

# Japanese Prefectural Scapegoats in the Constitutional Landscape: Protecting Children from Violent Video Games in the Name of “Public Welfare”

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## I. INTRODUCTION

In February 2005, a 17-year-old obsessed with violent video games fatally stabbed a teacher and injured two others at an elementary school in Osaka, Japan.<sup>1</sup> The tragedy propelled some prefectures or districts, namely Kanagawa, Saitama and Osaka, into a furor directed against the creators of *Grand Theft Auto III*. This video game was produced by the same video game maker as *Grand Theft Auto: San Andreas*, which created waves of controversy and inspired legislation at the state and federal levels in the United States.<sup>2</sup> While state and local video game censorship laws fall like dominos in American courts,<sup>3</sup> Japanese local governments have not yet faced the same legal opposition to the ban of the sale of this video game, which now carries the moniker of “harmful publication,” to minors.<sup>4</sup>

The stabbing spree at the Osaka elementary school was a sensational media tidbit that instigated this chain of legislative events, but there has been a growing concern among the public regarding the many cases of motiveless crimes committed by Japanese children.<sup>5</sup> In particular, statistics gathered by the Ministry of Education, Science and Technology indicated that there was an increase in violence among younger children in 2004.<sup>6</sup> Specifically, the number of cases in which grade school students attacked teachers in the 2004 academic year increased by 30 percent from 2003.<sup>7</sup> The trend continued into 2005, in which there were more than 2,000 reported cases of violence in primary schools, and assaults

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1. *Murder Spurs Video Game Restrictions*, DAILY YOMIURI (Japan), Mar. 9, 2005, at 3, available at 2005 WLNR 3614063; John Anderson, et al., *Debate Over Game Violence Boils Over in Japan*, GAMESPOT, June 20, 2005, <http://www.gamespot.com/news/6127821.html?&print1>.

2. Anderson, *supra* note 1; William Cross, *Hot Coffee and Freeze-Dried First Amendment Analysis: The Dubious Constitutionality of Using Private Ratings for Public Regulation of Video Games*, 4 FIRST AMEND. L. REV. 299, 311-13 (2006).

3. *Federal Ruling Blocks California's Ban on Violent Video Games*, L.A. TIMES, Dec. 23, 2005, at A1; *Judge: Ban on Violent Video Games is Illegal: Free Speech Cited; State May Appeal*, DETROIT FREE PRESS, Apr. 4, 2006, available at 2006 WLNR 17854713; *Judge Blocks Violent-Game Ban*, TULSA WORLD, Oct. 13, 2006, at A9, available at 2006 WLNR 17854713.

4. *Saitama Bans Sale of 'Grand Theft Auto' Game to Under-18s*, MAINICHI DAILY NEWS, Sept. 20, 2005, available at 2005 WLNR 14886678.

5. Unable to explain the surge in unprovoked crimes committed by teens, the media coined the term “kireru,” which means “to snap.” Paul Murphy, *Why Japan's Teens are at Breaking Point*, IRISH TIMES, Oct. 5, 2000, available at 2000 WLNR 3106022.

6. Editorial, *Steps Needed to Control Violent Schoolchildren*, DAILY YOMIURI (Japan), Sept. 28, 2005, at 4, available at 2005 WLNR 15299249.

7. *Id.*

against teachers again rose by at least 30 percent for the third consecutive year.<sup>8</sup>

Whether or not there is a link between violent youth behavior and violence in video games is a point that has been widely debated on both sides of the Pacific. The focus of the Japanese inquiry has been on the “isolating nature” of computers and television. This phenomenon was substantiated by a Hakuhodo Institute survey of children from the ages of 10 to 14 who considered video games their “friends.”<sup>9</sup> A research team led by Professor Akira Sakamoto at Ochanomizu University surveyed 592 fifth-grade students at schools located primarily in the Kanagawa and Niigata prefectures and found that there was a significant increase in aggression among children who played games that involved attacking enemies with “good-looking, intelligent or attractive heroes or heroines.”<sup>10</sup> However, the Computer Entertainment Supplier’s Association, consisting of about 170 Japanese computer game manufacturers and related businesses, contests the causal relationship between violence in video games and children’s behavior due to the dearth of research data.<sup>11</sup>

Iowa State University Professor Craig Anderson’s research regarding the relationship between video game exposure and aggression has been rejected by various American courts as failing to prove direct causation.<sup>12</sup> In *American Amusement Machine Association v. Kendrick*, Judge Posner found that Anderson’s studies did not demonstrate that violent video games caused one to commit a violent act or increased the average level of violence, nor did Anderson’s research prove that the interactive nature of video games, in contrast to passive entertainment, caused aggression.<sup>13</sup> Posner stated that all literature, including books, movies, television and

8. Editorial, *Rising Student Violence*, ASAHI SHIMBUN, Sept. 16, 2006, <http://blog.360.yahoo.com/blog-LT4JfBswaK2GzvYEJSp8f1Zh?p=130>. The increase of student violence has been attributed to the failure of parents to take responsibility for the moral upbringing of their children. The *laissez-faire* approach in monitoring children’s intake of violence found in video games, media and comics has been criticized. See Editorial, Steps needed to control violent schoolchildren, *supra* note 6.

9. Sharon Moshavi, *Wave of Violence by Teenagers Leads to Japan Hand-wringing*, BOSTON GLOBE, May 21, 2000, at A20, available at 2000 WLNR 2281229.

10. *Video Games with Heroes Make Kids Aggressive*, DAILY YOMIURI (Japan), Jan. 8, 2005, at 4, available at 2005 WLNR 334461.

11. *Id.*

12. *American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001); *Entm’t Software Ass’n v. Granholm*, 404 F. Supp. 2d 978, 982 (E.D. Mich. 2005); *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1059-63 (N.D. Ill. 2005).

13. 244 F.3d at 578-79.

other photographic media, is interactive.<sup>14</sup> Posner's view has been criticized as underestimating the difference between the reader's empathy with literary characters and actual participation in an action found in a video game.<sup>15</sup>

Four years later, in 2005, Illinois District Court Judge Kennelly expounded extensively upon the failure of Anderson's research to establish "a solid causal link between violent video game exposure and aggressive thinking and behavior."<sup>16</sup> In light of the lack of substantial studies proving the direct effect of violence in video games on children, the United States Senate passed the CAMRA Act in September 2006.<sup>17</sup> The bill authorizes funding for research on the impact of exposure to electronic media, including interactive video games, on children.<sup>18</sup>

American courts have not only recognized the tenuous link between violent video games and youth behavior, but have deemed video games a protected form of speech since Posner's opinion in *Kendrick*.<sup>19</sup> So how is Japan, rooted in the principles of freedom of speech and expression since the end of World War II, able to massage local ordinances that restrict such freedoms into their fundamental constitutional framework?

Part I of this comment will examine the history and application of freedom of expression in Japanese case law and the evolution of the "public welfare" concept and its circumscribing effect on individual freedoms. Part II will explore the recent local regulatory efforts and the historical underpinnings for these laws that place restrictions on materials to children. Part III will compare the Japanese legislative endeavors with their American counterparts and highlight the reasons why United States laws will continue to be struck down by courts. Part IV will analyze the response of the video game industry to the onslaught of legislation in Japan and the United States. Lastly, Part V will scrutinize the validity of addressing youth violence with a legislative ban of sales of video games to minors and introduce other key factors that should be considered in the de-escalation of the epidemic in Japan.

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14. *Id.* at 577.

15. Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT L. REV. 257, 264 (2004).

16. *Blagojevich*, 404 F. Supp. 2d at 1063.

17. S. 1902, 109th Cong., 152 CONG. REC. 113, S9564 (daily ed. Sept. 13, 2006) (statement of Sen. Stevens).

18. *Id.*

19. Gregory K. Laughlin, *Playing Games with the First Amendment: Are Video Games Speech and May Minors' Access to Graphically Violent Video Games be Restricted?*, 40 U. RICH. L. REV. 481, 504-09 (2006).

## II. FREEDOM OF EXPRESSION IN THE CONTEXT OF PUBLIC WELFARE

### A. Background

At the end of World War II, the Japanese government composed a new constitution resembling the draft prepared by the General Headquarters under the direction of the Supreme Commander of the Allied Powers, Douglas MacArthur.<sup>20</sup> The new constitution, the Nihonkoku Kempo, was based on the American ideas of the "sovereignty of the people, inviolability of fundamental human rights, and supremacy of the Constitution."<sup>21</sup> Article 98 of the Nihonkoku Kempo declares that it shall be the "supreme law of the nation" and that any law, ordinance or governmental act that is contrary to the constitution would not have any "legal force or validity."<sup>22</sup> Article 81 grants the Supreme Court "power to determine the constitutionality of any law, order, regulation or official act."<sup>23</sup> Despite these provisions, the Supreme Court of Japan has demonstrated a very conservative approach in its judicial review of lower court decisions and has been criticized for acting as a "rubber stamp" for actions taken by the government.<sup>24</sup> Although lower courts have actively challenged the constitutionality of laws and regulations, the Supreme Court has almost never reversed or invalidated governmental actions.<sup>25</sup> In the forty year period subsequent to the adoption of the Nihonkoku Kempo, the Supreme Court has declared only five statutes unconstitutional.<sup>26</sup> In the area of freedom of expression, the Supreme Court has never nullified a national, prefectural or local ordinance on constitutional grounds.<sup>27</sup>

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20. HIROYUKI HATA & GO NAKAGAWA, CONSTITUTIONAL LAW OF JAPAN 18-19 (Kluwer Law Int'l 1997).

