NOTES

Some Thoughts for Animal Lovers (and First Amendment Afficionados) in the Wake of United States v. Stevens

Wild animals never kill for sport. Man is the only one to whom the torture and death of his fellow-creatures is amusing in itself.

—James Anthony Froude

INTRODUCTION

A scantily clad woman whose face is left out of the frame enters a cold, bare room. In the center of the room fastened to the floor is a puppy who watches the woman approach. Wearing high-heeled shoes, she walks up to the animal. The woman talks seductively to the puppy at first, but then abruptly thrusts the heel of her shoe into its eye socket, followed by thrusts into its throat and abdomen. The puppy lets out excruciating cries until a final fatal wound is inflicted. However, the woman proceeds to stomp on the corpse until all that is left is “a moist pile of blood-soaked hair and bone.”

Cages line the perimeter of a building, the center of which contains the arena in which the cages’ inhabitants will be forced to literally rip each other to shreds. Before entering the ring, two dogs are fed hot pepper and gunpowder, poked with sharp objects, and administered electric shocks. During the fight, the two dogs rip each other’s ears off, tear at each other’s flesh, and break each other’s bones until only one is left standing. The winner is dragged out of the ring, while the loser remains the center of attention. The dog is hung in the center of the ring, drenched with lighter fluid, and burned alive—it is punishment for not obliterating its opponent and losing its owner money and prestige. Should authorities apprehend

1. The Yale Book of Quotations 295 (Fred R. Shapiro ed., 2006) (quoting James A. Froude, Oceana 77 (1887)).
those responsible for this brutality, the remaining dogs and their offspring will be put down by the state.3

In April of 2010, the Supreme Court decided the case United States v. Stevens, holding that a law, which purported to criminalize the distribution of all depictions of animal cruelty, was overbroad4 and thus in violation of the freedom of speech.5 The case delved into the underworld of animal cruelty, leaving those concerned with the proliferation of acts of violence towards animals to chew on the divide between not only speech and action but also between legitimate and illegitimate uses of animals in society today.6 The case has been lauded by some scholars as an example of the current Court’s dedication and resolve to uphold the First Amendment’s guarantee of free speech and expression at all costs.7 Others, however, view the majority’s holding as an absurd misapplication of the Court’s First Amendment doctrines and a step backwards in the development of animal rights law.8

The Stevens opinion focuses on the application of 18 U.S.C. § 48 (“old Section 48”) in three major contexts: the dog fighting industry, the crush video industry, and hunting and farming.9 The Stevens Court struck down old Section 48 as inconsistent “with the freedom of speech guaranteed by the First Amendment” for two main reasons.10 First, the Court found that old Section 48 was unconstitutional and violated First Amendment principles because depictions of animal cruelty had not historically been

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4. Meaning that it had the potential of chilling permissible along with impermissible speech.
5. Stevens, 130 S. Ct. at 1592.
6. Id.
9. Stevens, 130 S. Ct. at 1583, 1594 (“[T]he Court declines to decide whether . . . § 48 is constitutional as applied to two broad categories of depictions that exist in the real world: crush videos and depictions of deadly animal fights . . . . The Court concludes that § 48 reaches too much protected speech to survive. The Court relies primarily on depictions of hunters killing or wounding game and depictions of animals being slaughtered for food.”).
10. Id. at 1582.
considered a category of speech falling outside of First Amendment protection.\textsuperscript{11} Second, the Court held that the speech did not survive heightened First Amendment scrutiny, finding specifically that the law was over-inclusive and therefore in violation of the substantial overbreadth doctrine.\textsuperscript{12}

This Note will examine the reasons why old Section 48 was struck down and will examine whether the new Section 48, which was redrafted by Congress to specifically ban the production and distribution of crush videos, might survive First Amendment scrutiny in the future.\textsuperscript{13} This Note will also examine statutory language that purports to criminalize the use and distribution of dog fighting videos,\textsuperscript{14} the industry that was at issue in \textit{Stevens} but that skirted prosecution by launching a facial attack of old Section 48.\textsuperscript{15}

Specifically, this Note will explain why a content-based restriction on speech\textsuperscript{16} now must fall into one of the categories of First Amendment exceptions and also be narrowly tailored to a compelling interest to survive a facial challenge. This, I propose, constitutes a shift in the Court’s free speech jurisprudence, alluded to and predicted by Justice Kennedy more than twenty years ago in his \textit{Simon \\& Schuster} concurrence.\textsuperscript{17} One such historical category that will be explored is the speech integral to criminal conduct exception,\textsuperscript{18} which may help to protect such laws from being overturned on free speech grounds in the future. This Note will further examine the differences between content-based restrictions on real-life depictions of animal cruelty\textsuperscript{19} and restrictions on certain forms of entertainment that have similarly been struck down by the Court throughout the years.\textsuperscript{20}

This Note will thus first examine the importance of the freedom of speech and consider our relationship with animals, and dogs in particular, given that those were the animals sought to be protected in \textit{Stevens}. Second, it will discuss the \textit{Stevens} opinion and the Roberts Court’s strong

\begin{itemize}
  \item \textsuperscript{11} \textit{Id.} at 1586.
  \item \textsuperscript{12} \textit{Id.} at 1592.
  \item \textsuperscript{13} 18 U.S.C. § 48 (2006).
  \item \textsuperscript{14} 7 U.S.C. § 2156 (2006).
  \item \textsuperscript{15} \textit{Stevens}, 130 S. Ct. at 1583.
  \item \textsuperscript{16} This is a restriction based on what is being said and should be distinguished from time, place, and manner restrictions, which often are in the form of zoning and other local ordinances.
  \item \textsuperscript{18} Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).
  \item \textsuperscript{19} \textit{See, e.g.}, 18 U.S.C. § 48; 7 U.S.C. § 2156.
  \item \textsuperscript{20} \textit{See, e.g.}, Brown v. Entm’t Merch. Ass’n, 131 S. Ct. 2729 (2011); \textit{Simon \\& Schuster, Inc.}, 502 U.S. 105.
\end{itemize}
treatment of the freedom of speech as of late. Third, it will turn to consider and describe two of the historical categories at issue in Stevens, obscenity and speech integral to criminal conduct, and give three reasons why prohibitions on dog fighting and crush videos can easily fall within the latter. Fourth, it will delve into strict scrutiny analysis and explain how a law combating such videos can be narrowly tailored to serve a compelling governmental interest. Lastly, it will look ahead and examine the current language of Section 48 and 7 U.S.C. § 2156, and implore the Court to recognize such laws of man as constitutional in the future.

A. The Freedom of Speech

The First Amendment is, arguably, the most formidable and important amendment contained within the Bill of Rights. It states in pertinent part that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”\(^\text{21}\) The freedom of speech is one of the most stringently guarded rights contained within the Bill of Rights because it is considered “essential to the democratic process.”\(^\text{22}\) It is also vigorously guarded because having a smattering of different and opposing views in circulation is the best way to uncover truth.\(^\text{23}\)

While it is, perhaps, the most notorious of the amendments, it is also the one whose origins, original scope, and intent remain fuzzy at best.\(^\text{24}\) “The First Amendment is a distillation of proposals that James Madison submitted to Congress after consulting state constitutions and requests from

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23. James Weinstein, The Story of Masses Publishing Co. v. Patten: Judge Learned Hand, First Amendment Prophet, in First Amendment Stories 61, 90 (Richard W. Garnett & Andrew Koppelman eds., 2012) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) (noting that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.” (internal citation omitted)).
24. Geoffrey R. Stone, The Story of the Sedition Act of 1798: “The Reign of Witches,” in First Amendment Stories 13, 23 (quoting Benjamin Franklin, An Account of the Supreme Court of Judicature in Pennsylvania, The Court of the Press (Sept. 12, 1789), in 10 The Writings of Benjamin Franklin 37 (Albert Henry Smyth ed. 1907)) (explaining that the authors of the Amendment did not have a clear idea regarding the scope of the language of the amendment, but rather saw it as “an aspiration, to be given meaning over time”).
the state ratifying conventions." The language originally proposed by Madison was as follows:

"[T]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable" . . . "the people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances." Though the language of the First Amendment departs from Madison's proposal, his words arguably reveal the specific activities and forms of speech that the Founders intended to protect.

