NOTE

A Crushing Blow: *United States v. Stevens* and the Freedom to Profit from Animal Cruelty

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INTRODUCTION

Marion Crane steps into the bathtub at the Bates Motel and closes the translucent shower curtain.[1] A shadowy human figure appears through the spray of the warm and steamy shower.[2] Suddenly, a hand rips open the curtain revealing the figure of a woman with a raised bread knife.[3] The relentless attacker repeatedly slashes a screaming Marion.[4] The onslaught abruptly ends, leaving Marion to pull the shower curtain from its hooks as she slides to the tiled floor.[5]

This graphic scenario is instantly recognizable as the famous shower scene from Alfred Hitchcock's thriller, *Psycho*.[6] The characters enact a gruesome but fictitious murder that would carry criminal penalties were it real.[7] Consider another scenario.[8]

Daniel is a troubled pedophile with a penchant for violence.[9] To fulfill his deviant fetishes, Daniel plans to kidnap a child whom he will sexually abuse and ultimately murder.[10] In Daniel's script, he ties a plastic bag over the child's head, hangs the child, and then sexually molests him.[11] Daniel intends to film the child's struggles and eventual death, and then sell copies for commercial gain.[12] In common vernacular, Daniel plans to record a "snuff film" ("*Snuff*").[13]

Comparing *Psycho* and *Snuff*, the two obviously would share the medium of film.[14] In addition, both films would feature a violent

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[1] This scenario comes from the screenplay of Alfred Hitchcock's *Psycho*, which is available at http://www.paradiselost.org/psycho.html.

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] PSYCHO (Paramount Pictures 1960).

[7] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (2008) (defining murder under Arizona law); CAL. PENAL CODE § 187(a) (West 2007) (defining murder under California law); MODEL PENAL CODE § 210.2(1)(a) (2001) (providing criminal homicide constitutes murder when committed purposely or knowingly).

[8] This scenario derives from facts of *United States v. DePew*, 751 F. Supp. 1195, 1196-98 (E.D. Va. 1990).

[9] *See id.* at 1196.

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *See id. See generally* United States v. Marcus, 193 F. Supp. 2d 552, 558 (E.D.N.Y. 2001) (defining "snuff film" as film in which at least one participant dies as part of presentation).

[14] *See DePew*, 751 F. Supp. at 1196 (stating defendant's plan and interest to

murder that the creators sought to disseminate for commercial gain.[15] An important distinction remains, however: the Free Speech Clause of the First Amendment protects *Psycho* but not *Snuff*.[16]

To understand this threshold distinction, one must separate the underlying conduct itself from the film depicting that conduct.[17] Here, the underlying conduct is murder, and both *Psycho* and *Snuff* depict particular expressions of that crime.[18] Only the depiction element implicates the First Amendment's restraint on abridgement of speech.[19] Murder remains a crime regardless of its capture on film.[20]

Determining why the First Amendment does not protect *Snuff* presents challenges.[21] Indeed, the line-drawing difficulties bring to

produce film); PSYCHO, *supra* note 6.

[15] *See DePew*, 751 F. Supp. at 1196 (explaining plan to abuse and murder child and to market such film); PATRICK MCGILLIGAN, ALFRED HITCHCOCK: A LIFE IN DARKNESS AND LIGHT 494 (HarperCollins Publishers 2003) (mentioning *Psycho* became number two Paramount film in year of release); The Internet Movie Database, Box Office Business for Psycho, http://www.imdb.com/title/tt0054215/business (last visited Nov. 21, 2008) (listing Alfred Hitchcock's estimated budget for *Psycho* as $806,947 and gross revenue as $50,000,000 worldwide).

[16] *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (recognizing child pornography as categorically unprotected speech); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682 (1968) (reiterating First Amendment protects motion pictures and insisting upon procedural safeguards and supervision of censors); Times Film Corp. v. City of Chi., 365 U.S. 43, 47 (1961) (noting Court has never held free speech to be absolute or that all prior restraints on speech are invalid); Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 690 (1959) (stating First Amendment protects motion pictures); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (same); RICHARD A. POSNER, SEX AND REASON 381 (Harvard Univ. Press 1992) (setting aside child pornography and pornography in which adult model suffers physical injury as instances warranting suppression of speech).

[17] *See* sources cited *supra* note 16.

[18] *See* sources cited *supra* note 7.

[19] *See* U.S. CONST. amend. I (prohibiting Congress from making law that abridges freedom of speech or of press); Virginia v. Black, 538 U.S. 343, 358 (2003) (explaining First Amendment extends protection to expressive conduct and is not limited to actual speech).

[20] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (rejecting contention that First Amendment protection extends immunity to speech or expression that plays integral part of conduct that violates criminal statute); GARRY WILLS, UNDER GOD: THE CLASSIC WORK ON RELIGION AND AMERICAN POLITICS 84 (Simon & Schuster Trade 2007) (explaining murder not protected because killers make snuff film). *See generally* MODEL PENAL CODE § 210.2(1)(a) (2001) (providing criminal homicide constitutes murder when committed purposely or knowingly); *id.* § 210.2(2) (classifying murder as first-degree felony punishable by death).

[21] *See Ferber*, 458 U.S. at 764 (recognizing child pornography as categorically unprotected speech); *Times*, 365 U.S. at 48 (observing there is no absolute or complete freedom to exhibit every motion picture); POSNER, *supra* note 16, at 381

mind Justice Stewart's famous quip in regards to obscenity: "I know it when I see it."[22] Although it remains unclear exactly where First Amendment protection begins and ends, one cannot base a principled division on the underlying conduct depicted.[23] If *Snuff* is unprotected expression simply because of the underlying illegal conduct it depicts, virtually all news media, by logical extension, is similarly unprotected.[24] Notably, depictions of violent behavior and crimes constitute a significant portion of the nightly television news.[25] Rendering such depictions unprotected would arguably signal the death in large part of the marketplace of ideas.[26] Prohibiting news broadcasts of real violence contravenes a fundamental purpose of the First Amendment, and thus is impermissible.[27]

The point, then, is that *Snuff*'s depiction of actual murder, as compared to *Psycho*'s simulated murder, cannot explain by itself why *Snuff* is unprotected expression.[28] Wherever and however one draws the line, it is clear that there is a kind of First Amendment spectrum — certain materials fall on the protected side, while others remain categorically unprotected.[29] Accordingly, if *Psycho* and *Snuff* represent

(setting aside pornography in which adult model suffers physical injury as instance warranting suppression of speech).

[22] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (explaining inability to define intelligibly what materials fall within obscenity, but that "I know it when I see it . . .").

[23] *Cf. id.* (stating Supreme Court faced task of defining "what may be indefinable" in reference to First Amendment coverage in obscenity cases). *See generally infra* text accompanying notes 24-27 (discussing why underlying illegal conduct depicted in film cannot be reason for lack of First Amendment protection).

[24] *See* Roger N. Johnson, *Bad News Revisited: The Portrayal of Violence, Conflict, and Suffering on Television News,* 2 PEACE & CONFLICT: J. PEACE PSYCHOL. 201, 201 (1996) (suggesting huge effect on media and news broadcasting if violent programming removed).

[25] *See id.* at 207 (noting more than half of all news stories analyzed contained violence, conflict, and suffering).

[26] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (articulating marketplace of ideas rationale and justification for rigorous constitutional protection of speech).

[27] *See* U.S. CONST. amend. I; *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (discussing marketplace of ideas rationale). *See generally* Johnson, *supra* note 24 (discussing violence in news broadcasts).

[28] *See generally* United States v. DePew, 751 F. Supp. 1195, 1196-98 (E.D. Va. 1990) (presenting facts of case); PSYCHO, *supra* note 6 (depicting shower scene murder).

[29] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007) (stating political speech at core of First Amendment protection); Virginia v. Black, 538 U.S. 343, 358 (2003) (explaining First Amendment protection is not absolute and government may constitutionally regulate particular categories of expression); Miller v. California, 413 U.S. 15, 23 (1973) (recognizing obscene material is unprotected by First

diametrically opposed levels of First Amendment protection, how much protection should courts assign to cases in between?[30]

The Third Circuit Court of Appeals recently confronted this question in *United States v. Stevens*.[31] The *Stevens* court recognized depictions of animal cruelty as protected speech and facially invalidated a federal statute criminalizing such depictions on First Amendment grounds.[32] In doing so, the court separated the underlying conduct of animal cruelty from photographs, films, and sound recordings depicting that crime.[33]

This Note argues the *Stevens* court reached the correct holding, but applied an incorrect rationale.[34] Part I provides a brief overview of the First Amendment and the Supreme Court's framework for analyzing free speech cases.[35] It then discusses 18 U.S.C. § 48 and addresses relevant case law.[36] Part II presents the facts, rationale and holding of *Stevens*.[37] Part III argues the *Stevens* court was correct in holding § 48 unconstitutional, but erred in its rationale and line drawing framework.[38] First, the *Stevens* court correctly determined strict scrutiny review was appropriate and properly applied the narrow tailoring requirement of that review.[39] Second, although the court achieved the correct result, it erred in evaluating the compelling interest requirement of strict scrutiny review.[40] Third, the court's rationale with regard to compelling interests harms important social policy and minimizes the link between animal cruelty and human

Amendment); Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (recognizing imminent incitement of lawless activity as categorically unprotected speech); Watts v. United States, 394 U.S. 705, 707 (1969) (recognizing threats as categorically unprotected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 573-74 (1942) (recognizing fighting words as categorically unprotected speech). *See generally infra* Part I.A (discussing First Amendment and free speech framework of Supreme Court).