21. *Id.* at 19; NIHONKOKU KEMPO (The Constitution of Japan), translated in HIROSHI ITOH & LAWRENCE WARD BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70, app. 3, at 256 (Univ. of Washington Press 1978).

22. KEMPO, art. 98, para. 1, *see supra* note 21, at 268.

23. KEMPO, art. 81, *see id.* at 266.

24. HATA & NAKAGAWA, *supra* note 20, at 45-46.

25. *Id.* at 46.

26. Noriho Urabe, *Rule of Law and Due Process*, in JAPANESE CONST. LAW 173, 182 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).

27. Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 933 (1998).

Although the Japanese Supreme Court would agree with the American Supreme Court about the theoretical underpinnings of free speech, the Japanese Supreme Court has refrained from conducting judicial review of cases that would allow it to uphold this constitutional guarantee.<sup>28</sup> Instead of affirmatively interpreting constitutional law, the Japanese Supreme Court attempts to mediate matters, evaluating the system of checks and balances in light of the overarching concern of “harmony and collaboration.”<sup>29</sup> Japan values the establishment of consensus within its conformist society, and most lawsuits raising constitutional claims founder in the pursuit of social harmony, or “wa.”<sup>30</sup> In Japanese villages, decisions were traditionally made by way of an “informal system of give-and-take aimed at reaching a unanimous decision.”<sup>31</sup> It was vital that meetings in these villages conclude in unanimity and that no one should leave “frustrated or dissatisfied” since such a result would “weaken[] village or group unity and solidarity.”<sup>32</sup>

Apart from the cultural premise for the Court’s self-restraint, traditional Japanese civil law preceding the creation of the Nihonkoku Kempo established the dominance of the legislative body responsible for enacting laws reflecting constitutional ideals.<sup>33</sup> Traces of the civil law tradition appear to still exist in the Court’s refusal to actively implement its power of judicial review.<sup>34</sup> Further, the appointment of Supreme Court justices by the dominant political party since World War II has contributed to the Court’s “institutional conservatism.” The Liberal Democratic Party has continually appointed individuals who agree as to the Court’s “proper place in Japan’s constitutional scheme.”<sup>35</sup>

Generally, the Japanese rely less on formal legal institutions than their heavily litigious American counterparts.<sup>36</sup> The concept that courts should only be used for resolving legal disputes between citizens, not between the citizen and the government, is based on a German constitutional doctrine that may have affected the Japanese view of judicial review.<sup>37</sup> For example, Japan does not have adequate judicial remedies against administrative officials whose decisions infringe on private citizens’

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28. *Id.* at 910.

29. *Id.* at 983.

30. *Id.* at 939 (construing KROTOSZYNSKI, *infra* note 31).

31. RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 145 (2006).

32. *Id.*

33. *Id.* at 171-72.

34. *Id.*

35. *Id.* at 172.

36. *Id.* at 140.

37. Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European*, in JAPANESE CONST. LAW, *supra* note 26, at 1, 17.

constitutional rights.<sup>38</sup> Japanese administrative law, as it stands, does not allow courts to issue declaratory judgments or injunctions against agency decisions.<sup>39</sup>

Instead of addressing the constitutionality of laws, the Japanese Supreme Court looks instead to statutory interpretation.<sup>40</sup> To illustrate, a high-profile leader of a religious organization charged a magazine publisher with defamation, who was then later indicted.<sup>41</sup> The Supreme Court presented three factors required to prove defamation and skirted the constitutional question of how the freedom of expression weighed against “a person’s right to enjoy his reputation.”<sup>42</sup> In a different case, the Court created an exception to the freedom of expression by holding that governmental programs that impinge on the freedom of speech in academia may be invalidated on constitutional grounds.<sup>43</sup> Although a panel of judges agreed that the Ministry of Education’s approval process of school textbooks violated the authors’ freedom of academic speech, this example may only have the effect of a minuscule drop in the sea of Japanese judicial tradition.<sup>44</sup>

Freedom of speech, press and “all other forms of expression” are guaranteed in Article 21, which also provides that “no censorship shall be maintained.”<sup>45</sup> Interestingly, American case law centering on the freedom of speech has influenced the Japanese judicial approach in evaluating similar constitutional cases, where the courts have chosen to interpret the constitutionality of legislation.<sup>46</sup> The Japanese lower courts adopted the “clear and present danger” test derived from *Schenck v. United States*, 249 U.S. 47 (1919), and acquitted individuals indicted for supporting the overthrow of the government by force in violation of the Subversive Activities Prevention Act.<sup>47</sup> The Japanese Supreme Court

38. *See id.* at 18-19.

39. *See id.* at 20.

40. *See id.* at 21-23.

41. *See id.* at 22-23.

42. *Id.* at 23.

43. KROTOSZYNSKI, *supra* note 31, at 142.

44. *Id.* at 142-43.

45. KEMPO, art. 21, *see supra* note 21, at 259.

46. Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3, 41 (1996). Japanese judges and legal scholars still often examine American case law that expound upon constitutional issues; however, American decisions are not mirrored but rather “indigenized” into the Japanese judicial scheme. *Id.*

47. HATA & NAKAGAWA, *supra* note 20, at 129.

established that freedom of expression should be protected but not abused, and that it should be balanced against the public welfare, to wit, the maintenance of law and order by local governments.<sup>48</sup> In his dissent in the 1960 *Tokyo Ordinance Decision*, Justice Hachiro, citing *Saia v. New York*, acknowledged the importance of balancing local interests and the freedom of expression, but stressed that such freedoms should be placed in a “preferred position.”<sup>49</sup> Despite this legitimate concern, the Japanese Supreme Court continued its conservative analytical approach but adopted the “less restrictive alternative” doctrine, utilized by the United States Supreme Court in *Shelton v. Tucker*, allowing the restriction on freedom of expression only in the absence of a less restrictive choice in the implementation of a legislative act.<sup>50</sup> The Japanese Supreme Court has not been inclined to strike down legislative and executive acts based on the constitutionally guaranteed freedom of expression.<sup>51</sup>

As it stands, the Japanese Supreme Court is more than willing to defer to the other political branches in the enactment of laws; such judicial inclination is founded upon less “legal” than “social” and “political” justifications that are embedded in Japanese culture.<sup>52</sup> The lower courts are more active than the Supreme Court in reviewing the constitutionality of laws and official actions;<sup>53</sup> however, lower court decisions finding government administrative actions unconstitutional have been constantly overruled by a higher court or, ultimately, the Supreme Court.<sup>54</sup>

### *B. Public Welfare and the Justification for Censorship*

Articles 12 and 13 of the Nihonkoku Kempo state the following, respectively:

The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any

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48. In the 1960 “Tokyo ordinance decision,” the Supreme Court found that it was apparent from “the laws of crowd psychology and . . . actual experience” that local governments need to adopt measures restricting assemblies and demonstrations, without abusing their legislative powers, for the sake of public welfare. Judgment upon case of the Metropolitan Ordinance [Violation of Metropolitan Ordinance No. 44 of 1950 concerning Public Meetings, Mass Parade and Mass Demonstration], 14 KEISHU 1243 (Sup. Ct., July 20, 1960), *translated in* JOHN MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, at 84-116 (Univ. of Washington Press 1964).

49. *Id.* at 97.

50. HATA & NAKAGAWA, *supra* note 20, at 129; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

51. KROTOSZYNSKI, *supra* note 31, at 141.

52. Ford, *supra* note 46, at 42, 61.

53. HATA & NAKAGAWA, *supra* note 20, at 46.

54. Percy R. Luney, Jr., *The Judiciary*, in JAPANESE CONST. LAW, *supra* note 26, at 123, 139.



abuse of these freedoms and rights *and shall always be responsible for utilizing them for the public welfare.*

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, *to the extent that it does not interfere with the public welfare*, be the supreme consideration in legislation and in other governmental affairs.<sup>55</sup>

Determining how the concept of public welfare, or *kokyo no fukushi*,<sup>56</sup> was incorporated in the Nihonkoku Kempo presents a scholastic exercise in speculation.<sup>57</sup> One theory is that Japanese history and tradition emphasize the importance of the role of groups over that of the individual, and the limitations of the public welfare doctrine are held in a “natural social balance” against the individual rights granted by the Nihonkoku Kempo.<sup>58</sup> Another theory is that the individual lives in a symbiotic relationship with society and is subjected to “the pressures and responsibility of society.”<sup>59</sup>

Unlike the United States, Japan does not embrace the marketplace of ideas and self-governance theories when evaluating laws suspect of free speech infringements; instead, individual rights are balanced against public welfare.<sup>60</sup> Article 21 of the Nihonkoku Kempo, which guarantees the freedom of expression, does not require this right to be balanced against public interests;<sup>61</sup> the judicial exercise of considering the public welfare is encouraged in separate provisions of the Constitution, specifically Articles 12 and 13.