The important role that speech plays as the very lifeblood upon which our Constitution and the plan of government it set in motion rests, makes the area of law different than other areas of constitutional law, often trumping or giving exception to other constitutional provisions. It is also the reason behind the unusual exceptions prevalent in free speech jurisprudence, one of the most formidable being the ability of a person to launch a facial attack of a statute without satisfying the usual standing requirements. Additionally, it is unique in that the power and implications of the freedom of speech developed in a gradual crescendo, with more and more emphasis being placed on this freedom than on other

25. VILE, supra note 22, at 132.
26. Id. at 132–33 (citing Bill of Rights, No. 11, in 5 THE FOUNDERS' CONSTITUTION 25 (Philip B. Kurland & Ralph Lerner eds., 1987)) (emphasis added).
27. Although regarding the free exercise clause, the Court in Smith distinguished speech from action, stating:

[b]ut the “exercise of religion” often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. . . . “Laws,” we said, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”

28. Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 955–56 (1984) (explaining how it is easier to have standing when one is claiming a violation of the freedom of speech); see, e.g., Wooley v. Maynard, 430 U.S. 705, 712–13 (1977) (giving exception to Younger standing where there was a strong likelihood of further prosecution that involved the plaintiffs' freedom of speech).
constitutional guarantees. Typically, these other guarantees have followed more of a rollercoaster, with the power and implications of the language of the Constitution rising and falling with the substantive regime changes of the Court. In this way, the freedom of speech has also extended beyond the original intentions of the Founders that all should be free “to speak, to write, or to publish their sentiments.” Instead, it is now being used as a shield by the vilest members of society so that they might continue not only to promulgate, but to benefit from, their feeding on the basest desires of men simply because a medium has been labeled “speech.”

B. Our Relationship with Animals

New studies show that the relationship between dogs and humans was born out of an innate need for survival and companionship. These archaeological findings show that man’s early relationships with dogs might be best described as a mutually beneficial teaming-up. Early dogs were used by humans and accompanied them as they hunted for food, guarded camp, and herded their flocks. Although modern minds might characterize the relationship and particular task of hunting as violent, perhaps the more accurate characterization of the relationship would be a concerted and instinctive fight for survival. Arguably, this is the characterization that the current Court would attach to the relationship shared by animals and humans throughout history. The most recent developments in this relationship demonstrate it is even more beneficial to

30. Weinstein, supra note 23, at 61 (explaining that the “right slowly emerged through a long and arduous struggle, and only in relatively recent times could Americans safely exercise what we today take for granted as a core First Amendment right[,]” namely “[t]he right of American citizens to vehemently criticize their government”). This has, however, been the subject of much debate among scholars arguing that the potency of the right fluctuates in different contexts.


32. VILE, supra note 22, at 132–33 (citing Bill of Rights, No. 11, supra note 26).


34. Although animal cruelty is not limited to “man’s best friend,” given that Stevens was about dog fighting and because dogs are perhaps the most familiar domestic pet, the discussion here is so limited.


36. Id.

37. Id.

38. Id.

the human race than ever. Consequently, these animals deserve more protection than currently afforded them under the law.

In his *Stevens* opinion, Chief Justice Roberts was concerned with the potential application of old Section 48 to today’s legitimate hunting and farming practices, practices in effect long before the bond between man and dog was formed. The *Stevens* opinion, therefore, acknowledged the societal, historical, and practical value of such practices and, in light of this history, chose to stymie any possibility that old Section 48 would have an effect on the speech associated with such practices. The Chief Justice’s overbreadth analysis of old Section 48, in regard to these practices, led him and a majority of the Court to strike down the law as overbroad without reaching the question of whether a sufficiently narrowly tailored statute specifically targeting dog fight or crush videos would violate the First Amendment.

If one thing is clear, however, it is that those who are involved in and perpetuate the dogfight and crush video industries have turned the mutually beneficial relationship between animals and humans on its head. They have taken dogs’ natural ability to kill, hunt, guard, and scavenge and used it against them. In dog fighting, the killing, fighting, and torture is senseless and unnecessary, exploiting dogs’ usual proclivity to survive and please their human companions at all costs. Similarly, crush videos thwart the mutually beneficial relationship often shared between humans and animals. Instead they advocate senseless and purposeless killing of innocent animals to satiate the morbid sexual desires of the mentally disturbed.

**C. The Roberts Court’s Treatment of Free Speech**

*Stevens* has been described as one of the “most doctrinally significant constitutional opinions of the Supreme Court’s October 2009 Term.” Through it the Roberts Court has communicated and reiterated that the government bears a stringently high burden when asked to defend pieces of legislation aimed at deterring and criminalizing certain forms of speech.

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40. Dogs are now being used to care for and treat both physical and mental ailments, in addition to their better-known roles in law enforcement and rescue operations. Sharon L. Peters, *Good Dog!, USA WEEKEND* (Mar. 8, 2012), http://www.usaweekend.com/article/20120309/HOME05/303090016/Good-dog-.

41. *Stevens*, 130 S. Ct. at 1588–89 (discussing hunting and farming videos and magazines).

42. *Id.* at 1589–90.

43. *Id.* at 1592.


45. *Stevens*, 130 S. Ct. at 1584.
Put succinctly, it has been said that the case’s “significant holdings include employing a ‘longstanding traditions’ approach for determining whether a category of speech is excluded from First Amendment protection and providing additional guidance on the First Amendment overbreadth doctrine.” To take this one step further, the analysis also seems to contemplate a greater relationship between these two prongs of free speech analysis, namely the historical categories and strict scrutiny. The Supreme Court now seems to consider them as directly affecting one another. The historical categories are now not simply a hurdle that must be cleared; they have become just one of three elements that must be weighed and satisfied in a free speech analysis.

Stevens itself involved a prosecution for a dog fighting venture brought under old Section 48. The defendant ran a dog fighting enterprise, in which he sold certain dog fight propaganda, including videotapes of fights, training videos, and other recordings of his and others’ pit bulls in action. Although a direct application of old Section 48 to the defendant’s particular situation might not have created a Constitutional issue, the defendant challenged old Section 48 on its face. He argued that the law was overbroad and thus unconstitutional because it might criminalize or deter legitimate or socially acceptable speech concerning the killing of animals. Because of this facial attack, the case discusses and gives almost equal treatment to the topics of dog fighting, crush videos, and farming and hunting practices.

The Court’s analysis of the potential impact old Section 48 might have had on the legal, or if not legal the humane or socially acceptable, killing or wounding of animals by hunters and farmers led the Court to its conclusion that depictions of animal cruelty generally do not warrant the creation or, perhaps more accurately, the recognition of a new class of unprotected speech. This unwillingness of the current Court to accept new categories

46. Rhodes, supra note 44, at *1.
47. See, e.g., Stevens, 130 S. Ct. at 1588 (holding that the phrase “wounded or killed” in old Section 48 reached depictions of lawful treatment of animals); see also Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241–44, 256 (2002) (where the Court found that a ban on virtual child pornography was not narrowly tailored to a compelling government interest, did not fall into one of the historical categories, and was therefore unconstitutional).
48. Stevens, 130 S. Ct. at 1583.
49. Id.
50. Id. at 1592 (declining to “decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional”).
51. Id. (finding “[i]t is relatively ‘growing’ and ‘lucrative’ the markets for crush videos and dogfighting depictions might be, . . . they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of § 48”) (internal citations omitted).
52. Id.
53. Id.
or shoehorn certain speech into old ones continues to be a sticking point for the Court.\textsuperscript{54}

For example, a recent case in which the Court applied \textit{Stevens} is \textit{Brown v. Entertainment Merchants Association}.\textsuperscript{55} In \textit{Brown}, the Court was asked to rule on the constitutionality of a California statute which restricted the sale of violent video games to minors.\textsuperscript{56} The content sought to be censored there was described by Justice Alito in his concurrence as follows:

In some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.

