m]aybe video games are different," but then quickly (two lines later) dismisses this assertion as

145. See generally 413 U.S. 15 (1973).

146. 244 F.3d at 577.

147. 413 U.S. at 24.

148. 244 F.3d at 577.

"superficial" and "erroneous."¹⁴⁹ While it is the court's prerogative to make this decision, it is nevertheless a suspicious process when the opinion devotes only two lines to an issue the Federal Trade Commission felt worthy of 346 pages.¹⁵⁰

Whether the state has a compelling interest in regulating video game violence is perhaps an open question. However, none of the reasons stated in *Kendrick* is a valid argument against such an interest. Assuming such an interest does, in fact, exist, the next step in the strict scrutiny process is a determination of whether the ordinance is narrowly tailored to meet this compelling interest. On this point, the appellate court did not issue a ruling. The district court's decision that the ordinance is narrowly drafted to meet the potential harm and does not infringe upon other persons' First Amendment rights is the last authoritative statement on this issue.¹⁵¹

CONCLUSION

The debate over the effects of video game violence on children and the proper manner of regulation of this form of expression will likely take place at a local level in the near future. Whereas the debate over the scope and function of the First Amendment as it limits these legislative options will hinge on the opinions of the Supreme Court. Indianapolis is the first city to enact such an ordinance, other states are following suit.¹⁵² Politicians and government officials are voicing their opinion on a

149. *Id.* at 6.

150. See *FTC Violence Report*, *supra* note 4. See also discussion *supra* regarding the Federal Trade Commission report on the marketing of violent entertainment to children. The body of this report contains 116 pages. Additionally, there are 11 appendices, totaling 230 pages.

¹ 151. 115 F. Supp. 2d at 578.

152. In early 2001, a bill, similar to the Indianapolis ordinance, was introduced into the Oregon Senate. It states the following:

Be it Enacted by the People of the State of Oregon:

1. As used in this section and section 2 of this 2001 Act:

(1) 'Transportation Services' includes, but is not limited to, representations of cars, buses, trains and aircraft.

(2) 'Video Game Arcade' means any public facility where arcade or video games are provided for entertainment, including, but not limited to, fairs, movie theaters, restaurants, shopping malls, hotels, schools and carnivals.

(3) 'Violent Video Game' means an arcade or video game that:

(A) Is a point and shoot video simulator that involves one or more individuals firing simulated guns at a video screen that depicts human silhouettes, lifelike representations of human beings, transportation services, commercial structures or residential structures.

national level; however, the battleground for video game violence will be on the local level.

Until the Supreme Court provides a definitive ruling on the ability of a state to regulate video games, state legislators must take action against the effects of violent video games. Although there are other available avenues of relief—such as industry self-regulation or increased parental awareness—each of these alternatives is an imperfect solution. Individual states, therefore, have a duty to pass laws compelling manufacturers to curb the sale of violence to children. The media industry, driven by a lust for profit and a disregard for decency, must be corralled by laws in order to protect the interests of children.

(B) Contains realistic depictions of physical injury to a human silhouette or lifelike representation of a human being.

(C) Contains realistic depictions of blood, gore, mutilation or dismemberment of human beings.

2. An owner of a video game arcade may not permit a person under the age of 18 years to operate a violent video game.

3. Violation of section 2 of this 2001 act is a class A misdemeanor.

2001 OR S.B. 59

APPENDIX¹⁵³

CITY-COUNTY GENERAL ORDINANCE NO. 72, 2000

PROPOSAL No. 239, 2000

PROPOSAL FOR A GENERAL ORDINANCE to regulate the conduct of persons who own or operate places of business which contain amusement machines and/or video games, in such a manner that restricts and prohibits access to amusement machines and/or video games which are deemed harmful to minors, and to prohibit such amusement machines and/or video games on public property.

