

What Me Worry?

A Non-Player's Non-Lament

by

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There is a serious question as to why I am included as a member of this panel at all. It is quite clear that I am not a part of the game culture, except for game theory to deal with complex social phenomena, which just doesn't cut it at all. I do not design games, play games, or even like games. But all that said, it turns out that there is something of a more global perspective that I hope that I can contribute to the overall discussion. At this point, the charge to the panel is one that does bear on the larger questions with which I have worked over my professional life. The interaction between harm and innovation, which is surely raised in the game context, and the relationship between video games and monopoly—in culture no less—is also something to which I can give a passing acquaintanceship. Indeed what is so clear from reading the particular papers for the panel is that we do have a situation in which the larger debates over social regulation are deeply implicated in this area, and let me mention just two of them, and then to indicate how I would resolve these questions.

The first question hints darkly about the creation of a monopoly in culture. To someone who is raised in the antitrust tradition, this description seems to be more ominous than real. The question of monopoly requires that one have a clear definition of the relevant product over which the monopoly (or, I will add, cartel) can be imposed. Yet it is very hard to think of what would be the scope of the monopoly in this context with its whirling activity. One obvious candidate is that games clearly involve a composite of intellectual property forms, each of which in its own way seeks to give a monopoly to its creator. It would take greater knowledge than I possess to know the precise mix of patent protection (for the inventions that fuel the games), copyright for the text of the game itself, and the pictures and characters, and of course the law of trade names and trade marks by which these games are promoted.

Alas, in this context it is little more than a play on words to say that these are monopolies to fear. The question of the legal monopoly over a given game is quite different from the question of an economic monopoly over a given market. In ordinary real estate markets, each landowner has a monopoly over the plot of land that is distinctly his; yet houses sell at competitive prices, more or less, because of the number of close substitutes that are available to them, which constrain the price that any given owner can charge for what he owns. There are certain forms of intellectual property protection that can become broad enough to create an economic monopoly, but the sheer profusion of games that work variations on themes of sex and violence suggests that the monopolies here are of relatively narrow scope and are capable of quick erosion by imitation that comes close to, but does not cross the intellectual property divide. And if this analysis is wrong because it underestimates the number of real economic monopolies, then the appropriate response comes from the antitrust laws, which have long been adapted to this purpose, and need no special tinkering to deal with this market. My guess is that there have been few if any prosecutions in this area because the rate of innovation and turnover is inconsistent with the monopoly image altogether. Unless cultural monopolies operate in mysterious ways, the industry is cleared of this charge.

In an odd sense the real concern that many people harbor about video games is not cultural monopoly but cultural degradation. Ironically, the real complaint that one sees about video games is not that the sellers get

together to raise prices or to restrict output, but precisely the opposite. Video games offer powerful symbols and strong images. Many people take offense at them and would exclude them on that ground alone. They believe that these images are so strong but distasteful that they drive out from consideration those games or activities, e.g. chess and theater, that make more subtle appeals to the intellect and to aesthetic sensibilities. Here the argument is that the industry itself is so powerful in its presentation that it creates a negative cultural externality that sweeps away rival forms of art, which can be defined and understood as higher form of culture. In one sense, the champions of high-culture almost wish that there were cartel-like restrictions on these games because a reduction in their pervasive flow would allow these more fragile styles of art to flourish.

It is very hard to know exactly what to make of these kinds of claims. The most obvious point is that video games have their place in the pantheon of leisure activities, but they do not dominate these other types of activities to the point of exclusion. We still see students participate in theater, learn the violin, participate in marches against violence and the like. In the olden days of my youth we were always cautioned against watching cartoons because of the rapid rate at which animals and human beings seem to be killed off or suffer harmful consequences. But we survived, and the evidence is that the current generation of children will survive as well, so long as they are instructed by their parents that there is a difference between games and life—assuming that they cannot figure all this out by themselves. I see little evidence in the behavior of my children and their friends that they have been brought low by the scourge of video games, which is not to say that they have resisted their charms altogether. More than once I have begged or demanded that they cut off the power and return to saner pursuits. But family disputes are not resolved by the same rules that govern public policy. Since none of us are sure as to what the ideal mix is between high and low culture, it seems to me that these attacks on games should be understood largely in their moral dimension, as a form of cultural criticism in which all can participate if they so choose. But by the same token, I think that it is a mistake to act as though these moral qualms should be translated into legal compulsion about those activities that should be banned or regulated and those which should be allowed to go forward.

At this point it becomes necessary to stress several points. First, it seems clear that many of these games fail of their own accord, and do not need government assistance in that direction. Also, the rise of some outlets for video games is often correlated with the closing down of others. The evident decline in the number of arcades (for the most prosaic of business reasons, it appears) documented by Seth Killian with a certain level of malicious glee makes the point. It is easy to lament the bad stuff that is coming on the market; but easy to overlook the bad stuff that it has displaced. The overall situation is much more complicated to track than is any particular segment of it.

Yet, even if we focus our laser eyes on the home video game, regulation requires more than abstract condemnation of unsavory practices. It requires saying which things can be done and which ones are banned. It is hard to think of any wholesale ban against all video games from Pac Man to Mortal Kombat (the only two games that I know by name). But it is an open invitation to bloated bureaucracy to try to draw administrable lines between them. And should that effort be tried, then we shall create a cottage industry of firms that seek to market legally by coming close to the line, and a second industry of folks that will go underground for distribution to escape regulation. It is not a pretty sight, and before we are worried about the overall structure of culture from the advent of video games, we should reflect long and hard about the message that it sends to citizens young and old that we have no confidence in their ability to choose their leisure activities.

But are there more concrete concerns that could justify the ban? Here the one argument goes to the elusive suggestion that video games cause violence by showing us that life is cheap and easily debased. But once again,

there are other sources of inspiration for violent conduct that escape regulation—e.g. horror movies and books, and an alternative strategy for dealing with the problem. The law may not punish the incitement to violence if done in this diffuse and aggregate fashion, but it can punish the violator of rights who uses force against others, and it can systematically deny him any defense based on the ground that he was coerced into doing what he did by the excessive playing of video games. At this point we have little reason to go after the remote causes of harm, but choose to channel our efforts into dealing with sources of harm that really do matter. We avoid chasing after root causes by lopping off the offending branches. The strategy does well by reducing the costs and discretion of public enforcement, and by expanding the scope of freedom. And it is hard to believe that a larger dragnet that pursues endless individuals is better than a focused charge on the violence that we all deplore.

So here is the substantive bottom line: the two major justifications for serious regulation are the control of monopoly and the control of (the threat of) violence. We can do both without regulating video games, and should therefore stay our hand even if we take offense at what these games do and the values we inculcate. We should also beware that the folks who like these games the least often know the least about them, and thus should bring diffidence to their judgments on regulation. Note too that I have not said a word about the First Amendment as a grounds for protecting video games from regulation. But there really is no reason to go down that path. The First Amendment gains its intellectual coherence because it tracks a sound normative theory of law in sorting out permissible from impermissible speech regulation. To give an instant distillation of the cases, speech is presumptively allowed unless it is shown that the speakers seek to create monopoly or promote violence. Well we have examined both those issues here, and have reached the conclusion that no justification for regulation is at present made out on either of these heads. To be sure, one could ask about abstract ground to regulate in the name of public morals, or invoke some argument that children are a special class in need of regulation. But these are no better than the arguments mentioned before. The presumption of liberty is not that important when the topic at issue is the protection of our comfortable presuppositions. It is far more important with respect to activities that we don't like and wish would go away. But that is one of the advantages of taking a libertarian stance on life: you learn to defend activities that you don't like.