It also appears that there is no antisocial theme too base for some in the video-game industry to exploit. There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in ‘ethnic cleansing’ and can choose to gun down African–Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.\textsuperscript{57}

As in \textit{Stevens}, the \textit{Brown} Court refused to “shoehorn speech about violence into obscenity.”\textsuperscript{58} The Court also refused “to create a wholly new category of content-based regulation that is permissible only for speech directed at children.”\textsuperscript{59} Again, the Court emphasized that new categories of unprotected speech will not be created simply because “certain speech is too harmful to be tolerated.”\textsuperscript{60} Relying instead on the rule from \textit{Stevens} that “without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature

\textsuperscript{55} \textit{Brown}, 131 S. Ct. at 2734.
\textsuperscript{56} \textit{Id.} at 2732.
\textsuperscript{57} \textit{Id.} at 2749–50 (internal citations omitted).
\textsuperscript{58} \textit{Id.} at 2734–35.
\textsuperscript{59} \textit{Id.} at 2735 (finding that children have not historically been shielded from exposure to violent video speech or entertainment).
\textsuperscript{60} \textit{Id.} at 2734.
may not revise the ‘judgment of the American people,’ embodied in the First Amendment, ‘that the benefits of its restrictions on the Government outweigh the costs.’”61

Thus, Stevens and its progeny suggest that the decades-old words of Justice Kennedy, concurring in Simon & Schuster, have indeed come true. There Kennedy surmised:

[T]he use of these traditional legal categories is preferable to the sort of ad hoc balancing that the Court henceforth must perform in every case if the analysis here used becomes our standard test.

As a practical matter, perhaps we will interpret the compelling interest test in cases involving content regulation so that the results become parallel to the historic categories . . . . When we leave open the possibility that various sorts of content regulations are appropriate, we discount the value of our precedents and invite experiments that in fact present clear violations of the First Amendment . . . .

Given the holdings in Stevens and Brown, Justice Kennedy’s premonition seems to have come to pass. Kennedy’s words provide a way by which to further analyze the approach the Court is now taking towards content-based restrictions. His words also provide a tool to reconcile the Court’s treatment of unprotected categories of speech and speech that warrants the highest level of review.

Because the Court continues to pay lip service to the two-tiered approach traditionally applied when dealing with content-based restrictions,64 in practice it appears as though the categorical approach is now thought of in concert with strict scrutiny analysis. They now appear to be thought of more fluidly—the determination of one now affects the treatment of them all. It thus seems to be the case that had the Court not found Section 48 to reach legal depictions of animal killings, the Court might not have required a new category of speech for animal cruelty, and instead may have found that Section 48 fell within one of the previously delineated categories.

I. CATEGORIES OF UNPROTECTED SPEECH

Stevens’ first holding is that depictions of animal cruelty, generally, do not comprise a class of categorically unprotected speech, the content of which may be prevented and punished without violating the Constitution.65

61. Id. (quoting United States v. Stevens, 130 S. Ct. 1577, 1585 (2010)).
63. Categories, then strict scrutiny.
64. See, e.g., Stevens, 130 S. Ct. 1577; Brown, 131 S. Ct. 2729.
65. Stevens, 130 S. Ct. at 1584.
The Court has identified these unprotected categories to include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. In listing these classes, the Court made sure to punctuate the fact that this list has arisen out of history and tradition. The Court suggests and rationalizes, therefore, that this group has withstood the test of time. Consequently, the Court is not particularly receptive to the idea of new members, although it has noted that there may be more of these historical categories that simply have not yet been brought to its attention.

In fact, in regard to the recognition of new categories, the Stevens Court expressly rejected the idea that membership in an unprotected class of speech is simply dependent upon a “‘balancing of the value [or worth] of the speech versus its societal costs,’” once again harkening back to Kennedy’s assessment that “the use of . . . traditional legal categories is preferable to . . . ad hoc balancing.” Instead, the Stevens Court explained that “[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.” Further, the Court explained that the test balancing the costs and benefits of speech, which had been recited in prior cases establishing or dealing with the unprotected categories, was not a legal rule, but only a description of the type of speech which generally falls outside of the realm of the highest level of First Amendment protection. In fact, the Court reiterated throughout its discussion of unprotected categories that the fact that certain speech has little to no redeeming value will not cause a restriction of it to fall outside of strict scrutiny review.

Consequently, the Court in Stevens concluded that it would not create a new category of unprotected speech just to accommodate the purported

72. Id.
73. Id. Perhaps, speech implicating national security might be one, or may simply fall under one of the already recognized exceptions. In fact, this restrictive approach may be contrary to the intent of the originators of the First Amendment. They purposely chose to create broad language so that a reasoned and flexible approach might be taken. Stone, supra note 24, at 23.
74. Stevens, 130 S. Ct. at 1585 (internal citations omitted).
76. Stevens, 130 S. Ct. at 1585.
77. Id. at 1586.
78. Id. at 1585.
scope of old Section 48, which it thought would have required the Court to make a general exception for all depictions of animal cruelty, as well as for all illegal acts towards animals not considered cruel. 79  The Court in Stevens did, however, leave open the possibility that a more narrowly tailored and specific statute targeting real depictions of animal cruelty might fit into an already existing category of unprotected speech. 80  As mentioned above in regard to Kennedy’s discussion, this suggests that instead of the traditional two-step approach, the Court now sees those steps on a level playing field to be judged together. If a law is too broad or not narrowly tailored enough, the Court appears to think that necessitates its own categorical exception. 81  If the law is considered narrowly tailored to a compelling state interest, however, it is likely to fall within one of the historically recognized exceptions. 82

A. Obscenity

As of late, the Court has grown weary of attempts to shoehorn violent speech into the obscenity category. 83  However, given the unique sexual nature of crush videos, 84  they may still be in the running to fall under the exception. This chance remains slim, as the Court has held “that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct.’” 85  The Court established the obscenity exception in Roth v. United States, where it held that “obscenity is not within the area of constitutionally protected speech or press.” 86  Since Roth, the Court has significantly tightened its definition of the type of speech that may fall within the exception, “confin[ing] the permissible scope of such regulation to works which depict or describe sexual conduct.” 87  The test now used to identify obscenity is

