

Memorandum in Opposition to Massachusetts Senate Bill 168

Media Coalition believes that Senate Bill 168 is unnecessary as a study of video games and the proposed commission is susceptible to being politicized. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Massachusetts: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games. They have asked me to explain their concerns.

S.B. 168 would create a commission to study aspects of video games including: the social benefits of video games; the use of video games by the military and for educational purposes; whether they are addictive; any connection between video games and actual violence; and an evaluation of the law with respect to First Amendment protection afforded to video games. The legislation also calls on the commission to consider policy proposals to regulate video games and to estimate the cost of those proposals.

We believe that it is unnecessary to create a commission to conduct an assessment of certain video game content which we explain further below. However, even if an investigation was necessary, it must be neutral, comprehensive and transparent. The text of S.B. 168 is extremely prejudicial and suggests the commission's conclusions are predetermined. The bill includes many pejorative terms including "rampage killings," "killing games," "addiction to video games" and "training consumers' brains." This is terminology used by those who seek to censor the media. The bill's focus suggests the result that video games are associated with violence. The bill limits the focus of the inquiry to games with violent images. The commission is asked to investigate only video games as a cause of violence. The commission is told to assess the "social benefits" of video games. The bill requires the commission to analyze proposals to regulate certain video games. We are very concerned that the commission report will be used to perpetuate the claim that violent themes or images in the media cause people to commit actual violence.

A commission is unnecessary even if it is created to be an independent inquiry into an association between video games and violence. The premise for the commission is the belief that the media causes actual violence. In June, Media Coalition recently released a 13-page report, [*Only a Game: Why Censoring New Media Won't Stop Gun Violence*](#), to respond to this notion. It shows that the commonly held belief that media causes people to kill is based on flawed research and, those who accept the belief ignore ample evidence to the contrary. Among the report's key findings that are pertinent to the consideration of S.B. 168 include:

- Censorship of violent content is barred by the First Amendment for all types of media, but industry self-regulation works.

- Research into the effects of video games on aggression is contested and inconclusive. Much of it suffers from methodological deficiencies and provides insufficient data to prove a causal relationship.
- Real world evidence such as crime statistics does not support the theory that media causes actual violence.

I. First Amendment Bars Government Regulation of Video Games Based on Content

The Commission will be of limited benefit since any proposal to regulate video games based on their content likely violates the First Amendment, regardless of what the commission concludes with respect to points (i)-(iv). The state has very limited authority to regulate video games (or other media) based on their containing violent descriptions or depictions. In *Brown v. Entertainment Merchants Ass'n and Entertainment Software Ass'n*, the Supreme Court struck down a California law that banned minors from buying or renting video games with certain violent imagery. 564 U.S. ___, 131 S. Ct. 2729 (2011). The Court ruled that video games are entitled to constitutional protection the same as books, newspapers, movies or music. Justice Scalia, writing for the majority, specifically acknowledged that, “[L]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.” *Id.* at 2733. He also dismissed the state's argument that video games should be treated differently than books or movies because they are interactive.

The Court went on to find that there is no historic exception to the First Amendment for content with violent depictions or descriptions even as to minors. Justice Antonin Scalia noted that “California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none.” *Id.* at 2736. The opinion then mentions a long list of books read by children that are filled with violent and gory themes.

Since the law imposed a restriction on speech based on its content, the Court then applied strict scrutiny analysis and found that the law violated the First Amendment. It ruled that the California did not establish a compelling state interest to justify barring minors from buying or renting these video games because the social science studies relied on by the state “do not prove that violent video games *cause* minors to *act* aggressively” *Id.* at 2739. The opinion went on to find that even if California could establish a compelling state interest, the law would fail strict scrutiny since it only applied to video games but not to other media and it was not the least restrictive means as there are parental control tools provided by the video game industry. In *Brown v. EMA*, California paid the plaintiffs about \$1,000,000 in attorneys' fees and expenses.