[30] S*ee generally DePew*, 751 F. Supp. at 1196-98 (describing defendant's recorded statements and conversations with undercover agents); PSYCHO, *supra* note 6.

[31] United States v. Stevens, 533 F.3d 218, 221 (3d Cir. 2008) (en banc).

[32] *Id.* at 232.

[33] *Id.* at 223.

[34] *See infra* Part III.

[35] *See infra* Part I.

[36] *See infra* Part I.

[37] *See infra* Part II.

[38] *See infra* Part III.

[39] *See infra* Part III.A.

[40] *See infra* Part III.B.

social ills.[41] This Note concludes with comments on the United States Supreme Court's granting of certiorari in this case.[42]

I. BACKGROUND

The elegant and simple wording of the First Amendment masks the byzantine reality of its application.[43] For purposes of this Note, however, it is enough to understand the basic structure of free speech analysis.[44] With this architecture in mind, Part I presents the challenged regulation at issue in *Stevens*.[45] It then situates *Stevens* in the context of relevant case law, providing a foundation for later comparison and analysis.[46]

A. The First Amendment and Free Speech Framework

The modern conception of free speech emerged from a recent tradition of strong national judicial protection.[47] Despite disagreement over the exact boundaries of the First Amendment, Americans generally believe free speech is a national right central to notions of liberty.[48] This was not always so.[49]

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[41] *See infra* Part III.C.

[42] *See infra* Conclusion.

[43] *See* U.S. CONST. amend. I (prohibiting Congress from making laws abridging freedom of speech, press, or right to peaceably assemble and petition government); AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES 683 (Donald P. Kommers et al. eds., 2004) [hereinafter AMERICAN] (commenting Supreme Court's maze of doctrinal rules to evaluate speech restrictions is similar in complexity to Internal Revenue Code); DENCKLE MCLEAN, ESSAY ON THE FIRST AMENDMENT 1 (Fred B. Rothman Publ'ns 2000) (asserting that First Amendment and matters related to First Amendment are complicated despite simple phrasing of constitutional text); THE FIRST AMENDMENT: A READER 146 (John H. Garvey & Frederick Schauer eds., West Publ'g Co. 1992) [hereinafter FIRST AMENDMENT] (commenting that First Amendment appears to state simple rule but in fact First Amendment law is far more complex).

[44] *See infra* Parts I.A, III.A-B.

[45] *See infra* Part I.B.

[46] *See infra* Part I.C.

[47] *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 8-9 (Duke Univ. Press 2000) (arguing contemporary emphasis on role of courts as protectors of free speech is proper tradition but recent one); *id.* at 9 (noting recent robust judicial protection for free speech); *see also* LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 1 (Greenwood Publ'g Group, Inc. 2004) (stating modern First Amendment is product of complex layers of judicial interpretations by Supreme Court).

[48] *See* CURTIS, *supra* note 47, at 9 (commenting that although Americans disagree over precise content of First Amendment, free speech is central to concept of national

The original U.S. Constitution took effect without a bill of rights when New Hampshire ratified the document on June 21, 1778.[50] New York, North Carolina, Rhode Island, and Virginia still opposed ratification because the Constitution lacked liberty guarantees that those states deemed essential.[51] To appease this opposition, the First Congress began work on a bill of rights in 1789.[52] By 1791, three fourths of the states had ratified ten amendments in the Bill of Rights.[53] The First Amendment included a clause prohibiting Congress from making laws that abridge freedom of speech or the press.[54]

Originally, the 1789 Bill of Rights placed limitations on the federal government only.[55] However, in *Gitlow v. New York*, the Supreme Court extended the First Amendment to the states through the Due

enforceable rights); *see also* MCLEAN, *supra* note 43, at ix (observing society regards First Amendment as centerpiece of American law and culture); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT, at 100 (HarperCollins Publishers 2005) (noting that, although misled, ordinary American would read First Amendment and feel confident in protection of free speech rights).

[49] *See generally* CURTIS, *supra* note 47 (providing interesting analysis and background for various free speech struggles in American history).

[50] *See* THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 24 (Franklyn S. Haiman ed., 2d ed. 1993) (noting New Hampshire ratified Constitution on June 21, 1788, putting Constitution into effect without bill of rights); *see also* CURTIS, *supra* note 47, at 50-51 (mentioning omission of protection for speech in new Constitution); John P. Kaminski, *The Constitution Without a Bill of Rights*, *in* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 16, 19 (Patrick T. Conley & John P. Kaminski eds., Rowman & Littlefield Publishers, Inc. 1988) [hereinafter BILL OF RIGHTS] (examining omission of bill of rights in original Constitution).

[51] *See* CURTIS, *supra* note 47, at 50 (asserting omission of many basic rights from new Constitution was major argument against its adoption); KENNETH C. DAVIS, DON'T KNOW MUCH ABOUT HISTORY: EVERYTHING YOU NEED TO KNOW ABOUT AMERICAN HISTORY BUT NEVER LEARNED 131-32 (HarperCollins Publishers 2004) (explaining that states wary of new central government demanded amendments during ratification of Constitution); TEDFORD, *supra* note 50, at 24 (discussing Virginia, New York, North Carolina, and Rhode Island's reluctance to support Constitution because of lack of guaranteed civil liberties).

[52] *See* TEDFORD, *supra* note 50, at 25 (observing that First Congress began work during summer of 1789 and later proposed 12 amendments).

[53] *See generally* BILL OF RIGHTS, *supra* note 50, at xxi-ii (providing chronology of ratification of Bill of Rights).

[54] U.S. CONST. amend. I (prohibiting Congress from making laws that abridge freedom of speech or of press).

[55] *See* LARS R. JOHNSON & SOL BLOOM, THE STORY OF THE CONSTITUTION 160 (Christian Liberty Press 2001) (stating First Amendment initially only limited federal government); TEDFORD, *supra* note 50, at 26 (observing Bill of Rights of 1789 controlled federal government but did not limit state governments).

Process Clause of the Fourteenth Amendment.[56] From 1789 to the present, free speech issues checker American history.[57] Current emphasis on the judiciary as interpreters of the First Amendment and as protectors of free expression is a product of continuing doctrinal evolution.[58]

Central to the Supreme Court's analysis of free speech cases is the distinction between content-based and content-neutral restrictions of speech.[59] Content distinction has doctrinal roots in Supreme Court decisions as far back as the 1930s, and arguably has emerged as the principal organizing theme.[60] In essence, the Court recognized certain laws are more dangerous to free speech than others.[61] The Court

[56] Gitlow v. New York, 268 U.S. 652, 666 (1925) (stating freedom of speech and of press guaranteed by First Amendment are among fundamental rights and liberties protected by Due Process Clause of Fourteenth Amendment); *id.* (observing Due Process Clause of Fourteenth Amendment applies to states).

[57] *See* Van Orden v. Perry, 545 U.S. 677, 726 n.27 (2005) (Stevens, J., dissenting); ZINN, *supra* note 48, at 100 (explaining that only 10 years after states ratified First Amendment, Congress passed Sedition Act of 1798, which clearly abridged speech). *See generally* CURTIS, *supra* note 47 (providing interesting analysis and background for various free speech struggles in American history).

[58] *See* CURTIS, *supra* note 47, at 8-9 (arguing contemporary emphasis on role of courts as protectors of free speech is proper tradition); *id.* at 9 (noting robust judicial protection for free speech); LIDSKY & WRIGHT, *supra* note 47, at 1 (stating modern First Amendment is product of complex layers of judicial interpretations by Supreme Court).

[59] *See* CONSTITUTIONAL LAW 1060 (Geoffrey R. Stone et al. eds., 5th ed. Aspen Publishers 2005) (explaining distinction between content-based and content-neutral restrictions plays central role in Supreme Court's interpretation of First Amendment); FIRST AMENDMENT, *supra* note 43, at 148 (discussing architectural structure of First Amendment doctrine and noting law divides class of government acts in different directions); *id.* (asserting greatest divide of government acts with respect to First Amendment separates acts of content regulation from content-neutral acts); KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 72 (Greenwood Publ'g Group, Inc. 2004) (arguing content distinction principle dominates current First Amendment jurisprudence).

[60] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (noting under First Amendment analysis, content-based restrictions are presumptively invalid); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (explaining decisive factor for valid time, place, and manner restriction is restriction cannot be content based); Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980) (same); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (same); *see also* WERHAN, *supra* note 59, at 72 (explaining roots of content distinction doctrine extend to 1930s and 1940s Supreme Court decisions); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983) (commenting that distinction between content-based and content-neutral restrictions has roots in Supreme Court decisions of 1930s).