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable

79. Id. at 1586.
80. Id. at 1592.
81. Id. at 1586.
84. See supra INTRODUCTION (describing a crush video performance).
86. Roth, 354 U.S. at 484–85.
87. Miller, 413 U.S. at 24.
state law; and (c) whether the work, taken as a whole, lacks serious
literary, artistic, political, or scientific value.\textsuperscript{88}
This unwieldy rule, however, leaves much to be desired, and as society
continues to evolve in this area, the exception has lost steam\textsuperscript{89}—except in
the area of child pornography.
For example, in \textit{New York v. Ferber}, the Court was asked to rule on
“the constitutionality of a New York criminal statute which prohibit[ed]
persons from knowingly promoting sexual performances by children under
the age of 16 by distributing material which depicts such performances.”\textsuperscript{90}
The statute at issue in \textit{Ferber} did not require that the material in question
be legally obscene, although those advocating that the statute be upheld
attempted to shoehorn the topic into the category, a feat also attempted by
the advocates of old Section 48.\textsuperscript{91}
In an attempt to better define the category, the \textit{Ferber} Court noted that
the obscenity category was born not out of a need to ban the material
entirely, but instead to simply protect and curtail the distribution of
material to unwilling recipients and minors.\textsuperscript{92} The Court’s discussion of
the reasoning behind the obscenity exception, therefore, distinguishes child
porn from obscenity because, in regards to child porn, it is the
government’s goal not to simply protect unwilling recipients and juveniles
from viewing the material, but to eradicate the industry completely.\textsuperscript{93} The
\textit{Ferber} Court also noted that the best and perhaps only way to do this is by
outlawing the making and promotion of the material.\textsuperscript{94} The Court,
therefore, chose not to anchor speech regarding child porn in the obscenity
exception,\textsuperscript{95} although it may accurately be thought of as a subset of the
category. Instead, the Court chose to carve out a new exception for child
porn, essentially finding that any effort aimed at curtailing the physical and
emotional abuse of the nation’s youth carries with it the historical stamp of
approval.\textsuperscript{96} The Court now seems convinced analyses of historical
traditions are essential to its free speech jurisprudence.\textsuperscript{97}

\textsuperscript{88.} \textit{Id.} (emphasis added) (citing \textit{Kois v. Wisconsin}, 408 U.S. 229, 230 (1972) (quoting
\textit{Roth}, 354 U.S. at 489)).
\textsuperscript{89.} \textit{See, e.g., United States v. Playboy Entm’t Grp., Inc.}, 529 U.S. 803 (2000).
\textsuperscript{91.} \textit{Id.} at 754–55.
\textsuperscript{92.} \textit{Id.}
\textsuperscript{93.} \textit{Id.} at 760.
\textsuperscript{94.} \textit{Id.} (noting that “[t]he most expeditious if not the only practical method of law
enforcement may be to dry up the market for this material by imposing severe criminal
penalties on persons selling, advertising, or otherwise promoting the product”).
\textsuperscript{95.} \textit{Id.} at 761.
\textsuperscript{96.} \textit{Id.} at 757–58.
In sum, the difference between the obscenity and child porn exceptions is, perhaps, best explained by reciting the two different questions they require us to ask. For, in regard to obscenity, the question is “whether a work, taken as a whole, appeals to the prurient interest of the average person.” In regard to child porn, it is “whether a child has been physically or psychologically harmed in the production of the work.” Arguably, this second question best explains the legislatures’ goals regarding the crush video and dog fighting industries, and the propaganda they circulate to advance their cause and turn a profit.

In Stevens, however, the Court rejected such a drying up the market rationale as a means by which to shoehorn all depictions of animal cruelty into one of the pre-existing categories, arguably because of the fact that the curtailment of animal cruelty is not considered by the Court to be a compelling governmental interest. However, given that the Court is now seemingly treating its two-step approach—historically unprotected categories and strict scrutiny analysis—more as holistic factors to be weighed together, its reservations in adopting this rationale in Stevens may have had more to do with the fact that legitimate markets may have been dried up, along with the illegitimate ones, had old Section 48 been upheld.

Further, while the Court has rejected the notion that a simple cost-benefit analysis is all that lies between a permissible content-based restriction on speech and the death of a statute, the categories of speech that have fallen outside of the fullest of First Amendment protections may—and perhaps should—be characterized, not by their general benefit or worth to the human race, but by how intimately associated that speech is to criminal conduct. This discussion is best premised by an examination of the speech integral to criminal conduct category.

98. Ferber, 458 U.S. at 761.
99. Id.
100. Id.
101. H.R. REP. NO. 111–549, at 2 (2010) (“Although the Court declared the current statute to be substantially overbroad as written, this bill is narrowly drafted to prohibit only the sale or distribution, in interstate commerce and for commercial advantage or private financial gain, of obscene visual depictions of specific acts of animal cruelty, and only where the depicted act violates a State or Federal law prohibiting intentional cruelty to animals.”).
103. Id. at 1592.
B. Speech Integral to Criminal Conduct

Although Stevens forecloses the argument that depictions of animal cruelty as a whole should be added to the roster of unprotected speech, the majority’s discussion of speech integral to criminal conduct leaves open the possibility that a narrow ban on certain real-life depictions of animal cruelty may survive a First Amendment challenge. The case cited in Stevens as standing for the category of unprotected speech that is speech integral to criminal conduct is Giboney v. Empire Storage & Ice Co.

Giboney dealt with the constitutionality of restraining speech which was considered “an essential and inseparable part of a course of conduct which [was] in violation of the state law.” The speech at issue in Giboney was peaceful picketing by members of the local Ice and Coal Drivers and Handlers Union to persuade wholesalers to agree not to sell their ice to nonunion peddlers. Agreements of this sort were illegal in Missouri at the time and punishable by a fine and imprisonment. Such agreements also opened up participants to liability for civil damages. Given that such agreements were illegal, the target of the picketing brought suit to enjoin the union’s efforts, alleging that the union’s actions were in violation of the state’s anti-trade restraint statute, and that should it comply with the union’s demands, it too would be in violation of the same.

In response to the union’s argument that enjoining its picketing would be in violation of the its right to free speech, both state courts ruled that “the injunction to prevent picketing for such an unlawful purpose did not contravene the [union]’s right of free speech.” The Supreme Court agreed, thereby rejecting the contention “that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” The Court went on to categorize the union members’ picketing as “constitut[ing] a single and integrated course of conduct, which was in violation of Missouri’s valid law” and “the sole immediate object of [which] . . . was to compel Empire to agree to stop selling ice to nonunion

105. Stevens, 130 S. Ct. at 1585–86.
106. Id. at 1592.
108. Id. at 491–92.
109. Id.
110. Id. at 492.
111. Id. at 492–93.
112. Id. at 491, 493.
113. Id. at 494.
114. Id. at 504.
115. Id. at 498.
What is crucial to the characterization of speech integral to criminal conduct, therefore, is that the speech be both a part of “a single and integrated course of conduct,” and have a sole and immediate criminal objective.\footnote{116} In \textit{Giboney}, this included the union’s “powerful transportation combination, their patrolling, their formation of a picket line . . . [and] their publicizing.”\footnote{118}

The \textit{Ferber} Court also looked to this exception as an additional rationale for upholding a ban on the distribution, and later on the mere possession,\footnote{119} of child porn.\footnote{120} Reciting the \textit{Giboney} mantra that the freedom of speech does not “extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute,”\footnote{121} the Court found that the distribution of child porn was “an integral part of the production of such materials, an activity illegal throughout the Nation.”\footnote{122} The majority agreed that this was so because it found that “[t]he advertising and selling of child pornography provide[d] an economic motive for . . . the production of such materials.”\footnote{123} Further, the Court explained that the only reason such laws targeting the distribution of this speech were necessary was because the laws that simply targeted production of the videos were not effective or potent enough to kill the bulk of the abhorrent industry.\footnote{124}

At first glance, it appears as though the same logic would extend to the animal crush and dog fighting industries because the business models uniquely parallel the child porn industry. All three industries are dependent upon an underlying crime being committed and on the successful distribution and marketing of their “products.” According to the reasoning in \textit{Giboney}, this kind of production and distribution chain should be considered “a single and integrated course of conduct,” landing the speech in the speech integral to criminal conduct exception.\footnote{125}

However, the \textit{Stevens} Court appears to have overlooked or entirely discounted this reasoning. Perhaps because the Court was simply distracted with the government’s attempt to shoehorn old Section 48 into the obscenity exception, or perhaps because it was overwhelmed with the statute’s imprecise and overbroad language. The Court’s inaction does,
however, beg the question whether the speech integral to criminal conduct exception is somehow less of an exception than all the rest, or whether it was simply misapplied in the *Ferber* opinion, as the Court became overzealous in its attempt to pile reason upon reason for exempting child pornography from full First Amendment protection.\(^\text{126}\)

As stated, this Note posits that the most logical reason for the *Stevens* Court’s stance is that it viewed the categorical and strict scrutiny analysis as working together, especially given Justice Kennedy’s previous assessment as to the scope and logical development of the Court’s First Amendment jurisprudence.\(^\text{127}\) The Court has not, however, adopted Kennedy’s reasoning entirely. Now, if a law is not narrowly tailored to a compelling government interest, it is unlikely to fit neatly into one of the historical exceptions, and will be struck down. Therefore, a more nuanced and narrow statute separately criminalizing the distribution of animal fight and crush videos is required so that it might fit through the eye of the Court’s ever-shrinking First Amendment needle.

