

*Presentation notes for "Rated M for Moral Panic"*  
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INTRO

- A. Today I'm going to talk about legislative proposals to change the way video games are sold and rated. Most such proposals are of the sort that has been ruled unconstitutional, with several signed to law having already been overturned in court. Some, however, have yet to be tested in court.
- B. Ultimately, most such proposals reflect a moral panic surrounding video games, exploited for political interests. They betray a lack of understanding for how games work as an interactive medium. At the same time, the video game rating system itself is not perfect, either, so I will suggest some alternatives to legislation that may be worthy of consideration.

THE RATING PROCESS

- C. Before discussing the legislative proposals, it's important to understand the alternative in practice right now in the US: industry self-regulation. Much as the Motion Picture Association of America has a system to rate movies, the Entertainment Software Association has a system to rate games. This is the Entertainment Software Rating Board (or the ESRB).
- D. The ESRB was formed in 1994 in response to senate investigations into violent games. (This is pretty much the same way that the Film Code and the Comics Code came about years earlier.) There have been some changes since the system's inception, but the basic process of rating games remains mostly the same...
  - a. Publisher submits questionnaire, DVD with pertinent content, maybe a beta version of game to play
  - b. (This must include all hidden content, like what can be unlocked by beating the game or entering a code)
  - c. The footage is reviewed by 3+ trained raters otherwise unaffiliated with industry (which may include parents or professionally involved with children) ... the ESRB currently has 6 full-time raters on staff
  - d. Raters suggest overall rating (which goes on front and back of packaging) and some content descriptors (which go on back, and may not include ALL the content descriptors a game could have)

- e. Publisher may request resubmission or appeal if it disagrees; no one has ever appealed, but many have resubmitted
  - f. When game is ready for distribution, publisher sends final copy to check packaging.
  - g. At this step, raters also plays a sample of random & hand-picked games to verify that ratings were okay
- E. There's a range of ratings with age guidelines, but the ones of most interest to us are T for Teen (recommended for 13+), M for Mature (recommended for 17+), and AO for Adults Only (not recommended for anyone under 18).
- F. It's roughly the equivalent of PG-13, R, and NC-17 ratings, but with a major difference: Major retailers have a policy not to stock AO-rated or unrated games, and two major console manufacturers (Sony and Nintendo) say they will not grant licenses to AO-rated games.

#### PENALTIES & EFFECTIVENESS

- G. The ESRB also retains the right to enforce its own system with fees and penalties, as submitting games for rating involves entering a legal contract. The major example of a game that tried to circumvent the system is *Grand Theft Auto: San Andreas*, developed by Rockstar and published by Take2 Interactive.
- H. The game had a hidden sex simulator called "Hot Coffee" which was not reported during the ratings process. It wasn't accessible by playing and beating the game normally, but the entire mini-game *was* present on the game disc itself and easily unlocked if you knew how to search around the internet.
- I. The ESRB responded by slapping an AO rating on the game and ordering Take2 to provide a modified, M-rated version to retailers who wanted it replaced. The decision seemed like a slap on the wrist to many, but it effectively cost Take2 millions of dollars. An investigation by the FTC mandated no further fines for that infraction, but promised fines for subsequent attempts to circumvent the rating process.
- J. The effectiveness of the ESRB system is still a matter of debate. Some academic research has challenged the reliability and validity of how it identifies objectionable content.
- K. By the same token, in a report comparing the video game content rating system with the systems of the movie and music industries, the FTC called the ESRB system the "most comprehensive" and said it merited duplication.

## THE STUDY

- L. Despite the FTC's semi-regular reports to Congress along these lines, the last several years have seen a rise in legislation proposed to legally restrict minors' access to games, or to otherwise police game ratings and sale techniques.
- M. To get a sense of the nature of these proposals and whether any particular approach could predict which would be most successful in being signed to law, I conducted a discourse analysis of every bill I could find online at the state and federal level that was proposed between 1999 and 2006. This totaled over 80 bills, including bills proposed in 30 states and the District of Columbia.
- N. I did not find any trend in what characteristics could predict whether a bill would get signed to law, but there were of course trends in which laws were allowed to stand.
- O. Moreover, I found that the wording of several bills indicated a lack of understanding of how games work as a medium, as well as a widespread subscription to (or attempt to appeal to) a sense of moral panic surrounding games as a new technology and a pursuit for deviant boys.