[61] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (reiterating that content-based laws pose inherent risks to First Amendment values); *Mosley*, 408 U.S. at 95-96 (emphasizing that any restriction on expression because of its conduct

acknowledged that the fundamental nature of censorship is content control.[62] Restrictions based on content implicate censorship and, therefore, are subject to more exacting judicial scrutiny.[63] By contrast, restrictions that are content-neutral are less dangerous and as such, warrant less judicial scrutiny.[64]

Content-based regulations focus on the communicative impact of speech.[65] In other words, they restrict communication because of the message expressed.[66] The term "content-based" subsumes two subcategories: restrictions on the subject matter of the speech, and restrictions on the viewpoint of the speaker.[67] For example, a law prohibiting distribution of campaign literature within 100 feet of the entrance to a poll is content-based.[68] The law is content-based because

endangers our politics, culture, self-fulfillment, and national commitment to robust public debate); WERHAN, *supra* note 59, at 72 (analogizing content distinction to categorization and maintaining that principle behind content distinction is certain types of speech are more threatening to First Amendment values).

[62] *See Mosley*, 408 U.S. at 96 (recognizing content control is essence of censorship forbidden by First Amendment); *see also* WERHAN, *supra* note 59, at 72 (arguing content distinction principle illustrates Supreme Court's recognition that First Amendment centrally prohibits government censorship).

[63] *See Turner*, 512 U.S. at 642 (stating Court applies exacting scrutiny to laws restricting speech because of its content); AMERICAN, *supra* note 43, at 683 (explaining heightened judicial review of content-based restrictions expresses historic mistrust of official censorship); WERHAN, *supra* note 59, at 72-73 (noting content-based laws suggest likelihood of censorship and are therefore subject to strict scrutiny).

[64] *See Turner*, 512 U.S. at 642 (explaining content-neutral regulations pose less risk and thus, are subject to intermediate level scrutiny); WERHAN, *supra* note 59, at 74 (elaborating on content-neutral principles and stating such restrictions are subject to more lenient review); Stone, *supra* note 60, at 196-97 (stating content-based restrictions clearly receive more stringent review).

[65] *See* CONSTITUTIONAL LAW, *supra* note 59, at 1060 (explaining content-based restrictions regulate communication because of message expressed). *See generally* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 116 (1981) (discussing communicative impact concept); Stone, *supra* note 60, at 207-18 (same).

[66] *See* Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 19 (Lee C. Bollinger & Geoffrey R. Stone eds., 2005); *id.* (noting in contrast that content-neutral regulations restrict speech without regard to its message); Stone, *supra* note 60, at 190.

[67] *See* WERHAN, *supra* note 59, at 73 (discussing differences between content-based laws that restrict subject matter and those that restrict viewpoint of speaker); Nicole B. Casarez, *Content-Based Regulation of Speech*, *in* 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 361, 361 (Paul Finkelman ed., Taylor & Francis, Inc. 2006) (stating law is content based if it discriminates against subject matter or viewpoint). *See generally* Redish, *supra* note 65, at 117-19 (analyzing distinctions between subject matter restrictions and viewpoint restrictions).

[68] *See* Burson v. Freeman, 504 U.S. 191, 197-98 (1992) (explaining Tennessee

it applies to political campaign literature, a subject matter of speech, but would not apply to a concert handbill.[69] Alternatively, a law barring Republican flyers but allowing Democratic flyers near the same poll is viewpoint-based.[70] The law is viewpoint-based because it restricts only the Republican Party point of view.[71]

Courts do not necessarily view subject matter restrictions with the same presumptive disfavor as restrictions based on viewpoint.[72] Regardless, content-based laws generally receive strict scrutiny review.[73] Strict scrutiny review involves a two-part analysis.[74] First, the Court asks whether the regulation at issue furthers a compelling government interest.[75] If so, the Court inquires whether the regulation is the least restrictive alternative to accomplish the asserted interest.[76] If the regulation is the least restrictive alternative to further a

restriction is not content-neutral time, place or manner restriction but is content-based restriction on political speech). *See generally* Stone, *supra* note 60, at 190 (providing additional examples of content-based restrictions of speech).

[69] *See Burson*, 504 U.S. at 197-98; *see also* AMERICAN, *supra* note 43, at 683 (defining content-based restriction as regulation banning expression of all points of view toward particular topic or subject of speech); *id.* (providing example of ban on political campaigning and explaining ban applies to all political viewpoints). *See generally* Stone, *supra* note 60, at 239 (stating subject-matter regulations restrict entire subjects of expression).

[70] *See generally* Stone, *supra* note 60, at 197-200 (providing additional examples of viewpoint restrictions).

[71] *See* AMERICAN, *supra* note 43, at 683 (defining viewpoint-based restriction as government placing stamp of approval on one side of issue or debate and silencing other points of view).

[72] *See* Morse v. Frederick, 127 S. Ct. 2618, 2644 (2007) (expressing Court's position that viewpoint-based regulations are egregious form of content discrimination); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995) (same); *see also* WERHAN, *supra* note 59, at 73 (noting that while courts often invalidate both types of content-based restrictions, courts do not equally disfavor them); James Weinstein, *Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy*, *in* THE BOUNDARIES OF FREEDOM OF EXPRESSION & ORDER IN AMERICAN DEMOCRACY 146, 148 (Thomas R. Hensley ed., Kent State Univ. Press 2001) (stating some content-based regulations, such as viewpoint restrictions, are worse than others from First Amendment standpoint).

[73] *See, e.g.*, *Burson*, 504 U.S. at 198 (applying strict scrutiny to content-based regulation); Meyer v. Grant, 486 U.S. 416, 420 (1988) (same); Boos v. Barry, 485 U.S. 312, 321 (1988) (same).

[74] *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (defining strict scrutiny review as test Court uses to determine whether content-based regulation is necessary to serve compelling interest and is least restrictive alternative); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (same); Carey v. Brown, 447 U.S. 455, 461 (1980) (same).

[75] *See* cases cited *supra* note 74.

[76] *See* cases cited *supra* note 74.

compelling interest, it passes the narrow tailoring requirement and is constitutional.[77]

Although content-based regulations generally receive strict scrutiny review, the Supreme Court sometimes treats such regulations as content-neutral under the secondary effects doctrine.[78] Under the Court's line of secondary effects cases, even though a law facially discriminates based on content, that law need not receive strict scrutiny review.[79] Instead, if the law only tries to avoid the undesirable, incidental consequences of speech, the Court evaluates it as a content-neutral regulation.[80] A law prohibiting adult theaters from locating within 1,000 feet of any school, for example, receives the standard of review applied to content-neutral restrictions.[81] The law aims at secondary effects of adult theaters on the community, such as urban blight and prostitution, not at the content of the films.[82] The standard of review applied to content-neutral laws is lower than that applied via strict scrutiny review.[83]

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[77] *See Burson*, 504 U.S. at 211 (stating narrowly tailored content-based regulation constitutionally served compelling interest); Schirmer v. Edwards, 2 F.3d 117, 122 (5th Cir. 1993) (same); *see also* Casarez, *supra* note 67, at 361 (noting that constitutional regulation satisfies both elements of strict scrutiny).

[78] *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 443 (2002); City of Renton v. Playtime Theatres, 475 U.S. 41, 49 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976); *see also* CONSTITUTIONAL LAW, *supra* note 59, at 1301-02 (describing application of secondary effects doctrine and explaining content-based law characterized as content-neutral under doctrine).

[79] *See, e.g.*, *Alameda*, 535 U.S. at 443 (holding ordinance content-based on its face warrants intermediate review because it promoted interest in reducing secondary effects); *Renton*, 475 U.S. at 47 (describing content-based ordinance as consistent with Court's definition of content neutrality because concerns of ordinance were predominately with secondary effects of adult theaters); *id.* at 49 (explaining Court evaluates content-based regulation directed towards secondary effects under standard of review applicable to content-neutral regulations); *Young*, 427 U.S. at 70, 71 n.34 (stating city may draw content-based line without violating neutrality because zoning ordinance attempted to avoid secondary effects).

[80] *See Alameda*, 535 U.S. at 436 (stating concentration of adult establishments results in high crime rate); *Renton*, 475 U.S. at 50-52 (stating ordinance combats adverse effects of adult theaters on surrounding community and residential neighborhood); *Young*, 427 U.S. at 55 (explaining location of several adult businesses in same neighborhood attracts undesirable transients and increases crime).

[81] *See, e.g.*, *Renton*, 475 U.S. at 43 (presenting fact pattern).

[82] *See id.* at 47 (stating ordinance aimed at secondary effects of adult theaters, not at content of films); *id.* at 51 (mentioning neighborhood blight as one type of secondary effect caused by adult theaters on surrounding community).