WHEREAS, Marion County and the City of Indianapolis have compelling interests in protecting the well-being of minors, in protecting parents' authority to shield their minor children from influences that the parents find inappropriate or offensive, and in reducing juvenile crime; and

WHEREAS, our courts have recognized that minors are affected by and may be protected from patently offensive sex-related material; and

WHEREAS, recent academic literature corroborates the finding of earlier studies that violent video games produce psychological effects in minor children and that prolonged exposure to violent video games increases the likelihood of aggression in minor children (*see* Craig A. Anderson & Karen E. Dill, Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life, 78 J. of Personality and Soc. Psychol. 772 (2000) (summarizing past research and noting that the "positive association between violent video games and aggressive personality is consistent with a developmental model in which extensive exposure to violent video games . . . contributes to the creation of an aggressive personality" and concluding that "the present data indicate that concern about the potentially deleterious consequences of playing violent video games is not misplaced")); and

WHEREAS, growing evidence of the harmful effects of violent video games has led Congress to investigate the impact of these games on minor children (*see* Hearing on "The Impact of Interactive Violence on Children," United States Senate Comm. on Commerce, Science & Transportation, 106th Cong. (March 21, 2000) ("Hearing"); *see also* Majority Staff of Senate Comm. on the Judiciary, 106th Cong., Children, Violence and the Media: A

153. The text of the Indianapolis ordinance is available at 2000 WL 1528687.

Report for Parents and Policy Makers (Sept. 14, 1999)), and has led President Clinton to ask the Federal Trade Commission to investigate the marketing of violent video games to minor children (*see* Letter from William J. Clinton, President, to Janet Reno, Attorney General of the United States, and Robert Pitofsky, Chairman, Federal Trade Commission (June 1, 1999)); and WHEREAS, producers and retailers of video games agree that "the best control is parental control" (*see* Statement of the Video Software Dealers Association in conjunction with Hearing, above); and

WHEREAS, testimony before Congress indicates that fourth through eighth graders report spending an average of from half an hour to two-and-a-half hours playing video games in arcades each week (*see* Hearing, above, Testimony of Jeanne B. Funk, Ph.D., clinical child psychologist); and

WHEREAS, parents are less able in public places than in the home to control the level of violence and sexual content to which their minor children are exposed; now, therefore,

BE IT ORDAINED BY THE CITY-COUNTY COUNCIL OF THE CITY OF INDIANAPOLIS AND OF MARION COUNTY, INDIANA:

SECTION 1. Section 831-1 of the "Revised Code of the Consolidated City and County," regarding definitions, hereby is amended by the deletion of the language which is stricken-through, and by the addition of the language which is under-scored, to read as follows:

Sec. 831-1. Definitions.

As used in this chapter, the following terms shall have the meanings ascribed to them in this section.

Accompanied by for purposes of subsections 831-5(h), 831-5(i), 831-5(j), 831-6(f), 831-6(g), and 831-6(h), means that the parent, guardian, or custodian of the minor either:

(1) Is within five feet of the minor at all times while the minor is operating the amusement machine; or,

(2) Has appeared in person with the minor at the amusement location or place of business containing amusement machines on that day and has given his or her permission for the exhibitor or registrant or an employee of the exhibitor or registrant to place on the back of the minor's hand or wrist a clearly visible, non-transferable designation such as a stamp or wrist band signifying that the parent, guardian, or custodian has consented to allow the minor to operate amusement machines that are harmful to minors.

Amusement location means any public room or area in the city which contains five (5) or more amusement machines; however, amusement locations shall not include premises which are licensed (as defined in IC 7.1-1-3-20) for the sale of alcoholic beverages and where entry is limited to persons who are eighteen (18) years of age or older.

Amusement machine means a currency-operated machine or device, including a machine or device operated by tokens, cards, points, or other currency-like means, offered to the public as a game or amusement, the object of which is to achieve a high or low score based on the skill of the player, including, but not limited to, video games, pool or billiard tables and pinball machines. Such a machine or device designed and used exclusively for the vending of merchandise of a tangible nature shall not be deemed an amusement machine.

Exhibitor means a person who owns or operates a place of business in the city where four (4) or fewer amusement machines are located; however, the provisions of this chapter shall not apply to an exhibitor's place of business which is licensed (as defined in IC 7.1-1-3-20) for the sale of alcoholic beverages and where entry is limited to persons who are eighteen (18) years of age or older.

Graphic violence means an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration.