In 1954, the Japanese Supreme Court found that a local law in Niigata requiring demonstrators to obtain a license, under a reasonableness criterion, for the purpose of preserving public order and protecting others from harm was not unconstitutional.<sup>62</sup> The “rule of mass psychology” trumped the “clear and present danger” test when the Court upheld a similar

55. KEMPO, art. 12-13, *see supra* note 21, at 258.

56. Lawrence W. Beer, *Freedom of Expression*, in JAPANESE CONST. LAW, *supra* note 26, at 221, 223.

57. John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, in JAPANESE CONST. LAW, *supra* note 26, at 39, 51.

58. *Id.*

59. *Id.*

60. Robert Trager & Yuri Obata, *Obscenity Decisions in the Japanese and United States Supreme Courts: Cultural Values in Interpreting Free Speech*, 10 U.C. DAVIS J. INT'L L. & POL'Y 247, 274 (2004).

61. KROTOSZYNSKI, *supra* note 31, at 141.

62. (Names of parties unavailable) 8 KEISHU 1866 (Sup. Ct., Nov. 24, 1954), *translated in* COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, *supra* note 48, at 70-83.

ordinance in Tokyo.<sup>63</sup> In the *Tokyo Ordinance Decision*, the Court recognized that the Article 21 rights were “eternal and inviolate” and that the “absolute guarantee” of such rights “is one of the fundamental rules and characteristics of democratic form[s] of government which distinguishes democracy from totalitarianism.”<sup>64</sup> Regardless, the Court ultimately adhered to the view that the constitutional rights were “subject to abuse” and decided that “maintaining harmony with the public welfare” took precedence, allowing for much discretion in lawmaking to the local governmental bodies.<sup>65</sup> Prohibiting the use of public property for speech-related activities was based upon keeping public order, rather than regulating speech based on viewpoint.<sup>66</sup>

In the area of non-political speech, the Court found that the novel, *The Lady Chatterly's Lover*, was not pornographic in nature but nevertheless portrayed sexual acts in detail which “offend[ed] the sense of shame to the extent that one would be reluctant to read them aloud in a public meeting, to say nothing of a family gathering.”<sup>67</sup> The Tokyo high court convicted and fined both the translator and publisher of the novel.<sup>68</sup> Thereafter in 1957, the Supreme Court upheld the lower court's decision, declaring twelve passages in the book as obscene, and further defined obscenity as something that “wantonly arouse[s] and stimulate[s] sexual desire . . . and run[s] counter to proper concepts of sexual morality.”<sup>69</sup> The Court was concerned about protecting the community from foreign perspectives or an “un-Japanese worldview” of sex and gender.<sup>70</sup> Subsequent obscenity cases stand for the proposition that upholding the “healthy customs in sexual life” by banning obscene material is permissible and that public welfare “probably entails maintaining an orderly social life and morality regarding sex.”<sup>71</sup>

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63. HATA & NAKAGAWA, *supra* note 20, at 129, 133; *see supra* text accompanying note 48.

64. KROTOSZYNSKI, *supra* note 31, at 149.

65. *Id.* at 149-50.

66. *Id.* at 152.

67. K. Koyama & H. Ito, 11 KEISHU 997 (Sup. Ct., Mar. 13, 1952), *translated in* COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, *supra* note 48, at 3-37.

68. LAWRENCE WARD BEER, FREEDOM OF EXPRESSION IN JAPAN 348 (1997).

69. *Id.* (“Obscene material offends the person's ‘Sense of Modesty Regarding Sex’ (*Seiteki shuchishin*; alternatively, the ‘sense of shame’) . . .”).

70. KROTOSZYNSKI, *supra* note 31, at 166-67.

71. Ishii et al. v. Japan, 23 KEISHU 1239 (Sup. Ct., Oct. 15, 1969), *translated in* THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70, *supra* note 21, at 183, 186; Matsue v. Hakodate Customs Director et al., 38 MINSHU 1308 (Sup. Ct., Dec. 12, 1984), *translated in* HIROSHI ITOH & LAWRENCE WARD BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: 1970 THROUGH 1990, at 453, 459 (Univ. of Washington Press 1996).

Another subsequent case also involved the translation of a foreign publication, M. de Sade's *In Praise of Vice*. In 1969, the Supreme Court found that fourteen passages were "too boldly candid in portraying sexual conduct, . . . lacking in human feeling, . . . unrealistic, fanciful, and . . . joined with scenes of ugly brutality."<sup>72</sup> The Court found that sections of a literary piece must be evaluated in the context of the entire work; since the separate passages were obscene, the entire book was deemed obscene.<sup>73</sup>

The Supreme Court has side-stepped Article 21's prohibition against censorship of artistic expression, as in the foregoing cases, and has clearly demonstrated that Article 21 does not necessarily protect non-political speech.<sup>74</sup> The court in *de Sade* opined the following:

Freedom of the press and of other expression and academic freedom are extremely important as foundations of democracy, but . . . they are not absolute and without limits, their abuse is forbidden, and they are placed under limitations for the public welfare. When writings of artistic and intellectual merit are obscene, then to make them the object of penalties in order to uphold order and healthy customs in sexual life is of benefit to the life of the whole nation. Thus, we cannot say this is contrary to Article[] 21 . . .<sup>75</sup>

In his dissent, Justice Tanaka emphasized the importance of the Article 21 freedoms in creating the foundation for democracy and bringing it to fruition.<sup>76</sup> Justice Tanaka opined that Article 21 freedoms should be considered "absolute freedoms" and should not be infringed upon by laws that are based on a pretextual notion of deference to the "public welfare."<sup>77</sup> But within the same opinion, Justice Tanaka seemingly contradicted himself by expressing that he would never argue that these freedoms were absolute and "without limitation."<sup>78</sup> He realized that there are abstract "intrinsic" limitations, or as he put it, "freedom attended by discipline, which does not cross over into abuse . . . using the prevailing ideas of the community as a standard."<sup>79</sup> Nevertheless, Justice Tanaka believed that these limitations should not be externally established by the

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72. BEER, *supra* note 68, at 350.

73. *Id.*

74. Krotoszynski, *supra* note 27, at 970.

75. Ishii v. Japan, *translated in* ITOH & BEER, *supra* note 71, at 186.

76. *Id.* at 203.

77. *Id.*

78. *Id.* at 204.

79. *Id.*

legislature but “approved of as limitations on freedom insofar as they are limitations *inherent* in freedom.”<sup>80</sup>

In both of their majority opinions, the *Chatterly* and *de Sade* courts did not address the question of protecting minors from obscene materials; however, Justice Iwata did touch upon the issue of the age of readership in his concurring opinion in the latter case.<sup>81</sup> Justice Iwata indicated that anyone could easily obtain the book since the distribution of the publication was not restricted in any way and could thus potentially fall into the hands of a child who may be harmed by exposure to obscene material.<sup>82</sup> The Japanese have broadly accepted the government’s regulation of individual expression,<sup>83</sup> and such restriction of speech has been particularly justified on the basis of the social and moral development of children.<sup>84</sup>

### C. Carving Out a Special Exception for Children

Determining when the government’s interest should preempt freedom of expression for the sake of protecting the well-being and moral development of children has become a more complex question as technology advances.<sup>85</sup> Public pressure to censor materials to protect children has increased as result.<sup>86</sup> In the United States, there are proponents for the creation of a “two-tiered first amendment” for the purpose of protecting children from harmful material, including violent content.<sup>87</sup> The court in *Ginsberg v. New York* recognized the disparity in the constitutional rights of children and adults in regard to sexually obscene materials; the court in *FCC v. Pacifica Foundation* upheld the protection of children in the broadcasting context; and cases involving the state’s overriding interest as to personal religious freedoms as they affect minors support the notion of distinguishing free speech rights for

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80. *Id.*; see also *id.* at 214 (Irokawa, J., dissenting) (“Even when restriction for the public welfare is unavoidable, the way to fulfill the spirit of the Constitution is to give serious thought to what the public welfare is in that case, making an effort to deepen and concretize that concept. We must strictly avoid an attitude which casually uses the abstract notion of the public welfare and cuts down on freedom of expression with great dispatch. It is very regrettable that the majority opinion makes no reference at all to this point.”).

81. BEER, *supra* note 68, at 353.

82. Ishii et al. v. Japan, *supra* note 71, at 195-96.

83. James R. Alexander, *Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's In the Realm of the Senses*, 4 ASIAN-PAC. L. & POL'Y J. 148, 168 (2003).

84. *Id.* at 153-54.

85. Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 570-71 (2005).