[83] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (noting highest level of scrutiny applied to content-based regulations and contrasting intermediate standard of review applied to content-neutral regulations); *Renton*, 475 U.S. at 46-47

B. 18 U.S.C. § 48: Criminalizing Depictions of Animal Cruelty

Title 18 U.S.C. § 48 is a content-based restriction on speech, and is properly subject to strict scrutiny review.[84] Section 48 criminalizes knowingly creating, selling, or possessing a depiction of animal cruelty with the intent to place that depiction in commerce for financial gain.[85] Effective December 9, 1999, Congress passed § 48 to prohibit the production, sale, or possession of "crush videos."[86] Before discussing the legislative history of § 48, however, several aspects of the statute merit attention.[87]

Section 48(a) prohibits depictions of animal cruelty.[88] "Depiction" encompasses any visual or auditory depiction, including photographs, motion picture films, video recordings, electronic images, or sound recordings.[89] Such depictions are expressive conduct, which the First Amendment generally protects.[90] Thus, § 48 is subject to the First Amendment because it restricts expressive conduct.[91]

(explaining content-based regulations presumptively violate First Amendment, but content-neutral regulations are valid if they pass lower standard of review); *id.* at 47 (stating lower standard of review includes substantial government interest and alternative avenues of communication).

[84] *See infra* Part III.A. *See generally* Act of Dec. 9, 1999, Pub. L. No. 106-152, 113 Stat. 1732 (codified at 18 U.S.C. § 48 (2000)) (providing statutory text).

[85] *See* 18 U.S.C. § 48(a).

[86] *See* 145 CONG. REC. S15220-03, at S15221 (1999) (explaining purpose of statute is to prohibit individuals from profiting from animal cruelty videos and to eliminate commercial incentive). Note that § 48(b) contains an exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." *See* 18 U.S.C. § 48(b).

[87] *See generally* H.R. REP. NO. 106-397 (1999) (providing overview of § 48 and discussing other limiting aspects of § 48); *id.* at 7 (defining "animal" in terms of its common meaning and not including invertebrates, insects, crustaceans, or fishes); *id.* (limiting § 48 to depictions of real animals actually tortured, mutilated, maimed, wounded, or killed); *id.* (stating § 48 does not apply to simulated or virtual depictions of animal cruelty).

[88] 18 U.S.C. § 48(a) (stating creation, sale, or possession of depictions of animal cruelty is subject to criminal sanction).

[89] *Id.* § 48(c)(1) (defining term "depiction of animal cruelty" as used in subsection (a) to include photographs, films, video recordings, electronic images, or sound recordings).

[90] *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (providing examples of protected entertainment including motion pictures, radio and television broadcasts, and live entertainment); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682 (1968) (reiterating that First Amendment protects motion pictures); Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 690 (1959) (same).

[91] *See generally* 18 U.S.C. § 48(a) (stating creation, sale, or possession of depictions of animal cruelty is subject to criminal sanction, thus implicating First Amendment protection).

Subsection (a) further limits the statute's overall scope in several respects.[92] A proper defendant must have knowingly engaged in the prohibited activity for commercial gain.[93] Inadvertent possession with no intent to distribute, for example, does not yield criminal sanction under the statute.[94] Moreover, knowing possession with intent to conduct intrastate distribution does not trigger criminal liability.[95]

Although § 48 applies only to depictions, the underlying illegal conduct remains relevant through subsection (c)(1).[96] A depiction triggers § 48 only if it depicts conduct illegal in the jurisdiction where the capturing of the depiction occurred.[97] Thus, the intentional killing of living animals need not occur in the same jurisdiction in which a party possessed the depiction.[98] However, to trigger § 48 the possession must occur in a state that criminalizes animal cruelty.[99]

The limitations in § 48 apply to all depictions of animal cruelty in which an offender intentionally maims, mutilates, tortures, wounds, or kills an animal.[100] Legislative history, however, indicates a narrower intent.[101] Congress passed § 48 primarily to prohibit the dissemination of "crush videos."[102] A crush video usually depicts a woman stomping a small animal to death.[103] A typical video opens with a shot of a live

[92] *See generally id.*

[93] *Id.* (stating intention of proper defendant must be to place depictions of animal cruelty in interstate or foreign commerce for commercial gain).

[94] *See* H.R. REP. NO. 106-397, at 8 (1999) (explaining that statute permits mere possession of material described in § 48 for private use).

[95] *Id.* at 7 (stating acts punished only if done with intent of placing depiction in interstate or foreign commerce for commercial gain).

[96] *See* 18 U.S.C. § 48(c)(1) (stating criminal sanctions only apply if conduct is illegal under federal or state law in state where creation, sale, or possession of depiction took place).

[97] *Id. See generally* H.R. REP. NO. 106-397, at 8 (noting depictions of ordinary hunting and fishing activities do not trigger § 48).

[98] 18 U.S.C. § 48(c)(1); *see also* H.R. REP. NO. 106-397, at 8 (clarifying that act of placing prohibited depiction into interstate commerce violates § 48 even if conduct depicted is not illegal under state law of recipient).

[99] 18 U.S.C. § 48(c)(1). The limitations in § 48 do not apply to "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." *See id.* § 48(b).

[100] *See generally* 18 U.S.C. § 48.

[101] *See* United States v. Stevens, 533 F.3d 218, 222 (3d Cir. 2008) (en banc) (explaining legislative history indicates Congress primarily sought to prohibit dissemination of crush videos through passage of § 48).

[102] *See id.*

[103] *See* H.R. REP. NO. 106-397, at 2 (defining and describing crush videos); 145 CONG. REC. H10267-01, at H10267 (1999) (describing typical crush video as animal slowly crushed into floor limb-by-limb over period of 10 to 12 minutes by woman

gerbil, hamster, bird, kitten, or puppy taped to the ground.[104] Barefoot or clad in stilettos, a woman literally crushes the trapped animal, limb by limb.[105] The animal's squeals often drown out the woman's dominatrix-style address to her helpless victim as she crushes it into the ground.[106]

Such depictions excite and arouse persons with particular sexual fetishes.[107] Indeed, such persons pay from $30 to $100 per video, and may choose from over 3,000 titles.[108] Crush videos are widely available through the Internet, with distribution occurring through interstate and foreign commerce.[109] Using its power under the Commerce Clause, Congress sought to stem the interstate dissemination of crush videos.[110]

All fifty states and the District of Columbia criminalize animal cruelty, yet § 48 takes the additional step of criminalizing its depiction.[111] Crush videos are unique in that the female actor often conceals her face, with only her lower leg or foot appearing on film.[112] This narrow frame of view creates several legal difficulties.[113] The first

wearing high-heeled stiletto shoe).

[104] *See* 145 CONG. REC. H10267-01, at H10269 (stating crush videos feature small animals taped to ground including kittens, hamsters, birds, and monkeys).

[105] *See id.* at H10267 (recounting viewing of typical crush video).

[106] *See id.*

[107] H.R. REP. NO. 106-397, at 2-3 (noting crush videos appeal to persons with particular sexual fetish); *see also id.* at 3 (describing Internet sites where customer can dictate particular manner they wish to see animals tortured and killed).

[108] *See* 145 CONG. REC. H10267-01, at H10272 (discussing commercial value of crush videos and extent of problem).

[109] *See* H.R. REP. NO. 106-397, at 3 (discussing distribution and sale of crush videos).

[110] *See id.* (explaining Congress alone has power to regulate interstate and foreign commerce, thus it is appropriate for Congress to legislate to stop trade in crush videos). *See generally* U.S. CONST. art. I, § 8, cl. 3 (conferring power upon Congress to regulate commerce among states and with foreign nations).

[111] *See* United States v. Stevens, 533 F.3d 218, 224 n.4 (3d Cir. 2008) (en banc) (listing current state anti-animal cruelty laws); *see also* 18 U.S.C. § 48(a) (2000) (stating creation, sale, or possession of depictions of animal cruelty is subject to criminal sanction).

[112] *See Stevens*, 533 F.3d at 222 (explaining distinctive features of crush videos that make prosecution of underlying animal cruelty difficult); H.R. REP. NO. 106-397, at 3 (noting crush videos conceal women's faces, location, and date of activity); 145 CONG. REC. H10267-01, at H10267, H10269, H10271-H10273 (same). *See generally* 145 CONG. REC. E1067-01, at E1067 (1999) (urging legislation to provide prosecutors with tool to target crush videos).

[113] *See Stevens*, 533 F.3d at 222; H.R. REP. NO. 106-397, at 3 (explaining defendants often successfully assert jurisdiction and statute of limitations defense).

challenge involves identifying the woman who crushed the animal.[114] Even if identity is certain, establishing the location and date of the acts may be an insurmountable obstacle to successful prosecution.[115] The film itself aids little in this regard.[116] Thus, jurisdictional and statute of limitation issues invariably complicate court proceedings.[117]

Distributors of crush videos exploit the legal loopholes of state animal cruelty laws in conducting their trade.[118] To avoid legal difficulties and to provide prosecutors with a tool to target crush videos, Congress enacted § 48.[119] Whether the statute successfully incorporates these goals is a subject for later discussion in this Note.[120]

C. Relevant Cases: Lukumi v. City of Hialeah *and* New York v. Ferber

To date, the United States Supreme Court has addressed animal cruelty in the First Amendment context only once.[121] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* ("*Lukumi*") involved city ordinances that restricted ritual animal sacrifices.[122] The Supreme Court held the ordinances violated the Free Exercise Clause of the First Amendment.[123] Although the case turned on free exercise, rather than free speech analysis, the *Lukumi* Court directly recognized a state interest in preventing animal cruelty.[124]

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[114] *See* H.R. REP. NO. 106-397, at 3 (noting testimony of witnesses that crush videos often conceal women's faces, location, and date of activity).