### 1. The Relationship Between Unprotected Categories of Speech and Crime

In regard to historical categories, it seems particularly important to note that whether a form of speech falls within one of the unprotected categories is often dependent upon how closely associated that speech is with criminal activity. For example, the speech integral to criminal conduct category looks for speech so entwined with criminal goals and conduct that one cannot be had without the other.\(^\text{128}\) Likewise, the incitement category requires that the speech be so likely to lead to criminal activity that the temporal and spatial context of the speech is such that the words may be acted upon almost immediately.\(^\text{129}\) Similarly, the defamation exception is an example of speech illegal in and of itself.\(^\text{130}\)

The obscenity exception may also be explained in this way, for at its core it is a legal principle designed to guard the eyes of the innocent and unsuspecting from exposure to the grotesque, much like traditional criminal statutes and ordinances criminalizing indecent exposure or lewd public acts.\(^\text{131}\) In this sense, laws criminalizing the production and distribution of animal crush and fighting videos are perfect candidates to be labeled as falling under the wing of one of these exceptions. The most fitting being

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\(^\text{126}\) *See generally* *Ferber*, 458 U.S. 747.


\(^\text{128}\) *See* *Giboney*, 336 U.S. at 498.

\(^\text{129}\) *See* *Brandenburg* v. Ohio, 395 U.S. 444, 447–49 (1969).


\(^\text{131}\) *See* *Ferber*, 458 U.S. at 760.
speech integral to criminal conduct given that the distribution of these videos is indeed just one part of these illegal enterprises. Just how worthy these restrictions are, however, is perhaps best demonstrated by taking a look at content-based restrictions that did not fit the bill. This is also perhaps best premised by a discussion of speech as entertainment and the unique challenges that technological developments have played in this area of the law.

2. Entertainment and Criminal Enterprise

Crush videos, dog fighting, child porn, violent video games, and obscenity are all forms of entertainment, and there is no question that entertainment is a form of speech generally deserving of full First Amendment protection. In fact, the Court as of late, has often emphasized the difficulty in distinguishing entertainment from other types of speech that might be considered valuable, such as political or artistic speech. In the age of blogging, Twitter, and social media, this judgment seems especially poignant.

With its First Amendment jurisprudence, however, the Court seems to have drawn a line between entertainment, the production of which is dependent upon a crime being committed, and entertainment which is not dependent upon a crime, especially if Ferber’s holding was meant to have any reach at all. The production of child porn, dog fighting, and crush videos all require that an underlying crime be committed to create the footage. However, if one is able to produce the same footage without committing an actual crime, then the production of the image is not dependent upon the commission of a crime, and the distribution and possession of such speech is due full First Amendment protection.

Further, in order to reconcile and distinguish the cases in which the Court has examined and upheld the right of a criminal to recount his criminal acts, it should be noted that simply talking or writing about real or imagined criminal activity is not dependent upon the commission of a crime. For example, the Court held in Simon & Schuster that the First


133. Id. (stating that “[t]he Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. ‘Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine’” (quoting Winters v. New York, 333 U.S. 507, 510 (1948))).

134. Ferber, 458 U.S. at 761 (noting that the central issue with child pornography is “whether a child has been physically or psychologically harmed in the production”).


136. Id.
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Amendment protects a criminal’s right to speak freely about the crimes they have committed, even though they do not have the right to directly profit from their criminal acts.\(^{137}\) And this legal principle may be powerful enough to sustain a criminal conviction for the distribution of animal crush and dog fight videos because these videos go beyond mere speech. Instead, these videos constitute a modern form of contraband no different than the sale of illegal drugs or pirated goods.

In fact, the Court has already recognized this distinction in the context of national security and in regard to the First Amendment bounds of the material support statute. There the Court has drawn a line between independent advocacy and coordinated support.\(^{138}\) There is no reason why a similar line should not also be drawn in respect to the distribution of animal cruelty depictions. Further, although not used as a basis for its decision to uphold the material support statute, the Court hints that the *Giboney* rational may have lent further support for the decision to uphold the material support statute in *Holder v. Humanitarian Law Project*, noting the parallel between “speech coordinated with foreign terrorist organizations to speech effecting a crime, like the words that constitute a conspiracy.”\(^{139}\) There is no reason not to draw the same line in the context of animal cruelty.

This discussion also warrants an explicit recognition of the idea that technological advancement has affected and altered the premises underlying the Court’s traditional, and arguably somewhat outdated, view of the First Amendment. While the Court has been slow, even frozen, in its reaction to this reality, it has not gone wholly unnoticed. For example, in his *Brown* concurrence, Justice Alito, joined by Chief Justice Roberts, disagreed with the majority’s premise that new forms and avenues of speech made possible by technological advancement should be treated no differently than other more traditional forms of speech.\(^{140}\) He warned that “[w]e should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar.”\(^{141}\) Although speaking of the effect of violent video games on children, the discussion is no doubt applicable in the realm of video-recorded criminal acts as entertainment. It also lends support to the argument that crush and


\(^{139}\) *Id.* at 2723 n.5 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 502 (1949)).


\(^{141}\) *Id.*
dog fight videos constitute more than speech, and are in fact 21st Century contraband.

3. Free Exercise Cases

While these cases do not align as perfectly as the above discussions, support for this logical way of thinking about speech may also be derived from the Court’s free exercise jurisprudence. Justice Scalia, in his controversial Employment Division v. Smith opinion, held as much when he decided that religious entities should not be allowed to become laws unto themselves. He thereby distinguished previous cases where strict scrutiny had been applied to protect exercises of religion that violated certain local ordinances, but were not in violation of criminal law. The case is thus persuasive and provides some level of support for the idea that the First Amendment’s protections should not be allowed as a shield in all circumstances by those actively trying to circumvent society’s important and valid criminal laws.

In Smith, for instance, the question before the Court was whether Oregon’s criminalization of the religious use of Peyote violated the Native American practitioners’ First Amendment right to freely exercise their religion. Justice Scalia writing for the majority, held no, prohibiting such conduct—even where it is done as an act of worship or religious expression—does not violate the First Amendment’s guarantee. Scalia’s rationale was eerily reminiscent of the words that constituted Madison’s proposed language for the First Amendment: that one should be free “to speak, to write, or to publish their sentiments.” Scalia explained:

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all “governmental regulation of religious beliefs as such.” The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

But the “exercise of religion” often involves not only belief and profession but the performance of (or abstention from) physical acts . . .

143. Id.
144. Id. at 890.
145. VILE, supra note 22, at 132.
Respondents in the present case, however, seek to carry the meaning of “prohibiting the free exercise [of religion]” one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law . . . . They assert, in other words, that ”prohibiting the free exercise [of religion]” includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning.146

While this discussion was in the context of religion, there is no doubt that: (1) the freedoms protected in the First Amendment are linked at some level; and (2) that the freedom of speech also deserves such a straightforward and rational limit.