86. *Id.*

87. Saunders, *supra* note 15.

adults from those of children.<sup>88</sup> The often-cited *Ginsberg* case protects minors against speech that “predominantly appeals to the prurient, shameful or morbid interest of minors, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors.”<sup>89</sup>

Graphic and offensive violence could be placed under the obscenity exception of the First Amendment and evaluated under the *Ginsberg* test,<sup>90</sup> despite the fact that courts have found otherwise.<sup>91</sup> Parents possess the right and responsibility to decide upon the moral education of their children, and restrictions on the sale of certain violent video games to minors would not preclude parents who disagreed with the government’s policies from purchasing such games for their children.<sup>92</sup>

On the other hand, the “two-tiered first amendment” may be regarded as a “double standard” in which the legally established age of maturity may not be relevant to the question of when one is mature and capable of making rational choices and exercising responsibilities.<sup>93</sup> It is likely that there is no distinction between the competency of an 18-year-old and someone who may be a day, week or few months younger, but the law dictates that a clear definition must be established.<sup>94</sup> It may not be justifiable that immature 22-year-olds would have open access to violent material that responsible 16-year-olds could not obtain in the absence of parental consent. Nonetheless, implementation of some protective policies that equip children with the ability to develop into “rationally autonomous” adults is still warranted in light of the limited or incomplete capacities of minors.<sup>95</sup>

Although it appears that there is a lack of active political dialogue in Japan regarding children’s freedom of speech, the legislature has indirectly addressed it on a practical level, specifically in the issue of minors’ access to obscene media. The Child Welfare Law authorizes the

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88. *Id.* at 269-70.

89. *Ginsberg v. State of N.Y.*, 390 U.S. 629, 632-33 (1968).

90. Saunders, *supra* note 15, at 267.

91. *Kendrick*, 244 F.3d at 576-79; *Blagojevich*, 404 F. Supp. 2d at 1075-76.

92. Saunders, *supra* note 15, at 276-77.

93. Michael D.A. Freeman, *The Limits of Children’s Rights*, in *THE IDEOLOGIES OF CHILDREN’S RIGHTS* 29, 34-35 (Michael Freeman & Philip Veerman eds., 1992).

94. *Id.*

95. *Id.* at 37-38; see also *id.* at 36 (considering Martin Holt’s observation that young children are “egocentric” and “sensualists” whose moral judgment is based on what feels good).

national Child Welfare Consultative Commission and the local youth protection committees to “give warning as necessary” to manufacturers or retailers selling what the committees deem as obscene material to minors.<sup>96</sup> What exactly the “warning” entails is not clear, but as an illustration, under the Tokyo youth protection ordinance, the governor may designate a publication as inappropriate for children and require the attachment of such warning on the material.<sup>97</sup> In 1976, the National Police Agency implemented “Operation Purification” against certain publications and late-night television shows.<sup>98</sup> The Agency’s justification for this campaign was juvenile sex offenders’ claims that exposure to obscene material in the media was the impetus of their crimes.<sup>99</sup>

Although Japanese laws allow store owners to monitor the distribution of offensive materials to children, the grounds for such laws are based on public welfare and the view that the government should play a paternal role in the wholesome upbringing of children. The laws, however, do not directly address the children’s constitutional rights or exceptions thereof. There is no active academic or political advocacy for a two-tiered freedom of expression that distinguishes the rights of children from those of adults. Yet, the actions of Japanese legislators and agencies indicate either the lack of constitutional consideration or the willingness to carve-out an exception to Article 21 for the protection of children from materials that the government deems harmful.

### III. THE LOCAL ORDINANCES

Although the national legislative body, the Diet, has unsuccessfully attempted to pass legislation to restrict the sale of violent video games,<sup>100</sup> prefectural governments have passed laws banning the sale of violent video games to minors, in particular, the game *Grand Theft Auto III* (“GTAI”<sup>III</sup>). In June 2005, Kanagawa Prefecture passed a law that would fine stores up to 300,000 yen, or approximately \$2,776, if they are found selling or renting the game to minors.<sup>101</sup> The governor of Saitama Prefecture indicated that the “wholesome upbringing” of children is an important concern, and the ban of sales to minors was the “only

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96. BEER, *supra* note 68, at 346.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Kanagawa Acts to Curb Violent Video Games*, DAILY YOMIURI (Japan), June 16, 2005, at 4, available at 2005 WLNR 9637802.

101. Anderson, *supra* note 1; *Gamers Launch Online Attack on Governor Over ‘Grand Theft Auto’ Ban*, MAINICHI DAILY NEWS, July 23, 2005, available at 2005 WLNR 11644621.

option,”<sup>102</sup> a phrase that carries a faint vestige of the “less restrictive alternative” approach applied by the Japanese Supreme Court.

Articles 92 through 95 of the Nihonkoku Kempo delineate the powers of local governments, granting prefectures and municipalities the autonomous right to manage their affairs and enact their own regulations.<sup>103</sup> Additionally, the Local Autonomy Act prescribes the issuance of ordinances, or *jorei*, by the local entities; punitive provisions may be included within such ordinances.<sup>104</sup> In fact, local governments, which are elected bodies, have greater purview than the appointed national administrative agencies in the implementation of ordinances and their corresponding sanctions.<sup>105</sup> Additionally, the Local Autonomy Act allows prefectural governors, mayors, town and village heads, and local commissions, such as boards of education and public safety commissions, to pass local regulations, or *kisoku*.<sup>106</sup>

Japan has a unitary, centralized government, unlike the American federal system, in which all laws, with the exception of prefectural ordinances, are passed by the Diet, Japan’s national parliament.<sup>107</sup> Nonetheless, local governments are allowed some autonomy in administrative and legislative matters.<sup>108</sup> Japan does not consist of sovereign states but rather has created and maintained local governments that have “the right to manage their property, affairs and administration.”<sup>109</sup>

The Japanese Supreme Court has generally upheld the delegated lawmaking powers of local governments under the Local Autonomy Act, analogizing the prefectural and other local entities to the national Diet since representatives are popularly elected at both levels.<sup>110</sup> Delegation of legislative power is accepted as long as it is “restricted to a certain degree,” and ordinances may be passed in consideration of specific local needs.<sup>111</sup>

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102. *Saitama Bans Sale of 'Grand Theft Auto' Game to Under-18s*, *supra* note 4.

103. KEMPO, *supra* note 21, at 267-68.

104. HATA & NAKAGAWA, *supra* note 20, at 38-39.

105. *Id.*

106. HATA & NAKAGAWA, *supra* note 20, at 39.

107. ITOH & BEER, *supra* note 21, at 7.

108. *Id.* at 45.

109. HATA & NAKAGAWA, *supra* note 20, at 88 (stating although Article 94 of the Japanese Constitution provides for autonomous legislative powers to local governments, the Constitution does not clearly define what “local autonomy” fully entails).

110. HATA & NAKAGAWA, *supra* note 20, at 89.

111. *Id.*

Prefectures have established youth protection ordinances for the regulation of movies, magazines, advertisements and videos.<sup>112</sup> 23,685 items were designated as “harmful material” to minors in 1999.<sup>113</sup> Thus, it is no surprise that prefectures, such as Kanagawa, have successfully banned GTAIII under the umbrella of its youth protection ordinance.<sup>114</sup> The local government, finding that the game glorified violence and murder, explained the age restriction to retailers within the prefecture and demonstrated how the game should be separated from other games on store shelves.<sup>115</sup> The government provided no response or explanation when retailers challenged the ambiguity of the ordinance and questioned why GTAIII’s sequel, which contained comparable violence, was not banned.<sup>116</sup>

Contemporaneous with the enactment of the ordinance, a boy who frequently played GTAIII was arrested for murdering his parents and blowing up the family home.<sup>117</sup> It appears that media exposure of such incidents propagates the justification for such regulations, despite the concern that there is a lack of empirical studies demonstrating a causal relationship between video games and youth violence.<sup>118</sup> Additionally, it may have been easier to specifically target an American, rather than a Japanese-produced, video game; perhaps the violence in GTAIII is “un-Japanese,” as the sexual content in *Lady Chatterly’s Lover* was considered by the Japanese Supreme Court approximately fifty years ago.

North of Kanagawa, Tokyo took a different approach by demanding that software makers label violent material, instructing retailers to display such products on different shelves, and requesting identification from customers to confirm their age.<sup>119</sup> Although the basis for this measure was derived from a clause in its youth protection ordinance, Tokyo chose to institute a voluntary system instead of a mandatory scheme of sanctions against retailers and manufacturers.<sup>120</sup> The metropolitan

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112. The Ministry of Foreign Affairs of Japan, The Second Report of Japan Under Article 44, Paragraph 1 of the Convention on the Rights of the Child, ¶ 159 (Nov. 2001), <http://www.mofa.go.jp/policy/human/child/report2>.

113. *Id.*

114. *Microsoft to Add Parental Controls to Xbox 360 in Japan*, ASIA PULSE, July 21, 2005, available at 2005 WLNR 9637802.