[115] *See id.*

[116] *See id.*

[117] *See id.* (explaining defendants often successfully assert defense that state could not prove jurisdiction over place where act occurred); *id.* (explaining defendants often successfully asserted defense that state could not prove that actions depicted took place within statute of limitations). *See generally* 145 CONG. REC. E1067-01, at E1067 (urging legislation to provide prosecutors with tool to target crush videos).

[118] *See* 145 CONG. REC. E1067-01, at E1067 (declaring that distributors of videos take advantage of loopholes in state anti-animal cruelty laws).

[119] *See generally* H.R. REP. NO. 106-397, at 2-5 (elaborating on background and need for § 48).

[120] *See infra* Part III.

[121] *See* JORDAN CURNUTT, ANIMALS AND THE LAW: A SOURCEBOOK 186 (ABC-CLIO, Inc. 2001) (noting that except for cases involving federal wildlife protection, Supreme Court passed judgment on use of animals only one other time).

[122] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527-29 (1993) (describing ordinances enacted by city council in addressing religious animal sacrifice).

[123] *Id.* at 546-47 (explaining ordinances are unconstitutionally overbroad or underinclusive as to each asserted governmental interest).

[124] *Id.* at 538 (recognizing legitimate government interest in protecting public health and preventing cruelty to animals).

The congregants of Church of the Lukumi Babalu Aye ("the Church") practiced the Afro-Cuban Santeria religion.[125] Santeria involves ritualized animal sacrifice as a principal expression of devotion.[126] Seeking to practice Santeria openly, the Church leased land in the City of Hialeah, Florida and publicized plans to establish a house of worship.[127] In response, the Hialeah city council held an emergency public session at which the council approved an ordinance incorporating Florida's animal cruelty laws, except as to penalty.[128] Three later ordinances reflected the stated city policy to oppose ritual animal sacrifice.[129]

The Church filed suit to challenge the constitutionality of the ordinances under the Free Exercise Clause.[130] Ruling for the city, the district court identified four compelling governmental interests and concluded these interests justified the ordinances' prohibition on ritual animal sacrifice.[131] Most relevant here, the court found compelling the city's interest in protecting animals from cruelty.[132] The Eleventh Circuit Court of Appeals affirmed and the Supreme Court granted certiorari.[133]

In finding the city ordinances unconstitutional and reversing the lower courts, the Supreme Court concluded the legislature's motive was not to protect animals, but rather to suppress religion.[134] By proscribing all Santeria sacrificial practice, the ordinances improperly targeted religious conduct.[135] Far less restrictive ordinances could

[125] *Id.* at 524-25.

[126] *Id.* at 524. *See generally* CURNUTT, *supra* note 121, at 186-87 (discussing background and history of Santeria religion); MIGUEL A. DE LA TORRE, SANTERIA: THE BELIEFS AND RITUALS OF A GROWING RELIGION IN AMERICA (William B. Publ'g Co. 2004) (providing guide to history, beliefs, and rituals of Santeria religion).

[127] *Lukumi*, 508 U.S. at 525-26 (stating Church leased land in April 1987 for purposes of establishing house of worship, school, cultural center, and museum); *see also id.* at 526 (indicating Church filed suit to bring practice of Santeria into open, including ritual of animal sacrifice).

[128] *Id.* at 526.

[129] *Id.* at 527. *See generally id.* at 527-28 (providing summary of contents of ordinances).

[130] *Id.* at 528.

[131] *Id.* at 529-30.

[132] *Id.* (explaining district court found third compelling interest in protecting animals from cruelty).

[133] *Id.* at 530 (stating Eleventh Circuit Court of Appeals affirmed lower court's judgment in per curiam opinion).

[134] *Id.* at 535-38 (explaining religious practice singled out for discriminatory treatment).

[135] *Id.* at 538.

accomplish the city's stated ends.[136] In articulating this narrowing principal, however, the Court recognized as legitimate the governmental interest in preventing animal cruelty.[137] Indeed, Justice Blackmun's concurrence makes clear that the holding does not reflect the Court's views on the strength of a state's interest in protecting animals.[138]

The free exercise analysis of *Lukumi* is, to date, the only First Amendment case in which the Supreme Court has considered animal cruelty.[139] In the context of free speech, the Court has not yet addressed depictions of animal cruelty, but has recognized certain types of speech as categorically unprotected.[140] These include fighting words, threats, speech that incites imminent lawless activity, and obscenity.[141] In 1982, the Court added to this short list by recognizing depictions of child pornography as unprotected speech in *New York v. Ferber*.[142]

Ferber involved a New York criminal statute prohibiting the distribution of material depicting sexual performances by children under the age of sixteen.[143] The owner of an adult bookstore, Paul Ferber, violated the statute by selling two such films to an undercover police officer.[144] The Supreme Court noted that laws punishing the dissemination of depictions run a considerable risk of censoring free speech.[145] However, the Court ultimately concluded the states have

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[136] *Id.*

[137] *Id.*

[138] *Id.* at 580 (Blackmun, J., concurring) (stating holding of case and fact that entire Court concurs in result does not reflect Court's views of strength of interest in prohibiting animal cruelty).

[139] *See supra* note 121 and accompanying text.

[140] *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) (recognizing obscene material is unprotected by First Amendment); Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (recognizing imminent incitement of lawless activity as categorically unprotected speech); Watts v. United States, 394 U.S. 705, 707 (1969) (recognizing threats as categorically unprotected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 573-74 (1942) (recognizing fighting words as categorically unprotected speech). The Supreme Court granted certiorari to review the constitutionality of § 48; the Court heard oral arguments addressing depictions of animal cruelty on October 6, 2009. *See generally* Transcript of Oral Argument, United States v. Stevens, No. 08-769 (U.S. argued Oct. 6, 2009); United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (en banc), *cert. granted*, 129 S. Ct. 1984 (U.S. Apr. 20, 2009) (No. 08-769).

[141] *See* cases cited *supra* note 140.

[142] New York v. Ferber, 458 U.S. 747, 764 (1982) (recognizing child pornography materials are outside scope of First Amendment protection).

[143] *Id.* at 750-51 (presenting text of statute).

[144] *Id.* at 752.

[145] *Id.* at 756 (comparing child pornography laws to obscenity regulations and

greater leeway in regulating depictions of child pornography.[146] It reasoned that a democratic society depended on the healthy growth of young people into mature persons.[147] The asserted interest of protecting the physical and psychological well-being of minors was very compelling.[148] Articulating four additional factors supporting the creation of an unprotected category of expression, the Court upheld the New York statute and found that child pornography is not entitled to First Amendment protection.[149]

II. *UNITED STATES V. STEVENS*: FACTS, RATIONALE, AND HOLDING

The Supreme Court has not recognized a new category of unprotected expression since *Ferber* in 1982.[150] Subsequent cases involving child pornography have extended the *Ferber* rationale.[151] However, whether *Ferber* applies beyond the realm of child pornography is an open question.[152] The Third Circuit Court of Appeals recently confronted this issue in *United States v. Stevens*.[153]

In *Stevens*, law enforcement agents investigated Robert Stevens, a Virginia resident, whom they suspected of advertising illegal dog fighting videos.[154] On April 23, 2003, officers executed a search

acknowledging risk of censorship and suppression of protected expression).

[146] *Id.*

[147] *Id.* at 757.

[148] *Id.* at 756-57 (establishing interest in protecting minors is extremely compelling and beyond need for elaboration). *See generally* FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding government interest in well-being of children justified special treatment of offensive broadcasting); Ginsberg v. New York, 390 U.S. 629 (1968) (upholding law protecting children from exposure to literature not obscene); Prince v. Massachusetts, 321 U.S. 158 (1944) (sustaining statute prohibiting use of child to distribute literature on street).

[149] *See Ferber*, 458 U.S. at 756-64, 774.

[150] *See* United States v. Stevens, 533 F.3d 218, 220 (3d Cir. 2008) (en banc) (stating Supreme Court has not recognized new category of unprotected expression in over 25 years).

[151] *See* United States v. Williams, 128 S. Ct. 1830, 1842 (2008) (upholding provision criminalizing pandering or solicitation of child pornography); Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (striking down prohibition on virtual child pornography); Osborne v. Ohio, 495 U.S. 103, 125 (1990) (upholding statutory prohibition of possession and viewing of child pornography against constitutional challenge).

[152] *See infra* Part III.

[153] *See Stevens*, 533 F.3d at 224 (noting only recognized category of unprotected speech remotely similar to speech regulated by § 48 is child pornography as defined in *Ferber*, 458 U.S. at 764).