## SALE & RENTAL

- P. For this paper, I broke down the bills I analyzed into what they proposed. First I'm going to talk about the most common type of bill, which were those proposing that certain games be restricted in sale or rental.
- Q. These bills were proposed by Congress, the District of Columbia, and 30 states (that is, every legislative body in the sample). The last few years have seen a dramatic rise in bills at the state level, with 10 proposed in 2003 and 22 proposed in 2005 across various states.
- R. Most of these bills died in or before reaching committee review. Only nine states signed such bills to law, with varying degrees of success. As of this writing, seven states (California, Illinois, Louisiana, Michigan, Minnesota, Oklahoma, and Washington) have seen laws struck down in court for violating of the First Amendment, some with vows to appeal.
- S. Most of these bills offered an explicit definition of the type of content to be restricted, generally some kind of violent material such as "dismemberment" among "realistic" human characters, sometimes alongside sexual material like you might find in existing obscenity law.

- T. Not all bills to restrict sale are based on broadly-defined violent content, though.
- a. A couple states specified sexual content rather than violent content, which (for reasons I'll discuss shortly) was constitutional and allowed to stand without appeal, but both states did also propose bills to restrict the sale of violent games.
  - b. Two other states proposed restriction of games that specifically depict violence against law-enforcement officials.
  - c. One state — New York — would have restricted sale of games depicting racist stereotypes or derogatory language toward any group of persons.
  - d. Thirteen states simply restricted games based on ESRB ratings (which may or may not be assigned based on the presence of violent content), making the cutoff not at AO-rated games but at M-rated games.
- U. Most of the bills here would involve misdemeanor charges including fines and possible jail time for retailers who break the rules. Some do specify felony charges, however, and two states proposed bills that would have restricted sale of certain games to anybody, not just minors. At least one proposal suggested fining the buyer for “possession” of restricted games rather than the retailer.

## LEGALITY

- V. Restricting sale and rental of games, which are considered expressive speech much like other media, runs into obvious First Amendment issues. Legislators have attempted to get around this with two approaches: arguing that violent games are obscene in the same sense as pornography, and arguing that their proposal to restrict access to games meets strict scrutiny. I'll elaborate on these briefly.
- W. To define a game as **obscene** and therefore harmful to minors, legislators would have to demonstrate (according to the legal definition of obscenity) that it appeals to children's morbid curiosity, is considered obscene by community standards, and lacks any serious literary, artistic, political, educational, or scientific value when considered as a whole.
- X. But: representations of violence have always been held to a different standard from sexual material, especially because violent games aren't necessarily seeking to incite (real) violent action in the way pornography seeks to incite a real sexual response. Also, the bills as written define violence based on individual scenes without considering games as “whole” works, which is part of the legal understanding of obscenity.

- Y. To meet **strict scrutiny**, lawmakers would have to demonstrate a compelling need to protect children, narrowly tailor a bill to an express purpose, and offer a solution that lacks less restrictive alternatives.
- Z. But: it's hard to demonstrate that the "compelling interest" here is protecting children
  - a. Some of the bills imply more concern for adults, such as in the bills specifying violence against law enforcement officials, or bills noting that parents don't know how to play video games well enough to screen them.
  - b. In addition, judges aren't as convinced by media violence research as legislators, so not all accept that the interest served here is protecting minors. Some bills even propose compiling a review of media violence research (which wouldn't commence until after the bill built on assumptions of media violence research has already passed).
  - c. And finally, it's hard to argue that the bill would serve the express purpose of keeping games out of minors' hands, as the majority of M-rated games purchased for minors are already by adults or in the presence of adults.