Harmful to minors means an amusement machine that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years, and:

- (1) Contains graphic violence; or,
- (2) Contains strong sexual content.

Incidental view means a minor's view for fewer than thirty (30) seconds of the playing surface or screen of an amusement machine.

Knowingly means having general knowledge of, or reason to know, or a belief or ground for belief that warrants further inspection or inquiry of both:

- (1) The character and content of the visual representations of the amusement machine; and,
- (2) The age of the person operating or seeking to operate the amusement machine, provided, however, that an honest mistake shall constitute an

excuse from liability hereunder if the defendant made a reasonable bona fide attempt (including but not limited to asking for legal photo identification) to ascertain the true age of the minor.

Minor means a person under the age of eighteen (18) years. This definition does not apply to a minor who has obtained a court decree pursuant to IC 31-34-20-6.

Not harmful means an amusement machine that is not harmful to minors.

Nudity means an amusement machine's visual depiction or representation of human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or of a female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

Parent, guardian or custodian means and includes a person who has legal custody of the minor and is the minor's:

- (1) Natural parent;
- (2) Stepparent, adoptive parent or custodian as those terms are defined by IC 35-42-4-7;
- (3) Guardian as defined by IC 29-3-1-6; or
- (4) Other adult who has been appointed by a court to care for a minor;

but, for purposes of subsections 831-5(e), 831-5(f) and 831-5(g) and subsections 831-6(c), 831-6(d) and 831-6(e), shall not include an exhibitor, or owner or operator of an amusement location with respect to a minor who is present in the exhibitor's, owner's or operator's place of business.

Pool or billiard table means a table used for any form of the games commonly referred to as pool or billiards and includes any table of any size, the top of which is surrounded by an elastic ledge or cushion and which is designed or used to play any game which consists of impelling balls by means of sticks or cues.

Public property means all buildings and areas within Marion County that are owned, operated, or leased as lessee, by the City of Indianapolis, Marion County, a city or county department, a city-county agency, or a township, including but not limited to the Department of Parks and Recreation, but does not include property for which the City of Indianapolis, Marion County is the lessor.

Registrant in this chapter means a person registered with the controller under this chapter as the owner or operator of an amusement location in the city.

Strong sexual content means the visual depiction or representation by an amusement machine of nudity or explicit human sexual behavior by any human or human-like being in one or more of the following forms: masturbation; deviate sexual conduct; sexual intercourse; or, fondling of genitals.

SECTION 2. Section 831-5 of the "Revised Code of the Consolidated City and County," regarding operation of amusement locations, hereby is amended by the deletion of the language which is stricken-through, and by the addition of the language which is underscored, to read as follows:

Sec. 831-5. Operation of amusement locations; violations.

(a) All amusement locations shall be kept in a clean, healthful and sanitary condition at all times and the controller shall have the power to determine if such room or rooms are kept in a clean, healthful and sanitary condition and for such purpose, when desired, have the assistance of any law enforcement agency or the Health and Hospital Corporation of Marion County. If the controller shall determine, by a law enforcement agency or the division of buildings of the Health and Hospital Corporation of Marion County, that an unsanitary condition exists within an amusement location or on property immediately adjacent to the amusement location, which property is under the control of the amusement location owners or their lessee or lessor, the controller shall have the power to suspend the amusement location registration until such unsanitary condition is rectified.

(b) No registrant under this chapter shall permit persons to congregate in a disturbing manner within an amusement location or on parking areas or other property immediately adjacent to or normally used for purposes of parking for an amusement location which property is under the control of the amusement location owner or owners or their lessee or lessor. A violation of this provision shall be sufficient grounds for the revocation of the amusement location registrations by the controller.

(c) No registrant under this chapter, or registrant's employee, shall violate any state statute or city ordinance, or allow any other person to commit such violation, within an amusement location or on parking areas or other property immediately adjacent to or normally used for purposes of parking for an amusement location which property is under the control of the amusement location owner or owners or their lessee or lessor. A violation of this provision shall be sufficient grounds for the revocation of the amusement location registrations by the controller.

(d) All employees of a registrant under this chapter shall be eighteen (18) years of age or older.