[154] *Id.* at 220-21 (presenting facts of case leading to appeal).

warrant on Stevens's residence and found multiple copies of three videos.[155] The first two films, titled "Pick-A-Winna" and "Japan Pit Fights," respectively, featured footage of organized dog fights.[156] The third film titled "Catch Dogs," depicted a pit bull attacking a domestic farm pig.[157] All three films incorporated commentary and narration by Stevens.[158]

A grand jury indicted Stevens on three counts of violating 18 U.S.C. § 48.[159] At Stevens's trial, a jury found him guilty on all three counts.[160] The judge sentenced him to thirty-seven months imprisonment and three years supervised release.[161] Stevens appealed his conviction to the Third Circuit Court of Appeals.[162] The en banc court held that § 48 abridges free speech rights guaranteed by the First Amendment and vacated Stevens's conviction.[163]

In facially invalidating the statute, the Third Circuit declined to recognize a new category of unprotected speech without express direction from the Supreme Court.[164] Out of the traditionally unprotected categories, the court found the speech regulated by § 48 somewhat similar only to *Ferber*.[165] Addressing the five *Ferber* factors favoring creation of a new category of unprotected speech, the *Stevens* court rejected a government argument that depictions of animal cruelty were analogous to depictions of child pornography.[166]

Having determined that § 48 was a content-based regulation of protected speech, the *Stevens* court applied strict scrutiny review.[167] It held the statute failed this heightened standard of review for two

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[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id. See generally* 18 U.S.C. § 48 (2000).

[160] *Stevens*, 533 F.3d at 220-21.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 220.

[164] *See id.* at 225-26 (explaining hesitation of lower federal court to extend child pornography rationale).

[165] *Id.* at 224.

[166] *See id.* at 232 (stating inherent differences between animals and children causes attempted analogy of § 48 to child pornography to fail); *see also id.* 226-32 (discussing all five factors articulated in New York v. Ferber, 458 U.S. 747 (1982)). *See generally* New York v. Ferber, 458 U.S. 747 (1982) (providing guidelines for concluding actual child pornography is unprotected category of speech).

[167] *Stevens*, 533 F.3d at 232 (explaining that because § 48 is content-based and regulates protected speech, it must receive strict scrutiny review).

reasons.[168] First, the regulation served no compelling interest.[169] The court found preventing animal cruelty was not a sufficiently compelling interest in the context of free speech to justify a content-based regulation.[170] Second, even assuming the asserted interest was compelling, the statute failed to satisfy the narrow tailoring requirement.[171] In sum, because § 48 was unconstitutional, Stevens's conviction could not stand.[172]

Three judges on the en banc Third Circuit dissented.[173] Detailing the long-standing history of animal cruelty laws in the United States, these judges agreed with the government that its interest in protecting animals was compelling.[174] The dissenting circuit judges further argued that the depictions prohibited under § 48 were of such minimal social value as to fall outside of First Amendment protection.[175] Applying the *Ferber* factors, these judges would have recognized depictions of animal cruelty as a narrow category of unprotected speech, and thus would have upheld both the constitutionality of § 48 and Stevens's conviction.[176]

III. ANALYSIS

The *Stevens* court reached the correct holding, but applied an incorrect rationale.[177] The court correctly held 18 U.S.C. § 48 was not narrowly tailored under strict scrutiny review.[178] However, the court erroneously suggested there is no compelling government interest in preventing animal cruelty in the First Amendment context.[179] Moreover, the court's compelling interest rationale harms important

[168] *Id.* (stating § 48 fails strict scrutiny because it serves no compelling interest and is not narrowly tailored).

[169] *Id.*

[170] *Id.* at 230-31.

[171] *Id.* at 233-35 (discussing why § 48 fails narrow tailoring requirement).

[172] *Id.* at 220.

[173] *Id.* at 236 (Cowen, J., dissenting, joined by Fuentes and Fisher, JJ.).

[174] *Id.* at 237-40 (presenting nation's historical aversion to animal cruelty and finding compelling government's interest in preventing animal cruelty).

[175] *Id.* at 242.

[176] *Id.* at 250 (stating dissenting judges would have upheld § 48 as constitutional, and thus would have affirmed Stevens's conviction). *See generally id.* at 243-47 (discussing *Ferber* factors and concluding speech prohibited by § 48 possesses characteristics of unprotected speech identified by Supreme Court).

[177] *See infra* Part III.A-B.

[178] *See infra* Part III.A.

[179] *See infra* Part III.B.

social policy.[180] With this framework in mind, this Part addresses the narrow tailoring prong and then focuses on the government's compelling interest.[181]

A. Stevens *Correctly Held § 48 Was Not Narrowly Tailored*

In adjudicating free speech cases, courts address the nature of speech regulated and the nature of the regulation itself.[182] The distinction between protected and unprotected speech ties into the regulation inquiry and the eventual standard of review applied to the regulation at bar.[183] Because § 48 restricts protected speech and, as the government conceded, is a content-based regulation, the *Stevens* court appropriately applied strict scrutiny review.[184]

Strict scrutiny review involves a two-prong analysis.[185] The regulation at issue must further a compelling government interest and must be the least restrictive alternative for achieving that interest.[186] Section 48 fails strict scrutiny review because the government did not narrowly tailor its interest in preventing animal cruelty to the means employed to achieve that interest.[187] In short, the fit between the statute's means and ends was not close enough.[188] The three videos leading to Stevens's conviction highlight this impermissibly loose fit.[189]

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[180] *See infra* Part III.C.

[181] *See infra* Part III.A-C.

[182] *See* JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 35 (Westview Press 1999) (explaining free speech decisions focus on nature of speech and nature of regulation at issue); WERHAN, *supra* note 59, at 79 (providing flowchart of free speech jurisprudence where nature of speech and nature of restriction determine standard of review applied by courts); *id.* (discussing interplay of categorization principle and content distinction principle).

[183] *See* WEINSTEIN, *supra* note 182, at 35; WERHAN, *supra* note 59, at 79.

[184] *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (recognizing government may regulate protected speech based on content if regulation satisfies strict scrutiny review); United States v. Stevens, 533 F.3d 218, 223 (3d Cir. 2008) (en banc) (noting government concedes § 48 is content-based regulation of speech).

[185] *See* cases cited *supra* note 74.

[186] *See* cases cited *supra* note 74.

[187] *See Stevens*, 533 F.3d at 233 (noting Supreme Court consistently strikes down content-based regulations on narrow tailoring grounds); *see also* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 102 n.8 (1972) (stating that even if interest is compelling, government may not pursue such interest using means not narrowly tailored); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (same).

[188] *See Stevens*, 533 F.3d at 234.

[189] *See generally id.* at 220-21 (presenting facts of case including description of three videos leading to Stevens's indictment and conviction).

Two videos, "Pick-A-Winna" and "Japan Pit Fights," featured depictions of organized dog fights.[190] The third video, "Catch Dogs," featured dog training footage where pit bulls hunted and attacked wild hogs and domestic farm pigs.[191] None of the videos contained prurient material and the government did not allege that Stevens transported crush videos in interstate commerce.[192] Instead, the government cited the difficulty in prosecuting individuals for the underlying acts of animal cruelty in crush videos to defend § 48's tailoring.[193] This argument cannot justify the means employed by § 48 — criminalizing all depictions of animal cruelty — because crush videos represent only one portion of restricted speech.[194]

Moreover, for § 48 to satisfy the narrow tailoring requirement, it must be the least restrictive means to achieve the government's interest in preventing animal cruelty.[195] The footage of Stevens's videos demonstrates that § 48 was not narrowly tailored.[196] "Catch Dogs," for example, contained names and addresses of dog suppliers, locations of hunts, and clear images of participants' faces.[197] The State could prosecute offenders for the underlying acts of animal cruelty without banning the depictions of that crime.[198] In other words, because § 48 restricts such a broad amount of speech, it does not employ the least restrictive alternative.[199] The government's prosecution difficulty argument fails because Stevens's three videos are not crush videos.[200]

Stevens's conviction under § 48 outside the context of crush videos further highlights how the breadth of the statute has exceeded legislative intent.[201] As noted by the *Stevens* court, § 48 is both

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[190] *Id.*

[191] *Id.*

[192] *See id.* at 223.

[193] *See id.*

[194] *See id.* at 234 (stating that crush videos are only portion of speech restricted by § 48). *See generally* 18 U.S.C. § 48 (2000).

[195] *See* cases cited *supra* note 74; *see also Stevens*, 533 F.3d at 233 (noting asserted government interest is preventing animal cruelty).

[196] *See generally Stevens*, 533 F.3d at 234 (discussing footage of three videos).

[197] *See id.*

[198] *See id.* at 233 (noting § 48 is not least restrictive alternative to accomplish asserted government interest of preventing cruelty to animals).

[199] *See id.*

[200] *See id.* at 222 (noting videos do not contain prurient material and Stevens not charged with interstate transport of crush videos).