115. Anderson, *supra* note 1.

116. *Id.*

117. *Lowbrows Blame ‘Grand Theft Auto’ Influence on Teen who Killed Parents*, MAINICHI DAILY NEWS, June 23, 2005, available at 2005 WLNR 10004756.

118. *Murder Spurs Video Game Restrictions*, *supra* note 1.

119. *Tokyo to Label Violent Software*, DAILY YOMIURI (Japan), Oct. 14, 2005, at 2, available at 2005 WLNR 16685061.

120. *Id.*



government announced that the video game industry should take responsibility through its own "voluntary efforts."<sup>121</sup>

If the regulatory methods which local governments have adopted ever become subject to constitutional scrutiny, the Supreme Court will most likely uphold the prefectures' efforts by tipping the public welfare versus freedom of expression scale in favor of the former.<sup>122</sup> Although Article 81 of the Constitution expressly authorizes the Supreme Court to rule on the constitutionality of any law or regulation, the Court has imposed "self-restraint" in conducting judicial review, an idea that the Japanese form of democracy may still have difficulty embracing.<sup>123</sup> Unlike the American reliance on precedent established in *Marbury v. Madison*, there is no such political tradition of judicial review in Japan.<sup>124</sup> Deference to local ordinances by the highest court in the country is fairly predictable based on historical precedent.<sup>125</sup> The absence of recent reports regarding enforcement of the ban beyond the singling out of GTAIII in prefectures such as Kanagawa and Saitama demonstrate that local governments will resort to restrictive measures in banning specific products but will not attempt to enforce draconian regulations affecting the freedom of expression of an entire industry.

It is noteworthy to mention that the Japanese national government has a vested interest in the \$25 billion global game industry.<sup>126</sup> In particular, the Ministry of Economy, Trade and Industry recognized Japan's game industry as an extremely important contributor to the nation's economy.<sup>127</sup> In 2006, the Ministry published its "Game Industry Strategy." The goals of the strategy included amplifying the international profile of the Tokyo Game Show, an event that promotes the latest trends in the computer and video game industry, and "proactively disseminating positive information about the industry" in light of societal concerns about the effect of games on child development.<sup>128</sup> One may speculate that the government's involvement in the game industry has prevented the passage of laws at the national

121. *Id.*

122. See Krotoszynski, *supra* note 27, at 933.

123. HATA & NAKAGAWA, *supra* note 20, at 46.

124. *Id.*

125. See *id.*

126. Julie Tamaki & Chris Gaither, *Judge Halts Limits on Game Sales to Kids*, L.A. TIMES, Dec. 23, 2005, at A1.

127. Press Release, Ministry of Econ., Trade & Indus., Announcement of "Game Industry Strategy" (Aug. 24, 2006), available at <http://www.meti.go.jp/english/information/downloadfiles/PressRelease/060824Gameindustry.pdf>.

128. *Id.*

level, leaving local governments the option to regulate within their own boundaries.

Despite the government's financial interest in this industry, the National Police Agency organized a research group in April 2006 to look into the effects of video games on children.<sup>129</sup> Later that year, the Agency posted an article on its website advising parents to supervise the time spent by their children playing games and to be aware of the content and rating systems implemented by the video game industry.<sup>130</sup> The article also calls for (1) retailers and manufacturers to make the rating information easier to comprehend by consumers and to restrict the sale of violent video games to minors; (2) manufacturers to provide mechanisms in the video games so that users can monitor their time spent playing the games; and (3) schools to encourage discussions among students regarding the positive and negative effects of video game use and distinguishing virtual reality from physical reality.<sup>131</sup> However, nothing in the report suggests that national or local lawmakers should pass legislation that would ban the sale of violent video games to minors.

#### IV. COMPARING LOCAL LEGISLATIVE ACTION IN THE UNITED STATES

##### *A. Public Welfare versus Compelling State Interest*

Japan's concept of public welfare carries a different nuance from the American idea of "compelling governmental interest." In *Sable Communications of California, Inc. v. FCC* the United States Supreme Court articulated the following test:

The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.<sup>132</sup>

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129. Anoop Gantayat, *Japanese Police Investigate Games*, IGN.COM, Apr. 11, 2006, <http://games.ign.com/articles/701/701297p1.html>.

130. Akiko Shibuya, *Video Games and Children: Effect of Violent Scenes and Recommended Measures*, Dec. 1, 2006, at 16, <http://www.npa.go.jp/safetylife/syonen/29/7-sibuya.pdf>

131. *Id.* at 17-18.

132. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (citation omitted) (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980)).

The foregoing opinion established that the “least restrictive means,” or narrowly drafted regulations that do not infringe upon the freedom of speech, can be set forth to further the government’s goal of protecting children. However, as Judge Posner articulated in *American Amusement Machine Assoc. v. Kendrick*, laws directed against content-based material must be considered offensive by the community.<sup>133</sup> If, for example, a community no longer deems obscenity as offensive, yet still seeks to regulate the sale of or access to obscene materials, the state must provide a compelling basis, not a pretextual justification, for the belief that actual harms are caused by obscenity.<sup>134</sup>

The “compelling” standard requires more substantiation than evaluating whether a regulation is “plausible” in light of children’s First Amendment rights.<sup>135</sup> Judge Posner found that the dearth of solid social scientific evidence supporting the effect of violent video games on children did not provide the requisite compelling basis for the enactment of a local ordinance prohibiting minors’ access to such video games in the absence of parental consent.<sup>136</sup> Interestingly, Judge Posner took a step further and proclaimed that “conditioning a minor’s First Amendment rights on parental consent of this nature is a curtailment of those rights.”<sup>137</sup>

In contrast, under the public welfare concept, which is entrenched in the Japanese tradition, societal concerns trump individual choices. In the United States, however, the individual’s “inviolable right of expression is upheld” unless a compelling state interest for restricting this right can be shown.<sup>138</sup> The Japanese Supreme Court “more fully embrace[s] a community-based theory of freedom of speech” than the United States Supreme Court.<sup>139</sup> In Japan, the early 20th century gave birth to the idea of an Imperial “Family State.”<sup>140</sup> Rooted in the belief that the Emperor was in the direct lineage of Amaterasu, the Sun Goddess, the Emperor became a father figure over a nation subjected to a “sacred obligation” of obedience to its patriarch.<sup>141</sup> Although substantive law-making powers lay in the national legislature, this political concept influenced the narrowing

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133. 244 F.3d at 574-75.

134. *Id.* at 576.

135. *Id.*

136. *Id.* at 578.

137. *Id.*

138. Alexander, *supra* note 83, at 167.

139. KROTOSZYNSKI, *supra* note 31, at 153.

140. Ford, *supra* note 46, at 9-10.

141. *Id.* at 10-11.

of the individual's constitutional rights in consideration of such individual's obligations and responsibilities to the "Family State."<sup>142</sup>

### *B. The Failed Attempts by State Legislatures*

In 2005, the Illinois and California state legislatures passed bills authorizing restrictions on the sales of violent video games to children. However, both laws were struck down in their respective courts, which issued injunctions against the legislation that would adversely affect the video game industry.<sup>143</sup>

Illinois Governor Blagojevich signed the "Safe Games Illinois Act" in July 2005 that banned the sale or rental of violent and sexually explicit video games to minors and penalized retailers \$1,000 for violations.<sup>144</sup> The law was planned to go into force on Jan 1, 2006,<sup>145</sup> but before it could take effect, the United States District Court, Northern District of Illinois, found the law unconstitutional under the strict scrutiny test. The court specifically cited *American Amusement Machine Assoc. v. Kendrick* for the proposition that minors' First Amendment rights must be protected in order to maintain their access to information and not "leave them unequipped to cope with the world as we know it."<sup>146</sup> Although the court acknowledged the compelling state interest in preventing violent behavior in children, it deferred to the *Brandenburg v. Ohio* test and found that violence in video games does not "incite or produce imminent lawless action" based on the studies submitted by the State which failed to demonstrate a causal relationship between violence in video games and youth behavior.<sup>147</sup>

California Governor Schwarzenegger signed a similar bill in October 2005 requiring the labeling of violent video games and imposing a penalty of up to \$1,000 on retailers who rent or sell such games to children.<sup>148</sup> The United States District Court, Northern District of California, issued a preliminary injunction, finding the legislation unconstitutionally vague, specifically, on the issue of what would be considered a "violent" video game.<sup>149</sup> The court also found that the bill failed the *Brandenburg*

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142. *Id.* at 12-14.

143. *Blagojevich*, 404 F. Supp. 2d at 1072-73; *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1037-38 (N.D. Cal. 2005).

144. Press Release, Ill. Governor's Office, Governor Blagojevich Signs Law Making Ill. the Only State in the Nation to Protect Children from Violent and Sexually Explicit Video Games (July 25, 2005), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=4170>.

145. *Id.*

146. *Blagojevich*, 404 F. Supp. 2d at 1072-73 (citing *Kendrick*, 244 F.3d at 576-78).

147. *Id.* at 1073-74.

148. *Schwarzenegger*, 401 F. Supp. 2d at 1037-38.