(e) It shall be unlawful for a person to allow a *minor* under sixteen (16) years of age who is subject to the compulsory school attendance laws of the state and who is not accompanied by the *minor's* parent, guardian or custodian to be present in an amusement location between the hours of 7:00 a.m. and 3:30 p.m. on a day when such *minor's* school is in session.

(f) It shall be unlawful for a person to allow a *minor* to be present in an amusement location after the hours established by state statute or city ordinance for juvenile curfew unless such *minor* is accompanied by the *minor's* parent, guardian or custodian, or an adult specified by the *minor's* parent, guardian or custodian.

(g) It shall be unlawful for a person to operate an amusement location unless a sign is conspicuously posted inside the location which provides that no *minor* under sixteen (16) years of age may be present in an amusement location between the hours of 7:00 a.m. and 3:30 p.m. on a day when the *minor's* school is in session unless accompanied by the *minor's* parent, guardian or custodian, and that no *minor* may be present in an amusement location in violation of the curfew established by state statute or city ordinance.

(h) *It shall be unlawful for a registrant, a registrant's agent, or an employee of an amusement location knowingly to allow a minor who is not accompanied by the minor's parent, guardian or custodian to operate in the amusement location an amusement machine that is harmful to minors.*

(i) *It shall be unlawful for a registrant to operate an amusement location unless each amusement machine that is harmful to minors in the amusement location displays a conspicuous sign indicating that the machine may not be operated by a minor under eighteen (18) years of age unless the minor is accompanied by his or her parent, guardian, or custodian. If amusement machines that are harmful to minors are displayed together in an area separate from amusement machines that are not harmful, a single conspicuous sign in that area or at the entrance to that area may be used to mark the group of machines for purposes of this subsection.*

(j) *It shall be unlawful for a registrant to make available to patrons any amusement machine that is harmful to minors within ten (10) feet of an amusement machine that is not harmful. It shall further be unlawful for a registrant not to separate amusement machines that are harmful to minors from other machines by some form of partition, divider, drape, barrier, panel, screen, or wall that completely obstructs the view of persons outside the partitioned area of the playing surface or display screen of the*

machines that are harmful to minors. It shall be unlawful for a registrant, registrant's agent, or employee of an amusement location to allow a minor who is not accompanied by his or her parent, guardian, or custodian into the partitioned area.

(k) It shall be unlawful for a registrant to make available to patrons any amusement machine that is harmful to minors if the registrant has been cited for three (3) or more violations of Section 831-5(h), (i), (j), or (k) of this Code in any twelve-month period in the preceding three (3) years.

(l) One or more violations of Section 831-5(h), (i), (j), or (k) of this Code may serve as grounds for suspension or revocation of the amusement location's registration, pursuant to the authority vested in the controller and procedures prescribed in Chapter 801 of this Code. Three (3) or more violations of Section 831-5(h), (i), (j), or (k) of this Code, however, shall require revocation of the amusement location's registration, subject to the notice and hearing requirements of Chapter 801. For the purposes of this subsection, no more than one violation shall be deemed to have occurred on any one day.

SECTION 3. Section 831-6 of the "Revised Code of the Consolidated City and County," regarding operation of amusement machines by exhibitors, hereby is amended by the deletion of the language which is stricken-through, and by the addition of the language which is underscored, to read as follows:

Sec. 831-6. Operation of amusement machines by exhibitors; violations.

(a) No exhibitor or exhibitor's employee shall permit persons to congregate in a disturbing manner on the premises of the exhibitor's place of business.

(b) No exhibitor or exhibitor's employee shall violate any state statute or city ordinance, or allow any other person to commit such violation on the premises of the exhibitor's place of business.

(c) It shall be unlawful for an exhibitor or the exhibitor's employee to allow a *minor* under sixteen (16) years of age who is subject to the compulsory school attendance laws of the state and who is not accompanied by the *minor's* parent, guardian or custodian to operate an amusement machine in the exhibitor's place of business between the hours of 7:00 a.m. and 3:30 p.m. on a day when such *minor's* school is in session.