So too, when it comes to religion, this Note argues that a line should be drawn between talking about and performing a criminal act in the free speech realm.” However, criminalizing animal cruelty depictions requires another step, and that step is extending such performances to the modern day phenomenon of “recording.” Because recordings are different than speaking or writing about something you believe in or admire, they require the performance of a crime. Crime gave the Court a reason to abrogate some First Amendment protections in relation to speech and religion in Smith. There is no reason why the line should not be drawn similarly in regard to real life depictions of crime.

II. STRICT SCRUTINY

While the Court has generally subscribed to the truism that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,”147 it has been willing to make exceptions necessary to provide for the general welfare. The test as to when an exception will be provided is generally the same in this context as it is in the equal protection realm,148 although it has been criticized as less of a test or simply as inappropriate in the context of free speech.149 The test requires that content-based restrictions be narrowly drawn to serve a compelling governmental interest.150 In other words,

146 Smith, 494 U.S. at 877–78 (emphasis added) (internal citations omitted).
149 See Simon & Schuster, 502 U.S. at 127 (Kennedy, J., concurring).
150 See Loving, 388 U.S. at 11 (citing Korematsu, 323 U.S. at 216).
“[t]he [s]tate must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution.”\textsuperscript{151} The Court’s application of this test demonstrates that the challengers of these restrictions are overwhelmingly favored as victorious in such pursuits. In light of this reality, we are left to ponder exactly what qualifies as a compelling interest, and how a law like old Section 48 may be drafted to meet that interest.

A. Compelling Interests

Ferber provides the best discussion of when a compelling interest is potent enough to survive strict scrutiny. There is no question that the Court views protecting children from physical and mental harm as a compelling state interest of the highest order.\textsuperscript{152} Expounding upon this reasoning, the Court in \textit{Ferber} reiterated that ‘‘[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.’’\textsuperscript{153} As mentioned, the Court’s discussion of the rationales behind child porn and obscenity exceptions is telling in this regard. The Court’s rationale for the former is the broad interest society has in protecting the well-being of its youth.\textsuperscript{154} In regards to the latter, it is society’s interest in guarding the minds of unwilling recipients and minors from being exposed to obscene images.\textsuperscript{155}

Whether \textit{Ferber} is viewed as a unique situation where a law withstood strict scrutiny review, or as a case with which the Court simply carved out a new exception for child pornography, it seems clear that the Court views these interests on a continuum, with the interests in \textit{Ferber}, arguably, standing at the apex.\textsuperscript{156} This hierarchy of interests is further evidenced by the Court’s general willingness to treat minors differently when it comes to

\begin{itemize}
\item \textsuperscript{153} \textit{Ferber}, 458 U.S. at 757 (quoting \textit{Prince v. Massachusetts}, 321 U.S. 158, 168 (1944)).
\item \textsuperscript{154} \textit{Ferber}, 458 U.S. at 757.
\item \textsuperscript{155} \textit{Id.} at 754–55 (quoting \textit{Miller v. California}, 413 U.S. 15, 18–19 (1973)).
\item \textsuperscript{156} Given this hierarchy, it makes sense that depictions of animal cruelty are not regulated as vigorously as child pornography. It does not follow, however, that they warrant no regulation. Instead, a compromise is in order. The line belongs somewhere between distribution and possession in the animal context, whereas in the child pornography context both may be constitutionally banned.
\end{itemize}
free speech, although not all laws aimed at limiting minors’ access to speech have been treated with such leniency.

Laws relating to the treatment of animals, however, present a unique problem for the Court because of the simple fact that animals are not human. Animals are legally killed and wounded every day for a variety of reasons, and some for no reason at all. Animal shelters euthanize millions of unwanted or unclaimed animals each year. An even greater number are slaughtered to put food on our tables, to create goods, and to sustain human life. Animals are also hunted for food, sport, and entertainment, as hunting continues to be a favorite American pastime.

The vast majority of the American populace has taken no issue with these uses of animals, and these practices are generally considered humane, although some undoubtedly disagree with such an assessment. Somewhat contradictorily, however, is that while the majority of Americans condone these types of killings, the same people share a consensus that animals should not be treated cruelly.

Out of this consensus, certain laws criminalizing acts of animal cruelty have emerged, including laws that have been enacted by all 50 states and by the federal government (crush and dog fighting laws), as well as laws that are gaining but have not yet reached national consensus (anti-gas

158. See, e.g., Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729 (2011). However, these tend to be struck down, often on narrow tailoring grounds. See infra Part II.B for further discussion.
160. Slaughter, COMPASSION IN WORLD FARMING (Dec. 2009), http://www.ciwf.org.uk/includes/documents/cm_docs/2010/s/slaughter_fact_sheet_feb_2010.pdf (“In 2007, over 54 billion poultry and almost 2.5 billion mammals (pigs, goats, sheep, cattle and buffalo) were slaughtered for meat worldwide.”).
161. United States v. Stevens, 130 S. Ct. 1577, 1595 (2010) (Alito, J., dissenting) (“[T]he predominant view in this country has long been that hunting serves many important values, and it is clear that Congress shares that view.”).
164. Stevens, 130 S. Ct. at 1594 (Alito, J., dissenting) (“[H]unting is legal in all 50 states.”).
165. Id. at 1598 (Alito, J., dissenting) (“All 50 states and the District of Columbia have enacted statutes prohibiting animal cruelty.”) (citing United States v. Stevens, 533 F.3d 218, 223 n.4 (3d Cir. 2008) and H.R. REP. NO. 106-397, at 3 (1999)).
166. Id. at 1598.
chamber laws). While these laws are generally enforced throughout the United States, they are still not prosecuted as vigorously or taken as seriously as other criminal laws aimed at punishing crimes against humans. While unfortunate, this is reasonable given the fact that while some humans are animals, animals are not human.

This dichotomy suggests that protecting animals from cruel treatment will likely never constitute a compelling enough interest to warrant an abridgement of the speech related to such conduct. This will likely continue to be the case unless the Court is willing to overrule Stevens and extend the Ferber rationale to laws criminalizing acts of animal cruelty—the drying up the market rationale. Justice White, writing for the Ferber majority, explained:

We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.

Because the Court now seems to view these prongs of analysis as being dependent upon one another, should there be an adequately narrow statute banning the distribution of a specific, extreme act of animal cruelty, this drying up the market rationale should give some credence to the constitutionality of such a statute, as long as it is a valid criminal law.

In a related vein, the Court has explicitly recognized time and time again that seeing to it that a criminal does not profit from his crimes is a compelling interest that will carry the day, should one be required. Not allowing the distribution of certain depictions of extreme acts of animal cruelty purports to do just that, as it would constitute a ban on the sale of an illegal item, no different than the sale of stolen goods or narcotics. Further, the distribution of these works is distinguishable from the facts of

168. Allie Phillips, The Few and the Proud: Prosecutors Who Vigorously Pursue Animal Cruelty Cases, 42 THE PROSECUTOR 20 (2008) (“Too often a prosecutor will face insufficient evidence from the investigation, lack of support within the office, and apathy from the bench when seeking a trial date and/or an appropriate sentence for a convicted abuser.”).
170. Id. at 762.
172. Id.
Simon & Schuster where the Court struck down, on narrow tailoring grounds, a state law banning the sale of books by criminals chronicling their misdeeds and mandating that all profits go first to the victims of those crimes.  

This is worlds apart from the type of material dealt with and criminalized in statutes such as Section 48. Under Section 48 and proposed Section 2157, criminals may recount their fondest animal fight and crush video memories all they like. They may even create and distribute digitally rendered images of such acts. However, they must not be permitted to cower behind the First Amendment and continue to directly market and profit from their actual criminal acts. Preventing them from doing so not only satisfies a compelling interest, but is also, arguably, in line with the intended scope of the First Amendment—that the people may freely “publish their sentiments,” as long as they do not simultaneously violate valid law. As discussed above, this rational interpretation of the bounds of the First Amendment was also realized in Smith.