149. *Id.* at 1040-42.

test since the law appeared to be primarily focused on preventing harm to children, rather than preventing children from inflicting violence.<sup>150</sup> Under the *Brandenburg* test, the government may regulate material with violent content only if it can provide evidence that the medium will imminently cause children to commit violent acts; in this case, the court did not find the legislators' concern to be preventing children from committing violence, but rather the prevention of injuries caused to children from time spent playing violent games.<sup>151</sup> Like the district court in Illinois, the Northern District of California questioned the sufficiency of research on violent video games to demonstrate the state's compelling interest in protecting minors.<sup>152</sup> Subsequent to the Illinois and California decisions, other federal district court judges found similar laws passed in 2005 and 2006 in Michigan,<sup>153</sup> Minnesota,<sup>154</sup> and Louisiana unconstitutional.<sup>155</sup>

In *Kendrick*, the Seventh Circuit noted that the video games in the record had literary merit and contained unrealistic violence; if the games contained more realistic death and mutilation or were simply "animated shooting galleries," the Court acknowledged in dictum that a more narrowly drawn law may have had the chance to overcome constitutional scrutiny.<sup>156</sup>

Nevertheless, the differences between these failed American laws and the uncontested prefectural ordinances in Japan must be emphasized against the backdrop of each country's constitutional and political framework. In Japan, the concept of public welfare dictates that local governments are granted leeway in identifying specific products as "harmful" to minors, whereas the need to establish compelling state interest creates a seemingly insurmountable wall for the enactment of such laws in the United States. In fact, the *Kendrick* court criticized the singling out of video games in attaining the purported goal of preventing violent behavior in children when other violent media are still available.<sup>157</sup> Both Japan and the United States value the freedom of speech and expression but differ in their willingness to limit these rights as they pertain to children.

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150. *Id.* at 1045.

151. *Id.*

152. *Id.* at 1046.

153. *Entm't Software Ass'n v. Granholm*, 404 F. Supp. 2d 978 (E.D. Mich. 2005).

154. *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006).

155. *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006).

156. 244 F.3d at 579-80, n.6.

157. *Id.* at 579.

## V. THE VIDEO GAME INDUSTRY'S RESPONSE TO THE REGULATION OF CHILDREN'S ACCESS TO "HARMFUL INFORMATION"

In response to the Kanagawa Prefecture's designation of GTAIII as "harmful" for minors, Sony Computer Entertainment Inc. suggested that retailers should request that customers show identification and should prohibit the sale of Playstation-compatible games to those under the age of the appropriateness rating.<sup>158</sup> Microsoft Corp. announced that it would include parental controls in the Xbox game consoles that the company planned to sell in Japan.<sup>159</sup>

The Computer Entertainment Rating Organization ("CERO") was established in 2003 in Japan, imitating the video and computer game rating system established by the Entertainment Software Rating Board ("ESRB"), the self-regulatory arm of the Entertainment Software Association in the United States.<sup>160</sup> The CERO rating system is derived from testing conducted by volunteers ages 20 and older, including homemakers, students, senior citizens, and parents of children who regularly play video games.<sup>161</sup> But unlike its American counterpart, CERO has yet to be a vocal participant in Japan's politics of game regulation.

Sony, Microsoft and Nintendo have also placed or plan to place parental controls in their game consoles to be sold in the United States.<sup>162</sup> In addition to the individual manufacturers' efforts in restricting children's access to violent video games, ESRB has been actively collaborating with state and local governments, parent-teacher associations and retailers in promoting their self-regulatory efforts.<sup>163</sup> In June 2006, the president of ESRB, Patricia Vance, spoke at a hearing before the United States House of Representatives Subcommittee on Commerce, Trade

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158. *Sony's Japan Game Unit to Voluntarily Control Software Sales*, ASIA PULSE, June 8, 2005, available at <http://www.westlaw.com> (Find Citation "6/8/05 ASIAPULSE;" then Locate in Result "Sony's Japan Game Unit to Voluntarily Control Software Sales").

159. See *Microsoft to Add Parental Control to Xbox 360 in Japan*, *supra* note 114.

160. Computer Entertainment Rating Organization, Overview of the Organization, <http://www.cero.gr.jp/outline.html>; Entertainment Software Rating Board, About ESRB, <http://www.esrb.org/about/index.jsp>. The Entertainment Software Association ("ESA") has been responsible for challenging the constitutionality of state laws restricting the sale of violent video games to minors. The ESA is a named plaintiff in such court cases. See *Blagojevich*, *supra* note 146.

161. Computer Entertainment Rating Organization (CERO), <http://www.cero.gr.jp/recruitment.html> (last visited Oct. 14, 2007).

162. May Wong, *Sony Puts Parental Control in Games*, THE ARIZ. REPUBLIC, Nov. 28, 2005, available at <http://www.azcentral.com/arizonarepublic/news/articles/1128videogames11.html>.

163. Press Release, Entm't Software Rating Bd., PTA and ESRB Launch Nationwide Video Game Ratings Educ. P'ship (Nov. 15, 2006) (available at <http://www.esrb.org/about/news.jsp>); Press Release, Entm't Software Rating Bd., ESRB Retail Council (ERC) Establishes Unprecedented "Commitment to Parents" with Nat'l Video Game Retailers (June 21, 2006) (available at <http://www.esrb.org/about/news.jsp>).

and Consumer Protection, emphasizing the organization's efforts in raising awareness among parents about the video game rating system.<sup>164</sup>

In 2005, the video game *Grand Theft Auto: San Andreas* was released, a game in which the main character, Carl "CJ" Johnson, explores three cities where he purchases and operates businesses and becomes involved in various relationships.<sup>165</sup> CJ becomes entangled in a world of theft, prostitution and murder and is awarded for such behavior.<sup>166</sup> A public uproar arose when video game players released a program to the public that unlocked hidden preexisting codes within the game.<sup>167</sup> In one scene, CJ's girlfriend invites him into her home "for some coffee;" although the game player cannot see inside the house, he or she can hear groans and infer that CJ and his girlfriend are engaged in sexual conduct.<sup>168</sup> The "Hot Coffee" modification unlocks unused code, enabling the player to enter the house and see the couple engage in simulated sexual intercourse.<sup>169</sup> In response to the controversy arising from the locked-out sexually explicit content in the game, ESRB announced that the game's M (Mature) rating, designating games with content that "may be suitable" for persons ages 17 and older, would be replaced with the AO (Adults Only) rating.<sup>170</sup> The publisher of the top-selling game, Rockstar Games, agreed to notify stores to promptly stop the sales of the game until the packages were properly re-labeled with the new rating.<sup>171</sup>

In response to the "Hot Coffee" controversy, Michigan Senator Fred Upton proposed the Video Game Decency Act of 2006.<sup>172</sup> The specific purpose of The Video Game Decency Act of 2006 was "to prohibit deceptive acts and practices in the content rating and labeling of video games."<sup>173</sup> A game manufacturer's failure to disclose the full content of

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164. *Violent and Explicit Video Games: Informing Parents and Protecting Children: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 1 (2006) (written testimony of Patricia E. Vance, President, Entertainment Software Rating Board).

165. Cross, *supra* note 2, at 301-302.

166. *Id.*

167. *Id.* at 303.

168. *Id.*

169. *Id.*

170. *Violent and Explicit Video Games*, *supra* note 164, at 6; ESRB Game Ratings & Descriptor Guide, [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp) (last visited Sept. 16, 2007).

171. *Violent and Explicit Video Games*, *supra* note 164, at 6.

172. Jason Dobson, *Video Game Decency Act of 2006 Introduced to Senate*, GAMASUTRA, Sept. 29, 2006, [http://www.gamasutra.com/php-bin/news\\_index.php?story=11070](http://www.gamasutra.com/php-bin/news_index.php?story=11070).

173. Video Game Decency Act of 2006, H.R. 6120, 109th Cong. (2006).

a video game for the purpose of obtaining a less-restrictive ESRB rating would constitute a violation of the Act and be deemed an “unfair or deceptive act or practice” within the meaning of the Federal Trade Commission Act.<sup>174</sup> This bill, which essentially put teeth behind ESRB’s self-regulatory efforts, was presented soon after ESRB re-rated another popular game, *The Elder Scrolls IV: Oblivion*, from T (Teen) to M (Mature) after it was discovered that the game manufacturer had failed to disclose locked-out violent content.<sup>175</sup>

There is speculation that ESRB may be somehow involved with the introduction of the Video Game Decency Act.<sup>176</sup> This federal legislation differs from failed state laws that attempted to establish independent rating and labeling systems that would preempt ESRB’s self-regulatory mechanism.<sup>177</sup> Patricia Vance’s claim that ESRB will fine a video game manufacturer up to \$1 million for the “egregious failure to disclose pertinent content”<sup>178</sup> coincides with the bill’s purported objective and demonstrates willingness by the industry to enforce sanctions against its own members.