#### RATING & LABELING BILLS

- A. So, the sales bills are a constitutional dead end, but state legislators keep proposing them. Some states have also considered other approaches, however, and Congress seems to have moved on entirely. The handful of bills that *don't* propose restriction of sale, but still mean to interfere with the game industry's self-regulation, instead dictate some form of official regulation of game ratings and labeling. It remains to be seen how some would fare in court.
- B. Bills regulating rating practices seem an afterthought to bills restricting sale; every state that has proposed some sort of rating bill has done so only after proposing or as a part of a sale restriction bill. Six states have proposed bills to require retailers and the game industry to display, distribute, or otherwise promote ESRB ratings, and all have been signed as law and uncontested.
- C. Virginia is the only state testing the waters with a bill that would require a very large rating label – 3x3 inches on the front. This recalls the efforts of a couple states to put a big "18+" sticker on the front of M-rated games (which are suggested for 17+) as part of their sales restriction bills; while overturning the Illinois law, the judge said that forcing a label that big (and misleading) could be considered unconstitutional as well.

- D. Three states (Arkansas, New York, and Tennessee) have proposed instating their own rating systems to replace the ESRB's. All these bills have been abandoned.
- E. Another approach has been to propose changing the ESRB rating process itself. The federal Truth in Video Game Rating Act (proposed in 2006 and since reintroduced), mentioned at the beginning of this paper, requires raters to play every game "in its entirety" before rating it. Though publishers are technically already legally bound by contract to disclose hidden content, the act would also explicitly prohibit publishers from "withholding or hiding" content from raters. The bill also calls for a study that would assess the "effectiveness" of ESRB ratings and whether the system ought to be replaced.
- F. It's hard to say how this would do in court, but my guess is that it's still unconstitutionally broad. It's worth noting that this and other proposals so frequently seem to misunderstand or ignore certain characteristics of games that make content rating and regulation particularly challenging.

#### CONTENT CONSIDERATIONS

- G. In my paper, I describe three characteristics of video games that challenge the assumptions put forth in the legislation.
- H. First, content variability is the idea that games change from one play to the next. Some games can be played until they are *beaten*, but that doesn't mean you played them in their *entirety*. Lots of games have hidden bits that the ESRB couldn't find by just playing through them. That's why there are penalties for those who withhold content.
- I. Second, content modifiability is the idea that games made for PCs can be altered by enthusiasts who like to tinker with code. The "Hot Coffee" code was made by the original developers, and so it was fair game for rating; when some rogue player makes genitals for characters in *The Sims* that you can download and insert into the game, though, the ESRB doesn't hold that against the game publisher, but the game legislation proposed to date is unclear on how these things are to be handled.
- J. Third, content meaning (or content significance, as I've been saying in the revision I'm working on) is the idea that even violent content in games can be purposeful. Games like the critically successful *Shadow of the Colossus* and the recent blockbuster *BioShock* require the player to commit violence, but do so in a way that clearly calls the morality of the player's actions into question.
- K. And in retrospect, I should probably add content repetition as another characteristic of note, as some games don't *need* to be played for very long to get the main idea. Most people can't get past the 255<sup>th</sup> level of Pac-man to finish the

game, but you don't really need to play every level to rate Pac-man, I think.

## CONCLUSION

- L. To be frank, I offer these considerations not to help legislators craft better laws to restrict the sale of games, but to encourage us all — lawmakers, researchers, parents, and gamers — to consider what might be working and what might not be working about the ESRB's system, and what might make sense as an alternative to the legislation to date.
- M. It is a pretty robust system, but having only six trained raters going through thousands of games suggests that there may not be as much investigative playing going on as there could be. To demonstrate that they are indeed playing games sufficiently as part of the rating process, the ESRB could hire more raters, and publishers could furnish them with cheat codes and debug codes that may help allow them to select a representative sample of scenes to play from each game.
- N. At the same time, parents should take advantage of the parental controls built into the current generation of gaming systems, which can restrict games based on rating (not a perfect system, but a start). Also, many websites offer parent-friendly reviews by parents who play games themselves, such as [GamerDad.com](http://GamerDad.com).
- O. For parents who want to go through the content of games themselves with a fine-tooth comb, [GameFaq.com](http://GameFaq.com) offers complete written walk-throughs, written by amateurs, detailing the secrets of just about every game published now.
- P. These are just a few suggestions that could more directly address parental concerns about children's gaming habits than blanket legislation that could (in line with historical precedent) have a fairly restrictive effect on the development of games as an expressive medium.

Thanks for your time, and please feel free to offer any input during the Q&A or later by email.