In addition, should the Court desire a direct human connection, studies continue to show the very real human concerns of animal abuse, giving further credence to the seriousness of extreme acts of animal cruelty not simply disseminated but advertised by such videos. For instance, psychologists have long recognized the link between animal abuse and crimes of violence generally, and recent studies confirm just how solid a connection it is. This link should give the Court pause in its determination of just how compelling an interest the criminalizing of all facets of the animal abuse industry is.

For example, in addition to the recognition that most violent criminals have instances of extreme acts of animal cruelty in their past, the

175. Stevens, 130 S. Ct. at 1601 (Alito, J., dissenting).
176. VILE, supra note 22, at 132–33.
177. Phillips, supra note 168, at 21 (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 90 (4th ed. 1994)) (“The FBI has recognized the connection since the 1970s, when its analysis of the lives of serial killers suggested that most had killed or tortured animals as children . . . . [T]he American Psychiatric Association considers animal cruelty one of the diagnostic criteria of conduct disorder.”).
178. Sharon L. Nelson, The Connection Between Animal Abuse and Family Violence: A Selected Annotated Bibliography, 17 ANIMAL L. 369, 373 (2011) (internal citation omitted) (“Australian researchers discovered 100% of the sexual homicide perpetrators they interviewed had abused animals, and the Chicago Police Department found over 80% of those arrested on animal abuse charges had prior arrests for battery, weapons, or drug offenses.”).
179. Jared Squires, The Link Between Animal Cruelty and Human Violence: Children Caught in the Middle, 8 KY. CHILD. RTS. J. 2, 3 (2000) (“Jeffery Dalmer, the most notorious serial killer of recent memory, impaled the skulls of dogs he had killed on sticks and
scientific and law enforcement communities have recognized a specific link between the abuse of animals and children, in addition to domestic violence situations generally. Such victims often testify that their abusers used animal cruelty or threats of violence toward the family pet to strike fear in the hearts of their victims, and to coerce them into continued compliance with such abuse. Instances have been reported of abusers violently killing animals before their victims’ eyes, as an all too real example of what may be in store for them and other family pets should a victim not submit to further abuse. Further, children who grow up in these abusive environments are much more likely to grow up to become animal abusers themselves.

Given the unquestionable link between crimes against animals and violence towards humans, an acknowledgment and stringent punishment of crimes against animals should be considered of the utmost importance. This is because it should help law enforcement personnel nip serious psychological problems in the bud before these criminals graduate to exercising their rage and morbid curiosities out on human victims. Although courts have generally found this type of psychological evidence unpersuasive, this link has proved stronger than those which the Court has adjudicated in the past and should give courts pause going forward.

Another plausible explanation for the Court’s unfortunate decision in Stevens is that the law criminalizing certain acts of cruelty against animals is still in its infancy, simply too young for the Court’s stamp of approval, despite the aforementioned evidence that animal cruelty is a serious crime and an all too effective indicator of serious anti-social behavior and violent tendencies. Interestingly, here the criminal law in respect to animals has many parallels to the law of sexual assault. Both require clear lines to be drawn so that a crime may be accurately identified. This is because the line displayed then in his yard. Ted Bundy, accused of 50 murders . . . spent ‘much of his childhood torturing animals.’ He also ‘spent much of his youth with a grandfather who assaulted people and tormented animals.’

180. Id. at 2.
181. Id. (quoting Agnes Diggs, Shelter Offers Pets Protection, Citing Links to Domestic Violence, L.A. TIMES (May 17, 1999), http://articles.latimes.com/print/1999/may/17/local/me-38082 (recounting an instance where “[o]ne man butchered a kitten in front of his girlfriend, threatening to do the same to her because she lost her house key”)).
182. Squires, supra note 179, at 2.
between permissible and criminal conduct is often thin, given that the underlying acts are similar. For example, intercourse between two consenting adults is legal, while rape is not. The killing of animals is generally legal while cruelty towards them is not. Therefore, these acts often present two sides of one coin and, particularly in the area of content based regulation of speech, courts may be uncomfortable with restricting speech that potentially goes to either side. However, should a statute be effectively aimed at the illegal side of the coin, the First Amendment should not stand in the way of bringing those criminal actors to justice.

B. Narrow Tailoring

While the task of identifying a sufficiently compelling interest seems altogether grueling, crafting a statute sufficiently narrow to address that interest might, in fact, pose an even more challenging legal feat. For it often appears that narrow tailoring analysis is more an exercise in creativity than a measured and balanced application of legal principles and rules to a set of facts. This may be said of the Court’s concern in Stevens that old Section 48 might criminalize or simply squelch practices not considered cruel and criminal, as well as in other cases where the Court has found that a law was not the most effective means to a desired end.

After examining old Section 48 through the prism of unprotected speech categories, the Stevens majority proceeded to an overbreadth analysis of the statute, asking whether a “‘substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” Consequently, “[t]he first step in overbreadth analysis is to construe the challenged statute” in order to determine what exactly it covers.

Old Section 48, which was plainly titled “depiction of animal cruelty,” read as follows: “Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.” The statute defined depictions of animal cruelty as

any visual or auditory depiction . . . in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such

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188. Stevens, 130 S. Ct. at 1587 (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).
189. Stevens, 130 S. Ct. at 1587 (quoting United States v. Williams, 553 U.S. 285, 293 (2008)).
conduct is illegal under Federal law or the law of the State in which the
creation, sale, or possession takes place, regardless of whether the
maiming, mutilation, torture, wounding, or killing took place in the
State.\footnote{191}

Examining this language, the Court concluded that the statute was not
sufficiently limited to acts of extreme cruelty towards animals, but also
reached speech related to treatment considered humane or socially
acceptable.\footnote{192}

Here, the Court’s analysis sheds some light upon the majority’s views
as to the treatment of animals. The Court drew a line between the humane
and inhumane treatment of animals, and it noted that illegal acts may be
found on either side of that line.\footnote{193} Therefore, the pertinent question to ask
is not whether a law reaches illegal acts involving animals, but whether the
law was specifically “designed to guard against animal cruelty.”\footnote{194} By
leaving open the possibility that speech relating to the latter might be
permissibly curtailed, the Court suggests that bringing these specific
criminal enterprises to justice may constitute a compelling enough interest
and fall into a recognized historical category rendering a statute
constitutional.

Narrow tailoring requires that a law be adequately linked to the state
interest it serves.\footnote{195} Again, this is best illustrated by example. Upon
vocalizing the fact that the prevention of real harm to children is a
compelling interest, the Court in \textit{Ferber} went on to note that all the
evidence points to the fact “that the use of children as subjects of
pornographic materials is harmful to the physiological, emotional, and
mental health of the child,” thus linking up the industry at which the law
was aimed to an actual harm.\footnote{196}

In \textit{Brown}, however, the Court did not find a similar “direct causal link
between violent video games and harm to minors.”\footnote{197} The narrow tailoring
requirement was also unmet because the Court found the statute to be both
overinclusive and underinclusive. It was underinclusive for two reasons.
First, it only dealt with video games, and did not restrict other mediums of
entertainment, such as television, movies or books that might similarly
make some minors more prone to aggressive behavior.\footnote{198} Second, it also
afforded parents or guardians a veto power, making it up to them whether

\footnote{191} \textit{Id.} § 48(c)(1).
\footnote{192} \textit{Stevens}, 130 S. Ct. at 1588.
\footnote{193} \textit{Id.} at 1588–89.
\footnote{194} \textit{Id.} at 1588.
\footnote{198} \textit{Id.} at 2740.
the children would be allowed to be entertained by the violent video games in question.  