[201] *But see* H.R. REP. NO. 106-397, at 4 (1999) (identifying government's interest in regulating treatment of animals as preventing desensitization to animal cruelty generally).

overinclusive and underinclusive.[202] Section 48 is overinclusive because it criminalizes depictions legal in one jurisdiction but not another.[203] It is underinclusive because it does not apply to intrastate transfers of depictions.[204] In sum, the *Stevens* court correctly held that § 48 is unconstitutional because the statute fails the narrow tailoring prong of strict scrutiny review.[205]

Some contend that strict scrutiny review should not apply to § 48.[206] Rather, § 48 should receive the lower standard of review applied to content-neutral regulations.[207] Because the Supreme Court treats content-based regulations as content-neutral under the secondary effects doctrine, they reason that § 48 should receive lower review.[208] By analogy to the doctrine, they argue that § 48 aims at secondary effects of animal cruelty, rather than at expression itself.[209] Dog fighting, for example, results in undesirable secondary effects such as gambling, drug sales, and weapons violations.[210] Because the causes of these effects relate to the content of speech, § 48 should receive a lower standard of review.[211]

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[202] *See Stevens*, 533 F.3d at 233-34.

[203] *See id.*

[204] *See id.*

[205] *See* cases cited *supra* note 187.

[206] *See Stevens*, 533 F.3d at 247 (Cowen, J., dissenting) (concluding that speech regulated by § 48 possesses necessary attributes of unprotected speech); *id.* at 243 (stating government may regulate category of unprotected speech).

[207] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (noting highest level of scrutiny applied to content-based regulations and contrasting intermediate standard of review applied to content-neutral regulations); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986) (explaining content-based regulations presumptively violate First Amendment, but content-neutral regulations are valid if they pass lower standard of review); *see also id.* at 47 (stating lower standard of review includes substantial government interest and alternative avenues of communication).

[208] *See* cases cited *supra* note 79.

[209] *See generally* 18 U.S.C. § 48 (2000).

[210] *See* Lisa Olson, *Dogfighting World is Inhuman Society: Vick's Case Helping Expose Common Culture of Cruelty*, N.Y. DAILY NEWS, July 19, 2007, http://www.nydailynews.com/sports/football/2007/07/19/2007-07-19_dogfighting_world_is_inhumane_society.html?page=0 (recounting detective's statement that police confiscate more drugs and guns by breaking up dog fighting rings than drug rings); *cf.* Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1155 (Wash. 1978) (listing secondary effects of adult establishment as attracting transients, increasing crime, parking congestion, and decreasing property values); *id.* at 713 (noting contribution of adult theaters to neighborhood blight).

[211] *Cf. Renton*, 475 U.S. at 49 (concluding because secondary effects of adult theaters relate to content of speech, Court reviews zoning ordinance under standard of review applied to content-neutral regulation).

Although superficially plausible, the above argument lacks substantive merit as to the secondary effects doctrine.[212] The doctrine presupposes that courts can distinguish between the primary and secondary effects of speech.[213] Assuming courts can distinguish appropriately and consistently, the broader issue is whether courts should permit the government to regulate speech on this basis.[214] Because content-based regulations implicate official censorship, courts are suitably suspicious and generally apply heightened review.[215] In this way, strict scrutiny functions as a First Amendment gatekeeper.[216] Reflecting judicial concern with content-based regulations, the Supreme Court has never applied the secondary effects doctrine outside of the "adult" products or services context.[217] In other words, the Court has only applied the doctrine to uphold regulations restricting sexually graphic expression.[218] On its face, § 48 is a content-based regulation of protected non-sexually graphic speech.[219]

[212] *See generally* CONSTITUTIONAL LAW, *supra* note 59, at 1301-02 (describing application of secondary effects doctrine).

[213] *See* Boos v. Barry, 485 U.S. 312, 335 (1988) (Brennan, J., concurring) (stating future litigants will likely point to plausible secondary effects to justify impermissible content-based regulations); *id.* (emphasizing secondary effects doctrine does not provide clear lines needed in First Amendment analysis); *id.* at 336 (stating that courts are burdened with ambiguous and unworkable distinction between primary and secondary effects of speech).

[214] *See id.* at 337 (arguing that even if confident in courts' ability to distinguish between primary and secondary effects, content-based regulation still unconstitutional); *see also* CONSTITUTIONAL LAW, *supra* note 59, at 1255 (posing question of whether it makes sense to treat content-based law more leniently than other content-based laws simply because it involves secondary effects).

[215] *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 457 (2002) (Souter, J., dissenting) (stating content-based regulations carry high risk because selective application of law based on content provides opportunity for government censorship).

[216] *See generally Renton*, 475 U.S. at 57 (Brennan, J., dissenting) (arguing ordinance is content-based on its face and thus should receive strict scrutiny review); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 85 (1976) (Stewart, J., dissenting) (contending prime function of First Amendment is to prevent impermissible interference with protected speech).

[217] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993) (rejecting argument that content-based regulation of news racks is content neutral under secondary effects doctrine); *Boos*, 485 U.S. at 321 (same); *id.* at 337-38 (Brennan, J., concurring) (noting prior precedent limited its own application to businesses dealing in sexually explicit materials).

[218] *See* cases cited *supra* note 217. *See generally* CONSTITUTIONAL LAW, *supra* note 59, at 1301 (commenting that Supreme Court has appeared to move away from secondary effects analysis).

[219] *See* United States v. Stevens, 533 F.3d 218, 223 (3d Cir. 2008) (en banc) (noting § 48 is content-based regulation of protected speech); *id.* at 224 n.5 (stating

Thus, the secondary effects doctrine is inappropriate and strict scrutiny review must apply.[220] The *Stevens* court correctly analyzed the narrow tailoring prong of that review and held § 48 was unconstitutional.[221]

B. Stevens *Erroneously Suggested the Government Has No Compelling Interest in Preventing Animal Cruelty in the First Amendment Context*

Although achieving the correct result, the *Stevens* court incorrectly analyzed the compelling interest prong of strict scrutiny review.[222] The court erroneously suggested there is no compelling government interest in preventing animal cruelty in the First Amendment context.[223] The court erred in its analysis for three reasons.[224] First, the compelling interest requirement is not a sterile proclamation of what the judiciary deems compelling in the vacuum of the courtroom.[225] There is no bright-line test for determining which government interests qualify as compelling.[226] Instead, societal consensus in the form of legislative judgment often informs what constitutes an interest compelling enough to allow infringement on free speech rights.[227] The

court does not address constitutionality of statute only regulating crush videos).

[220] *See id.* at 223 (explaining strict scrutiny required because § 48 regulates protected speech based on content).

[221] *See id.* at 235.

[222] *See id.* at 226 (stating preventing animal cruelty does not rise to compelling government interest in light of First Amendment rights).

[223] *See id.*

[224] *See generally id.* at 226-30 (discussing compelling interest analysis).

[225] *See generally id.* at 238 n.19 (Cowen, J., dissenting) (stating Supreme Court has not established exact test for compelling interest requirement).

[226] The Supreme Court has never articulated a rule or test for determining if an asserted government interest is compelling. *See id.* at 227 (majority opinion) (acknowledging Supreme Court has not provided clear guidance for determining what interests qualify as compelling). Indeed, the Court has recognized a wide variety of interests under strict scrutiny review with minimal discussion explaining such recognition. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1995) (recognizing compelling interest in compliance with Establishment Clause); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118-19 (1991) (recognizing compelling interest in ensuring compensation for victims of crime); New York v. Ferber, 458 U.S. 747, 758 (1982) (recognizing compelling interest in protecting well-being of minors); *see also Stevens*, 533 F.3d at 238 n.19 (Cowen, J., dissenting) (noting Supreme Court recognizes wide variety of compelling interests in diverse contexts).

[227] *Id.* at 239 (explaining Supreme Court often looks to nationwide legislative prevalence to support conclusion that stated interest is sufficiently compelling); *see, e.g.*, *Simon & Schuster, Inc.*, 502 U.S. 105 (using fact that every state has body of tort law to serve interest in ensuring compensation for victims of crimes to support finding

Stevens court failed to analyze the compelling interest prong of strict scrutiny review in this context.[228] Second, the court erroneously interpreted *Lukumi* as indicating the Supreme Court's view that the government interest at issue in § 48 — preventing animal cruelty — is not compelling.[229] *Lukumi*, however, did not involve a genuine government interest of protecting animals.[230] The *Stevens* court ignored Justice Blackmun's concurrence, which makes explicit the high court's belief in the strength of just such a compelling interest.[231] Third, the *Stevens* court failed to assign sufficient weight to the human interest implicit in preventing animal cruelty, and thus made an erroneous distinction between humans and animals.[232]

1. Legislative Judgment and Societal Consensus

The *Stevens* court addressed the compelling interest prong of strict scrutiny review under the first *Ferber* factor.[233] Although acknowledging the appealing nature of the animal protection cause, the court did not afford it the status of a compelling interest in the First Amendment context.[234] In reaching this conclusion, the *Stevens* court reasoned that the Supreme Court has only found an interest compelling for a content-based restriction where the interest relates to human well-being.[235] The court acknowledged the similarity between § 48 and the New York statute at issue in Ferber in that both regulated

that such interest is compelling); *Ferber*, 458 U.S. 747 (detailing legislative findings and stating Supreme Court would not second-guess legislative judgment that protecting well-being of minors was compelling).

[228] *See generally Stevens*, 533 F.3d at 226-30 (analyzing compelling interest inquiry under first *Ferber* factor).