However, the industry’s reaction may simply have been a response to the frenzy created by the legislation regulating sales of video games to minors. The video game industry has been extremely active in educating the public and enforcing proper ratings of games. However, most of these efforts came after concerned politicians took action against allowing children’s access to gratuitous violence or sexually explicit content in games.

Is it fair to conclude that the enactment of legislation that is suspected of constitutional infringement, or the threat thereof, is a necessary evil in the balancing of the industry’s freedom of speech and expression and the protection of children? The president of the Entertainment Software Association commented that the State of Illinois knew that the ban of the sale of violent video games was unconstitutional and that lawsuits in which such legislation is challenged are a waste of taxpayers’ money.<sup>179</sup> One may only speculate as to whether ESRB would have been as intent on its self-regulatory efforts if laws affecting sales of video games were never proposed at the state or federal levels.

Although Japan’s local ordinances that target a specific video game would never pass constitutional muster in the United States, they remain

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174. *Id.* § 2.

175. Kris Graft, ‘Video Game Decency Act’ Introduced, Next Generation, Sept. 29, 2006, [http://www.next-gen.biz/index.php?option=com\\_content&task=view&id=3917&Itemid=46](http://www.next-gen.biz/index.php?option=com_content&task=view&id=3917&Itemid=46); see *Violent and Explicit Video Games*, *supra* note 164, at 7.

176. Graft, *supra* note 175.

177. See *Blagojevich*, *supra* note 146.

178. *Violent and Explicit Video Games*, *supra* note 164, at 6.

179. *Failed Video Game Ban Will Cost Illinois \$510,000*, CHI. SUN TIMES, Aug. 12, 2006, at 29, available at 2006 WLNR 13965757.



uncontested in the Japanese courts. The local ordinances only affect sales of the banned video game to residents within the prefectural boundaries. However, there may be a nation-wide interest in having an organization such as CERO model the ESRB in its rating system, emulate its' public information campaigns, cooperate with retailers in the sale of video games to age-appropriate customers, and enforce sanctions.<sup>180</sup>

CERO has adopted a rating system similar to its American counterpart<sup>181</sup> but has provided fewer categories of suitability.<sup>182</sup> Additionally, CERO requires that icons designating content-based descriptors, including violence, sexual content, horror, references to alcohol, tobacco and illicit drugs, profanity, and gambling, be attached to the packaging of video games.<sup>183</sup> Both CERO and ESRB distinguish between what is appropriate for mature audiences, or persons who are ages 17 and older, from games that are only suitable for persons who are ages 18 and over. Although the age of majority in Japan is considered to be 20 years of age,<sup>184</sup> CERO has overlooked this fact and patterned its age divisions after those in the United States.

It is also an interesting proposition that a one-year difference determines whether children can purchase certain video games; in the case of *Grand Theft Auto: San Andreas*, the discovery of the unlocked code allowing players to view a simulated sex scene was sufficient to bump up the rating from "M" to "AO" in the United States.<sup>185</sup> Between October 2005 and January 2006, the United States Federal Trade Commission conducted a nationwide undercover operation to measure how often children could purchase "M" rated games at retailers in 43

180. See *supra* note 163.

181. ESRB has provided the following categories of suitability: EC (Early Childhood) for ages 3 and older; E (Everyone) for ages 6 and older; E+10 for ages 10 and older; T (Teen) for ages 13 and older; M (Mature) for ages 17 and older; AO (Adult Only) for ages 18 and older; and RP (Rating Pending) which is used for the advertising of a game that has been submitted to ESRB, awaiting a final rating before the game's release. ESRB Game Ratings & Descriptor Guide, *supra* note 170.

182. CERO has provided the following categories of suitability: "A" for persons of all ages; "B" for persons ages 12 and older; "C" for persons ages 15 and older; "D" for persons ages 17 and older; and "Z" for persons ages 18 and older. Computer Entertainment Rating Organization (CERO), <http://www.cero.gr.jp/rating.html> (last visited Oct. 14, 2007).

183. *Id.*

184. Official Website of Yamaguchi Prefecture (2004), <http://www.pref.yamaguchi.jp/gyosei/kokusai/access/2004/jan2004/culture.htm>.

185. Cross, *supra* note 2, at 304.

states.<sup>186</sup> Forty-two percent of the under-aged shoppers were able to buy “M” rated games, which was an improvement from eighty-five percent in 2000.<sup>187</sup> Nevertheless, it is evident that “M” rated games remain accessible to those under the age of 17, regardless of whether they are accompanied by an adult at the time of purchase.

The method by which games are generally evaluated is not a perfect science; each game is evaluated by a minimum of three adults who are part-time, trained ESRB raters recruited from New York City and typically have experience with children or are parents or caretakers themselves.<sup>188</sup> Game publishers must also submit responses to a written questionnaire and disclose all content, including any “locked-out” simulations.<sup>189</sup> Subsequent to the review by ESRB of the game, an official rating is issued to the game manufacturer, who may appeal the rating assignment to the Appeals Board consisting of publishers, retailers and other professionals.<sup>190</sup> For online games, ESRB has provided a caveat that the user-generated content in such games which carry the warning, “Game Experience May Change During Online Play,” is not rated by ESRB.<sup>191</sup>

## VI. IS THE BAN OF VIOLENT VIDEO GAMES AN EFFECTIVE CURE FOR THE YOUTH VIOLENCE EPIDEMIC?

In 1998, the United Nations Committee on the Rights of the Child found that Japan did not implement sufficient measures to protect children from “the harmful effects of the printed, electronic and audio-visual media, in particular violence and pornography” in adherence to Article 17 of the Convention on the Rights of the Child. This Article requires States to “encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being” in light of parental responsibility and the child’s

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186. Press Release, Fed. Trade Comm’n, Undercover Shop Finds Decrease in Sales of M-Rated Video Games to Children (March 30, 2006), *available at* <http://www.ftc.gov/opa/2006/03/videogameshop.htm> (although a high percentage of under-aged shoppers are still able to purchase “M” rated games, the percentage has dropped steadily since 2000, when 85 percent of shoppers reported that they were able to purchase such games. The percentage of retailers providing information regarding the ESRB rating system, as well as the percentage of cashiers or clerks asking the child’s age, have risen since 2000, from 12 percent to 44 percent, and 15 percent to 50 percent, respectively).

187. *Id.*

188. ESRB Frequently Asked Questions, <http://www.esrb.org/ratings/faq.jsp#14> (last visited Oct. 14, 2007).

189. *Id.*

190. *Id.*

191. ESRB Game Ratings & Descriptor Guide, *supra* note 170.

freedom of expression.<sup>192</sup> However, the Committee expressed other concerns regarding child abuse, discriminatory treatment, usage of corporal punishment and existence of widespread bullying at schools, the highly competitive educational system, drug and alcohol abuse, and a high suicide rate.<sup>193</sup> Approximately six years later, the Committee issued another report mentioning that Japan had not adequately addressed the problems of discriminatory treatment of children citing the “excessively competitive nature” of the education system and the prevalence of bullying at schools.<sup>194</sup> Protecting children from harmful material in the media was no longer specified as a point of concern by the Committee.<sup>195</sup>

Is the focus on violence in video games diverting politicians and the public from addressing the true causative factors contributing to children “snapping” and committing sudden violent acts?<sup>196</sup> A social phenomenon labeled “hikikomori,” affecting an estimated one million teens and adults,<sup>197</sup> came under the public eye in the 1990s.<sup>198</sup> Hikikomori is a state of social withdrawal that does not stem from a mental illness.<sup>199</sup> Although “hikikomorians,” unable to cope with pressures of the real world, typically withdraw into their living spaces or bedrooms in their family’s homes for prolonged periods of time, they have been linked to serious crimes.<sup>200</sup> They play video games, watch television, or simply

192. U.N. Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Japan*, ¶ 16, U.N. Doc. CRC/C/15/Add.90 (June 5, 1998); Convention on the Rights of the Child, art. 17, G.A. Res. 44/25, Annex, U.N. Doc. A/44/49 (Nov. 20, 1989).

193. U.N. Committee on the Rights of the Child, *supra* note 189, at ¶¶ 19, 21, 22, 24, 26, 35.

194. U.N. Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Japan*, ¶ 6, U.N. Doc. CRC/C/15/Add.231 (Feb. 26, 2004).

195. *Id.*

196. Moshavi, *supra* note 9.

197. Phil Rees, *Japan: The Missing Million*, BBC NEWS WORLD EDITION, Oct. 20, 2002, <http://news.bbc.co.uk/2/hi/programmes/correspondent/2334893.stm>.

198. Tatsushi Ogino, *Managing Categorization and Social Withdrawal in Japan: Rehabilitation Process in a Private Support Group for Hikikomorians*, 13 INT’L J. JAPANESE SOC. 120, 120 (2004).

199. *Id.* at 121.