Even if the media effects research demonstrated a certain connection between consumption of media with violent content and future antisocial behavior, the Supreme Court is

reluctant to accept such a justification for restricting speech. In *Ashcroft v. Free Speech Coalition*, Justice Kennedy writing for the majority said, “The Government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’” 535 U.S. 234, 253 (2002) (citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curium)). The limited exception to this rule is for speech that explicitly advocates actual violence or illegal activity but only if it is intended to incite imminent unlawful activity and is likely to do so. See, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Nor can the state give legal effect to voluntary rating systems. Courts have repeatedly struck down such laws. Voluntary ratings exist to help parents determine what is appropriate for *their* children, but a government body violates the First Amendment if it enforces these rating systems whether directly or indirectly. Most recently in *Entertainment Software Ass’n v. Hatch* 443 F. Supp. 2d 1065 (D. Minn. 2006) *aff’d sub nom. Entertainment Software Ass’n v. Swanson*, 519 F. 3d 768 (8th Cir. 2008) the district court struck down a Minnesota law that barred anyone less than 17 years old from buying or renting a video game carrying a “Mature” or “Adults Only” rating under the video game industry’s voluntary rating system. Courts in many states have held it unconstitutional for the government to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. In *Engdahl v. City of Kenosha*, 317 F. Supp 1133 (E.D. Wis. 1970), the court threw out a Kenosha ordinance that used Motion Picture Association of America (MPAA) ratings to bar minors from accessing certain films. In *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing as determined by a voluntary rating system created by the motion picture industry. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20 percent on all admissions to view movies rated either “X” or unrated was an unconstitutional delegation of legislative power to a private trade association. See also *Swope v. Lubbers*, 560 F. Supp. 1328 (W.D. Mich. 1983) (use of motion picture rating system was improper as a basis for determination of constitutional protection); *Drive-In Theater v. Huskey*, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on “R” or “X” rating).

II. Research Does Not Show that Media Causes Actual Violent Behavior

There have been numerous independent reviews of media effects studies by government bodies and the courts and all have found that the science does not show that media with violent content causes actual violence let alone “rampage killings.” These reviews found that the research is inconclusive, flawed and heavily disputed. [For a more detailed discussion of the problems with this research see part 1, section 2 of [Only a Game](#).]

Government reviews of the social science

Government bodies in Sweden and Australia did recent reviews of the literature as part of the process to consider restricting access to certain video games. In 2012, the Swedish Media Council released a [report](#) on its comprehensive survey of all available literature published in

international research journals studies of video games with violent content and aggressive behavior during the period from 2000 to 2011. The Council reviewed 161 articles which contained 106 empirical studies and 55 articles consisting of “meta studies,” research overviews, scientific debate articles, method critiques or comments on the articles of others. The Council concluded that “there was no evidence for VCG (violent computer games) causing aggressive behaviour [sic].” The report went on to state that much of the research suffers “from serious methodological deficiencies.” A similar 2010 [review](#) by the Australian Attorney General’s Department found that the studies on video games effects on aggression are divided. The report summary notes that “[O]verall, as illustrated in this review, research into the effects of VVGs [violent video games] on aggression is contested and inconclusive.” It adds, “Significant harmful effects from VVGs have not been persuasively proven or disproven.” The conclusions of the Swedish and Australian reviews are not outliers. The Swedish Media Council report notes that reviews that reached the same conclusions were published by the Swedish National Institute of Public Health, Norwegian Social Research (NOVA) and the British Departments of Education and Culture, Media and Sport among others.

Several domestic reviews were conducted following the shootings at Columbine. The Surgeon General’s lengthy 2001 report *Youth Violence: A Report of the Surgeon General* extensively explored the causes of youth violence. The authors concluded that, despite a “diverse body” of research, it was not possible to come to a conclusion about the effect of media consumption on minors in either the short or long-term. In September 2000, the Federal Trade Commission released its report “Marketing Violent Entertainment to Children: A Review of the Self-Regulation and Industry Practices in the Motion Picture, Music Recording and Electronic Game Industries” which included an appendix that reviewed media effects research. The report stated that “[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even the most important, factor in contributing to youth aggression, antisocial attitudes, and violence.” The National Research Council’s comprehensive 1993 report “Understanding and Preventing Violence” offered a matrix of the risk factors for violent behavior. Media with violent content is not cited as a factor.

Judicial reviews of the literature and testimony

Courts have been more dismissive of the social science literature and testimony from leading researchers. In addition to the law in California, there have been successful challenges to eight other state and local laws barring minors from buying or renting video games with violent images. In most of these cases lawyers for the respective government bodies submitted social science research, public reports and statements from medical and psychology trade associations to justify the laws. In each case where the court examined social science research it ultimately concluded that the social science failed to establish a causal link between content with violent images and real world anti-social behavior.