(d) It shall be unlawful for an exhibitor or the exhibitor's employee to allow a *minor* to operate an amusement machine in the exhibitor's place of business after the hours established by state statute or city ordinance for juvenile curfew unless such *minor* is accompanied by the *minor's* parent, guardian or custo-

dian, or an adult specified by the *minor's* parent, guardian or custodian.

(e) It shall be unlawful for an exhibitor to have amusement machines in his or her place of business unless a sign is conspicuously posted near any amusement machines which provides that no *minor* under sixteen (16) years of age may operate an amusement machine between the hours of 7:00 a.m. and 3:30 p.m. on a day when the *minor's* school is in session unless accompanied by the *minor's* parent, guardian or custodian, and that no *minor* who is in violation of the curfew established by state statute or city ordinance may operate an amusement machine.

(f) *It shall be unlawful for an exhibitor, an exhibitor's agent, or an exhibitor's employee knowingly to allow a minor who is not accompanied by the minor's parent, guardian or custodian to operate in the exhibitor's place of business an amusement machine that is harmful to minors.*

(g) *It shall be unlawful for an exhibitor to make available to patrons in his or her place of business amusement machines that are harmful to minors unless each amusement machine that is harmful to minors displays a conspicuous sign indicating that the machine may not be operated by a minor under eighteen (18) years of age unless the minor is accompanied by his or her parent, guardian, or custodian. If amusement machines that are harmful to minors are displayed together in an area separate from amusement machines that are not harmful, a single conspicuous sign in that area or at the entrance to that area may be used to mark the group of machines for purposes of this subsection.*

(h) *It shall be unlawful for an exhibitor to make available to patrons any amusement machine that is harmful to minors within ten feet of an amusement machine that is not harmful. It shall further be unlawful for an exhibitor, exhibitor's agent, or exhibitor's employee to allow a minor who is not accompanied by his or her parent, guardian, or custodian to view, with the exception of an incidental view, the playing surface or screen of a game that is harmful to minors.*

(i) *It shall be unlawful for an exhibitor to make available to patrons any amusement machine that is harmful to minors if the exhibitor has been cited for three (3) or more violations of Section 831-6(f), (g), (h), or (i) of the Code in any twelve-month period in the preceding three (3) years.*

SECTION 4. Chapter 831 of the "Revised Code of the Consolidated City and County," regarding amusement machine locations, hereby is amended by the addition of a NEW Section 831-7, regarding harmful games on public property, to read as follows:

Sec. 831-7. Harmful games on public property.

It shall be unlawful for a [sic] registrant or exhibitor to make available on public property any amusement machine that is harmful to minors.

SECTION 5. Section 831-7 of the "Revised Code of the Consolidated [sic] City and County," regarding inspections and reports of violations, upon the passage of this ordinance shall be RENUMBERED as "Section 831-8."

SECTION 6. Section 831-8 of the "Revised Code of the consolidated City and County," regarding enforcement and penalties, hereby is amended by the deletion of the language which is stricken-through, and by the addition of the language which is underscored, to read as follows:

Sec. 831-89. Enforcement and penalties.

A person who violates any provision of this chapter shall be punishable as provided in section 103-3 of the Code; provided, however, the fine imposed for such violation shall not be less than two hundred dollars (\$200.00), *that for the purpose of assessing fines no more than one violation shall be deemed to have occurred on any one day*, and *that* each day that an offense continues shall constitute a separate violation. The fines assessed for violations of this chapter shall be deposited with the law enforcement agency that caused the violation to be filed, if any.

SECTION 7. The expressed or implied repeal or amendment by this ordinance of any other ordinance or part of any other ordinance does not affect any rights or liabilities accrued, penalties incurred, or proceedings begun prior to the effective date of this ordinance. Those rights, liabilities, and proceedings are continued, and penalties shall be imposed and enforced under the repealed or amended ordinance as if this ordinance had not been adopted.

SECTION 8. Should any provision (section, paragraph, sentence, clause, or any other portion) of this ordinance be declared by a court of competent jurisdiction to be invalid for any reason, the remaining provision or provisions shall not be affected, if such remaining provisions can, without the invalid provision or provisions, be given the effect intended by the Council. To this end, the provisions of the ordinance are severable.

SECTION 9. This ordinance shall be in effect September 1, 2000.