200. Julian Ryall, *Japan’s Lost Generation of Bedroom Hermits*, SCOT. ON SUNDAY, Aug. 3, 2003, <http://scotlandonsunday.scotsman.com/index.cfm?id=837952003>; see Ogino, *supra* note 198, at 120-22 (Hikikomorians have been unfairly connected to violent behavior in the media; even the government became suspicious and the Ministry of Health, Labor and Welfare established a group that researched the social disorder subsequent to a murder case in 2000. Hikikomorians withdraw from school or employment,

do nothing, and technology and convenience enables them to create and exist in “virtual worlds.”<sup>201</sup> It is unfair, however, to place the brunt of all the blame for this disorder on technology and entertainment, specifically video games, when other factors such as slow growth in the country’s economy, bullying at schools, pressure to perform academically, and soft parenting have allegedly contributed to this behavior.<sup>202</sup> Japan’s leading psychiatrist in the area of hikikomori, Dr. Tamaki Saito, has pointed to the co-dependent relationship between mothers and sons as a relevant factor in the facilitation of this behavior, which mainly affects males.<sup>203</sup>

Identifying and banning the sale of specific violent video games will not, in and of itself, alleviate the problem of violence amongst younger-aged children. As the United Nations observed, the stressful competition created by the nation’s educational system, the problem of bullying on school grounds, and the discriminatory treatment of certain classes of children, including children with disabilities, children of migrant workers, and Amerasian, Korean, and Ainu children, are issues that need to be addressed by Japan.<sup>204</sup> These issues are indicative of problems deeply embedded in the core of Japan’s everyday culture, which prefectural ordinances that restrict access of “harmful material” to minors will not remedy.

Article 18 of the Convention on the Rights of the Child emphasizes that parents have the primary responsibility in raising their children.<sup>205</sup> Commissioned by the Ministry of Education, Professor Yoshinao Hirano at Shinshu University concluded that there was a lack of moral instruction and discipline by parents, especially in comparison to the upbringing of children in Korea, Britain, Germany, and the United States.<sup>206</sup> Perhaps parents in Kanagawa, Saitama, and Osaka benefit from local ordinances, which identify material that they would not want their children to access. Indeed, constitutional tradition allows such a practice in Japan. But, the hazard of pushing such laws is that it distracts lawmakers and the public from the substantive issues that underlie

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and according to research, 18% of a group of over 14,000 cases reported to have committed violence against their parents).

201. Tim Larimer, *Staying In and Tuning Out*, TIMEASIA.COM, Aug. 21, 2000, <http://www.time.com/time/asia/features/ontheroad/japan.otaku.html>.

202. Maggie Jones, *For Some in Japan, a Room is Their World*, INT’L HERALD TRIB., Jan. 15, 2006, at 1, available at <http://www.ihrt.com/articles/2006/01/13/news/shutins.php>; Rees, *supra* note 197.

203. Rees, *supra* note 197.

204. U.N. Committee on the Rights of the Child, *supra* note 192, ¶¶ 6, 25, 49.

205. Convention on the Rights of the Child, *supra* note 192, art. 18.

206. Moshavi, *supra* note 9.

“motiveless violence”<sup>207</sup> and the recent increases in school violence among younger-aged children.

Besides addressing parental responsibility in raising children, another key and perhaps more important issue is the need to re-evaluate Japan’s educational system and practices. Many students attend cram school from five to nine o’clock in the evening and, for some, private lessons thereafter, before coming home to complete homework and sleeping around 2 a.m.<sup>208</sup> At the schools, teachers closely watch for deviations in dress and conduct amongst the students and administer tests that “objectively” place the children in a hierarchy based on their grades.<sup>209</sup> Although corporal punishment of students by teachers is unlawful, it is a common practice by which teachers will typically single out the weaker or unpopular children.<sup>210</sup> One author characterized the Japanese educational system as “endless labor” and “abuse”,<sup>211</sup> one does not need to reach far to see the basis of this observation. The onerous burdens imposed upon children in their classrooms while they engage in the laborious pursuit of making the grade should be evaluated as one of the major contributing factors for the increase of youth violence in Japan. The restriction of the sale of violent video games and similar materials to these children should not be erroneously understood as a potential cure-all for this epidemic when graver root causes exist.

## VII. CONCLUSION

Although ESRB may have increased its self-vigilance in response to legislative threats of enforcement, Japan’s CERO should follow its American predecessor’s footsteps by collaborating with local governments, retailers and the public in the education and enforcement of the rating system. Local legislatures should initiate dialogue with the organization

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207. Murphy, *supra* note 5.

208. Norma Field, *The Child as Laborer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in CHILDREN AND THE POLITICS OF CULTURE 51, 54 (Sharon Stephens ed., 1995) (noting that the children also play video games when they arrive home after a long day of classes).

209. *Id.* at 58-59 (on a five-point system, the teacher is required to award a “5” (highest score) or a “1” (lowest score) to seven percent of the students, a “4” or “2” to 24 percent, and a “3” to 38 percent. The standard-deviation test score, or *hensachi*, determines which junior high, high school or university the student would be able to attend).

210. *Id.* at 59-60.

211. *Id.* at 53, 56.

and create partnerships to educate parents, as exemplified in the United States by the public service campaigns launched by ESRB and the Attorney General's offices in Georgia and Utah.<sup>212</sup> In December 2006, United States Senators Hillary Rodham Clinton and Joe Lieberman partnered with ESRB to release a nationwide television public service announcement to educate parents regarding the rating system.<sup>213</sup> Two major retailers also appeared in the announcements, asserting their policy not to sell M-rated games to unaccompanied minors less than 17 years of age.<sup>214</sup> An ongoing cooperation with the game industry may be more effective than piecemeal censorship in addressing the violent content in games, even if "public welfare" plays in favor of local governments infringing upon the freedom of expression.

In January 2007, Rockstar Games announced that it had partnered with Capcom Co. to release *Grand Theft Auto: San Andreas* in the Japanese market.<sup>215</sup> Japan-based Capcom Co. was also responsible for previously distributing the controversial *Grand Theft Auto III* in September 2003.<sup>216</sup> GTAIII received a "harmful" product label and retailers located within the prefectures that banned the sale of the game to minors were required to display the game separately from the others.<sup>217</sup> This was the first time the sale of a product had been restricted due to its violent content; in the past, sexually explicit content, as opposed to violence, was the determinating factor in limiting the access of certain materials.<sup>218</sup> Previous restrictions on the sale of GTAIII influenced the recent release of *San Andreas*, as evidenced by the game maker's editing of the game, including preventing the ability to "injure downed civilians," and the "Z" rating (18 years or older) of the game.<sup>219</sup> Despite the edits and the

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212. Press Release, Office of the Attorney Gen., State of Geor., Geor. Attorney Gen. Thurbert Baker Launches New Public Service Campaign on Video Game Ratings (Aug. 15, 2006), available at [http://www.esrb.org/about/news/download/ga\\_psa\\_campaign.pdf](http://www.esrb.org/about/news/download/ga_psa_campaign.pdf); Press Release, Utah Attorney Gen. Mark Shurtleff, Should I Play or Should I Go? (June 26, 2006), available at <http://attorneygeneral.utah.gov/PrRel/prjune262006.htm>.

213. Press Release, Entm't. Software Rating Bd., Sen. Hillary Rodham Clinton & Joe Lieberman Join ESRB to Launch Nationwide Video Game Ratings TV PSA Campaign (Dec. 7, 2006), available at <http://www.esrb.org/about/news/12072006.jsp>.

214. *Id.*

215. Press Release, Take-Two Interactive Software, Inc., Rockstar Games Announces P'ship with Capcom Co., Ltd. for the Release of Grand Theft Auto: San Andreas in Japan (Nov. 14, 2006), available at <http://ir.take2games.com/ReleaseDetail.cfm?ReleaseID=218529>.

216. *Japanese Prefecture to Restrict Sales of "Harmful" U.S. Video Game*, AP ASIA, May 31, 2005, available at 2005 WL 5/31/05 APASIA 11:13:39.

217. *Id.*

218. *Id.*

219. *GTA: San Andreas Tops Japanese Sales Charts*, GAMASUTRA, Feb. 2, 2007, [http://www.gamasutra.com/php-bin/news\\_index.php?story=12634](http://www.gamasutra.com/php-bin/news_index.php?story=12634).

restrictive rating, the game took the top spot during the week of its release in January 2007 with over 227,000 units sold.<sup>220</sup>

Although local ordinances cannot curb the demand for violent video games, they have apparently been successful in compelling the industry to make modifications to their products. However, game regulation alone will not solve the problem of youth violence in Japan. As with any societal change, there is no single quick fix. Politicians need to reevaluate the Japanese educational structure and how that affects student behavior. In addition, parents are the key to educating children that there is a proper way to settle disagreements and directing the younger generation towards constructive outlets to address the frustration and fears that they experience in their daily lives. Local communities and governments can provide such outlets through community outreach and programs. Regulating “harmful materials” may have relatively little or no effect in influencing child behavior; rather, educators and parents have the ultimate responsibility in molding the next generation.

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220. *Id.* *Dragon Quest Monsters* was the second-most selling game, selling approximately 103,000 units, less than half of the *Grand Theft Auto: San Andreas* units sold.