Dr. Craig Anderson is the leading academic whose work is often cited to support the theory that there is a causal link between violent content and violent behavior. His research was

closely scrutinized in *Entertainment Software Ass'n v. Blagojevich* in which U.S. District Court Judge Kennelly heard testimony from Dr. Anderson regarding his research on media causing aggression in minors. The court also heard testimony from Dr. Jeffrey Goldstein and Dr. Dmitri Williams that challenged Dr. Anderson's conclusions based on their research and their review of his work. Judge Kennelly concluded, "we agree with Dr. Goldstein and Dr. Williams that neither Dr. Anderson's testimony nor his research establish a solid causal link between violent video games exposure and aggressive thinking and behavior." 404 F. Supp. 2d at 1066 *aff'd* 469 F.3d 641 (7th Cir. 2006). In *Video Software Dealers Ass'n v. Schwarzenegger*, the Ninth Circuit cited other cases where Dr. Anderson's research was offered as evidence to support restrictions on video games, "We note that other courts have either rejected Dr. Anderson's research or found it insufficient to establish a causal link between violence in video games and psychological harm. See *AAMA v. Kendrick*, 244 F.3d at 578; *Granholm*, 426 F. Supp. 2d at 653; *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1069 & n.1 (D. Minn. 2006); *Blagojevich*, 404 F. Supp. 2d at 1063." 556 F. 3d 950 at 963.

In *Brown*, Justice Scalia summarized the social science, "These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively (which would at least be a beginning)...[T]hey show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game." *Brown*, 131 S. Ct. at 2379.

III. Real World Evidence: No Correlation Between Media Violence and Actual Violence

Crime statistics disprove the claim that there is a correlation between violent or sexual content and the commission of crimes. Despite the explosive growth of media in the last 20 years, crime has dropped overall and youth crime in particular has declined steadily in much of the country. "Violent victimization" has declined by 72% since 1993 according to the National Crime Victimization Survey published by the Department of Justice in October 2012. James Alan Fox, a noted criminologist at Northeastern University, published an [article](#) in the Boston Globe that shows there is also no correlation between media proliferation and incident of mass shootings. [Statistics](#) also show that there is no correlation between crime rates and media consumption when comparing different countries based on their media consumption. Michael Males, a Senior Researcher for the Center on Juvenile and Criminal Justice and Sociology Lecturer at University of California at Santa Cruz, demonstrated the lack of a correlation between consumption of media with violent content and actual crime statistics in his comment submitted to the FCC in response to Notice of Inquiry MB Docket No. 04-261. <http://apps.fcc.gov/ecfs/document/view.action?id=6516794018>. Males comment addressed on violence on television and the correlation to crime rates but the lack of correlation has remained the same even as video games have become more common.

HISTORICAL PERSPECTIVE

Finally, it is important to give context to this discussion. There is nothing new about the claim that media causes violence or antisocial behavior and that science proves it. This claim is as old as the media. There is a long history of moral panic resulting blaming the media for antisocial behavior by minors and adults. At one time or another, books, movies, opera, jazz, blues, rock and roll, heavy metal and rap music, television, radio, comic books, Internet, and social networking sites have all come under attack for “causing” such behavior in minors (and adults). The fear of the dangers of these media was no less palpable than the present concerns about video games. Anthony Comstock called dime novels “devil traps for the young.” Duke Ellington’s “The Mooche” was blamed for inciting rape. The Federal Communications Commission and the FBI investigated the lyrics of “Louie, Louie” for suspicion of corrupting kids. See, Peter Blecha, *Taboo Tunes: A History of Banned Bands and Taboo Songs* (2004).

Dubious science has often been used to justify calls for censoring media. The campaign against comic books was a typical example of moral panic supported by “respected” research. In the 1950s, the battle against comic books was championed by Dr. Frederic Wertham, a renowned psychiatrist, crusader for children and the author of “Seduction of the Innocent” about the evils of comic books. Wertham conducted extensive research that he said proved that comic books turned kids into criminals and juvenile delinquents. His research gave credibility to his claims that comic books were a menace. When the Senate held hearings to investigate how comic books were corrupting minors, Wertham told the Judiciary Committee, “as long as the crime comic books industry exists in its present forms there are no secure homes.” The fear of comic books passed as the moral panic abated but the reputation of the industry suffered for many years. Years later a researcher discovered that Dr. Wertham manipulated his research to reach the results that fit his views.

If you would like to discuss further our position on this bill, please contact me at 212-587-4025 x3 or at horowitz@mediacoalition.org. Also, we can supply any documents cited in this memo if the hyperlinks are not available.

We ask you to please protect the First Amendment rights of all the people of Massachusetts and reject S.B. 168.

Respectfully submitted,



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Executive Director
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