199 This, the Court said, was not “how one addresses a serious social problem.” 200 The Court also found the law overinclusive because it went too far to assist parents with their parenting by restricting children’s access to material that the state, not the parents, thought should be in order, effectively “abridg[ing] the First Amendment rights of young people whose parents . . . [consider] violent video games [to be] a harmless pastime.” 201

A law that appropriately and independently criminalizes the production and distribution of crush and dog fight videos is distinguishable from the facts which led to the statute in Brown being struck down. Independently criminalizing the distribution of depictions of extreme animal cruelty, such as dog fighting and crush videos, as opposed to outlawing all depictions of illegal acts toward animals, more adequately addresses and serves the compelling interest that the Court has accepted, namely not permitting criminals to profit from their crimes. This should also help to quench the fears of the Court in regard to the chilling of legal speech regarding animals, such as hunting and farming videos. In addition, the Court providing this united front against animal abuse should raise the issue more prominently in the minds of law enforcement officials, causing them to take more seriously crimes of extreme acts of animal cruelty as a beneficial and effective means by which to ensure the safety of the community generally.

C. The Problem with Exceptions

Old Section 48 contained an exceptions clause, which purported to exempt from liability “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” 202 The Stevens majority rejected the argument that this clause adequately delineated between speech involving the humane and inhumane treatment of animals. 203 Interestingly, the Court’s reasoning here largely tracks the reasons given for de-emphasizing the balancing language used to describe unprotected categories of speech, 204 as the Court grows increasingly unwilling to judge the value of speech.

Therefore, legislatures should also steer clear of these types of exceptions clauses, and instead adhere to the principle that content-based restrictions on speech must apply to all if they are to apply to one person’s

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199. Id.
200. Id.
201. Id. at 2741–42.
203. Stevens, 130 S. Ct. at 1590.
204. Id. at 1585.
The reasons for the Court’s disenchantment with such exception clauses are anchored in the idea that even though some speech may be deemed valueless, it is still generally protected by the First Amendment. This also evidences the general shift in the Court’s First Amendment jurisprudence that whether or not speech is protected is no longer dependent upon a determination of the worth of such speech.

The Court in *Stevens* surmised that it could be argued that most speech lacks serious value, yet the First Amendment protects it from Government restraint. The Court there went on to note that the inverse is true as well. That obscene or otherwise unprotected speech will not automatically garner the full extent of the First Amendment’s protection simply because it may contain an element of serious value. This serves as an additional warning and hurdle to legislatures whose intent is to stymie the content of certain speech for the common good.

### III. Looking Ahead

The current version of Section 48, titled “animal crush videos” states in pertinent part that “[i]t shall be unlawful for any person to knowingly sell, market, advertise, exchange, or distribute an animal crush video in, or using a means or facility of, interstate or foreign commerce.” The statute defines an animal crush video as “any photograph, motion-picture film, video or digital recording, or electronic image that—depicts actual conduct in which [one] or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury . . . ; and is obscene.” The statute also contains an exemption clause which relieves from liability those who create or distribute “any visual depiction of—customary and normal veterinary or agricultural husbandry practices; the slaughter of animals for food; or hunting, trapping, or fishing.”

There is also a piece of federal legislation aimed at the distribution of animal fighting videos and other propaganda. The law, as it currently stands, states:

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205. *Id.* (bearing in mind that all speakers should still be permitted to speak their minds about any issue—this discussion is limited to genuine depictions of animal cruelty).

206. *Id.*

207. *Id.* at 1590–91 (“*Most of what we say to one another lacks . . . ‘value’ (let alone serious value), but it is still sheltered from government regulation.*)” (internal citations omitted).

208. *Id.* at 1591 (explaining that the Court has never “determine[d] that serious value could be used as a general precondition to protecting other types of speech in the first place”).


210. *Id.* § 48(a).

211. *Id.* § 48(e).
It shall be unlawful for any person to knowingly use the mail service of the United States Postal Service or any instrumentality of interstate commerce for commercial speech for purposes of advertising an animal, or an instrument described in subsection (e), for use in an animal fighting venture, promoting or in any other manner furthering an animal fighting venture except as performed outside the limits of the States of the United States. 212

This statute defines animal fighting venture as “any event . . . that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment.” 213 It also contains an exemption for “any activity the primary purpose of which involves the use of one or more animals in hunting another animal.” 214

The language in both pieces of legislation speaks to the issue in Stevens. Both deal with speech directly related to the respective criminal acts and enterprises. Both also include more limited exceptions clauses which better delineate between the cruel and humane treatment of animals. In this respect, the legislation is much improved because it does not require interpreters to delineate for themselves the difference between speech that has value and speech that has none. This comports with the Court’s holding that valueless speech is protected by the First Amendment just as stringently as speech considered to exude value and enrich human life.

However, in light of the above discussion, the statute restricting the sale or distribution of animal fight videos may have more going for it. It appears to be less problematic than the animal crush statute because it more neatly comports with the facts and analysis of Giboney, in that the distribution of such videos is often done to further the industry. This is because these videos are often distributed for sale or to advertise fights. 215 They are also used as a tool so that those who fear being caught at a dog fight may continue to bet on fights while remaining offsite. 216 In this way, animal fight videos are more analogous to the speech integral to criminal conduct in Giboney because there the speech itself was illegal while it simultaneously encouraged further illegal conduct. Similarly, the making of a dog fight video is an illegal act done to incite further lawless conduct, as was the case in Stevens.

The trouble with the current version of Section 48 is that it seems to describe conduct relatively similar to the act of hunting. It attempts to distinguish and except hunting by including the requirement that the conduct or depiction also be obscene. While this is rational because there

212. 7 U.S.C. § 2156(c) (Supp. IV 2011).
213. Id. § 2156(g).
214. Id.
216. Id.
is a clear difference between hunting and the torture that occurs during the making of a crush video, the conduct does not likely rise to the legal definition of obscenity, given the fact that no sex act is portrayed. A more effective and clear statute should instead delineate between hunting and animal cruelty by criminalizing the sale or distribution of depictions of animal killing or torture with the additional requirement that the act be *one of extreme cruelty*. This is the delineation made in the prosecution of acts of animal cruelty that should also effectively and narrowly target the sale of depictions of the same.

**CONCLUSION**

The constitutionality of legislation outlawing the distribution of animal crush and animal fighting videos depends upon the meaning of the speech integral to criminal conduct exception, the identification of a compelling enough interest to warrant such a restriction on speech, and the meticulous drafting of a statute designed to meet that interest. In order to best protect the rights of animals and to best enforce this nation’s criminal laws, courts should honor the speech integral to criminal conduct exception and extend its reach to speech, the existence of which is entirely dependent upon the commission of a crime. Further, courts should consider as a compelling interest, not the general killing or wounding of animals, but laws which ensure that criminals are not profiting from their crimes and laws that help law enforcement to present a united, effective front against criminal activity whether the victim is a man or man’s best friend.

Finally, while the First Amendment was no doubt intended to protect the voice of the minority in our largely majoritarian system of government, the Court’s jurisprudence has become unwieldy and largely unpredictable in this area, defying logic and this country’s policymaking branches. By giving force to the speech integral to criminal conduct exception and interpreting the language of the First Amendment as permitting the free publication of one’s sentiments while not trampling on this nation’s criminal laws, the Court would bring order and reason back to this area of law. This would effectively heed the warning of Sir Thomas Moore when he said:

> The law, Roper, the law. I know what’s legal, not what’s right. And I’ll stick to what’s legal. . . . I’m *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can’t navigate, I’m no voyager. But in the thickets of the law, oh there I’m a forester . . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country’s planted thick with laws from coast to coast—
Man’s laws, not God’s—and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then? . . . Yes, I’d give the Devil benefit of law, for my own safety’s sake.\(^{217}\)

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