[229] *See id.* at 226-27 (discussing *Lukumi* within court's compelling interest analysis and concluding Supreme Court has suggested preventing animal cruelty is not compelling in First Amendment context). *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[230] *Lukumi*, 508 U.S. at 542 (stating city ordinances at issue had suppression of religion as objective); *see id.* at 580 (Blackmun, J., concurring) (explaining ordinances singled out religion and did not genuinely seek to prevent animal cruelty).

[231] *See id.* (noting that holding does not reflect Court's view of strength of interest in preventing animal cruelty); *id.* ("The number of organizations that have filed amicus briefs on behalf of this interest, however, demonstrate that it is not a concern to be treated lightly.")

[232] *See Stevens*, 533 F.3d at 229-30.

[233] *See id.* at 226-30.

[234] *Id.* at 226, 230.

[235] *Id.* at 227.

depictions to indirectly stem the underlying act.[236] Nevertheless, the court found that § 48 does not serve a compelling government interest because it does not regulate the underlying act of animal cruelty.[237] Protecting the physical and psychological well-being of children warranted conflation of the depiction and underlying act in Ferber — preventing animal cruelty, according to the court, "simply does not implicate interests of the same magnitude."[238]

By drawing a First Amendment line between humans and animals, the court neglected societal consensus and erroneously analyzed the compelling interest prong.[239] Certainly, the Supreme Court has not yet recognized a nonhuman interest as sufficiently compelling to justify a content-based restriction.[240] The high court, however, has not had occasion to consider animal cruelty in light of the Free Speech Clause — until now.[241]

In addition, when determining whether a government interest is compelling, the Supreme Court often looks to societal consensus in the form of nationwide legislative prevalence.[242] In *Ferber*, for example, the Court supported its finding of a compelling interest by citing legislative judgment.[243] Almost all the states and the federal government have enacted legislation aimed at combating child pornography.[244] That legislative judgment combined with literature detailing the effects on children used as pornography subjects "easily passe[d] muster under the First Amendment."[245] Although noting the

[236] *See id.* at 228.

[237] *Id.*

[238] *Id.*

[239] *See generally id.* at 226-30 (analyzing compelling interest prong of strict scrutiny review).

[240] *See id.* at 227 (stating Supreme Court has only found interest compelling for content-based restriction when interest related to human well-being). *But see* CURNUTT, *supra* note 121, at 186 (noting that except for cases involving federal wildlife protection, Supreme Court passed judgment on use of animals only one other time).

[241] *See* United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (en banc), *cert. granted*, 129 S. Ct. 1984 (Apr. 20, 2009) (No. 08-769); *see also* CURNUTT, *supra* note 121, at 186.

[242] *See* sources cited *supra* note 227 and accompanying text.

[243] New York v. Ferber, 458 U.S. 747, 757-58 (1982) (detailing legislative findings and stating Supreme Court would not second-guess legislative judgment that protecting well-being of minors was compelling).

[244] *Id.* at 758.

[245] *Id.* ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." (footnote omitted)).

comprehensive state statutory schemes designed to prevent animal cruelty, the *Stevens* majority failed to give this legislative judgment appropriate weight.[246] Indeed, as explained by the dissent, the United States has a long-standing aversion to animal cruelty with the first laws proscribing such cruelty enacted in 1641.[247] That all fifty states and the federal government have passed statutes prohibiting the underlying conduct at issue in § 48 demonstrates that preventing animal cruelty rises to the level of compelling.[248]

2. Misinterpretation of *Lukumi*

The *Stevens* court further argues that the government did not satisfy the compelling interest prong because the Supreme Court suggested in *Lukumi* that protecting animals is not compelling in the First Amendment context.[249] The *Stevens* court's interpretation of *Lukumi*, however, is incorrect.[250] In *Lukumi*, the Supreme Court held that Church members could freely practice Santeria, including ritual animal sacrifice, under rights guaranteed by the Free Exercise Clause.[251] The Court recognized a compelling government interest in preventing animal cruelty, but ultimately determined the legislature's actual motive was to suppress religion.[252] Thus, the Court did not decide whether a law genuinely seeking to prevent animal cruelty necessitated a religious exemption due to the Free Exercise Clause.[253] The city ordinances at issue in *Lukumi* singled out and directly burdened religion; the ordinances did not implicate the interest in animal protection that the high court recognized as compelling.[254]

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[246] *See Stevens*, 533 F.3d at 228.

[247] *Id.* at 238 (Cowen, J., dissenting).

[248] *Id.* at 238-39; *see also* sources cited *supra* note 227.

[249] *See Stevens*, 533 F.3d at 226-27 (discussing *Lukumi* within court's compelling interest analysis and concluding Supreme Court has suggested preventing animal cruelty is not compelling in First Amendment context). *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[250] *See generally Stevens*, 533 F.3d at 226-27 (discussing *Lukumi*).

[251] *Lukumi*, 508 U.S. at 524 (invalidating ordinances as violating Free Exercise Clause).

[252] *Id.* at 535-38 (explaining religious practice singled out for discriminatory treatment); *see also* H.R. REP. NO. 106-397, at 11 (1999) (acknowledging Supreme Court recognized preventing animal cruelty as compelling government interest).

[253] *See Lukumi*, 508 U.S. at 580 (Blackmun, J., concurring) ("This case does not present . . . the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment.")

[254] *Id.* at 542 (majority opinion) (stating city ordinances at issue had suppression of religion as objective); *see id.* at 580 (Blackmun, J., concurring) (explaining

Finding *Lukumi* instructive, the *Stevens* court cited the dissenting views of the House Report on § 48.[255] Those views noted that although the Supreme Court recognized as compelling the government interest in preventing animal cruelty, that interest did not prevail against free exercise rights.[256] Thus, the argument went, fundamental human rights supersede animal rights.[257] As explained above, however, *Lukumi* did not involve a genuine government interest in protecting animals.[258] The *Stevens* court incorrectly construed *Lukumi*'s holding as suggesting a Supreme Court view that preventing animal cruelty was not compelling in light of human rights.[259] Justice Blackmun's concurrence in *Lukumi* highlights this error.[260]

Justice Blackmun made clear that the city ordinances prohibiting ritual animal sacrifice singled out and directly burdened religion.[261] The Court would have faced a harder case if the law genuinely sought to prevent animal cruelty.[262] Moreover, Justice Blackmun explicitly stated the decision did not reflect the Court's views of the strength of the States' interest in preventing animal cruelty.[263] Indeed, the number of amicus briefs filed in support of animal interests demonstrated society's view on the importance of protecting animals.[264] The *Stevens* court's reliance on *Lukumi* to suggest the government had no compelling interest in preventing animal cruelty in the First Amendment context was therefore erroneous.[265]

3. First Amendment Line-Drawing

The *Stevens* court also erred in failing to give sufficient weight to the human interest implicated in preventing animal cruelty.[266] As alluded

ordinances singled out religion and did not genuinely seek to prevent animal cruelty).

[255] *Stevens*, 533 F.3d at 226-27; *see also* H.R. REP. NO. 106-397, at 11.

[256] *See* H.R. REP. NO. 106-397, at 11.

[257] *See id.*

[258] *Lukumi*, 508 U.S. at 542; *id.* at 580 (Blackmun, J., concurring).

[259] *See Stevens*, 533 F.3d at 226-27 (discussing *Lukumi* and concluding Supreme Court has suggested preventing animal cruelty is not compelling in First Amendment context).

[260] *See generally Lukumi*, 508 U.S. at 577-80 (Blackmun, J., concurring).

[261] *Id.* at 580 ("It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. Because respondent here does single out religion in this way, the present case is an easy one to decide." (citation omitted)).

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *See* United States v. Stevens, 533 F.3d 218, 226-27 (3d Cir. 2008) (en banc).

[266] *See id.* at 229-30 (noting and dismissing government's desensitization argument).

to above, analyzing the interest at issue in § 48 within the *Ferber* framework resulted in the court comparing apples and oranges.[267] Certainly, the court may analogize to the *Ferber* rationale for purposes of guidance in determining whether § 48 regulates unprotected expression.[268] The *Stevens* court, however, conflated strict scrutiny review with factors relevant to creating a new category of unprotected expression.[269] The court directly compared the government interest in preventing animal cruelty with the interest in preventing physical and psychological harm to children.[270] Finding the latter interest surpassing in importance, the court drew a First Amendment line based on the obvious distinction between humans and animals.[271] Such a line, however, ignores the reality that animal cruelty and child pornography are remotely similar subjects.[272]

Moreover, the court's line drawing fails to appreciate the human interest implicit in § 48.[273] Although noting the government's desensitization argument, the court dismissed it without reference to supporting empirical data.[274] Indeed, Supreme Court precedent does provide an argument that where the causal link between viewing a depiction and perpetrating the conduct depicted is low, First Amendment protection remains.[275] This precedent, however, is in the context of *virtual* child pornography where the depiction does not

[267] *See id.* at 226-30 (analyzing compelling interest inquiry under first *Ferber* factor); *see also* text accompanying *supra* note 236.

[268] *See id.* at 225 (stating Supreme Court cited five factors that favored creating new category of unprotected expression).

[269] *See id.* at 226 (explaining first *Ferber* factor most important because if government interest is not compelling, then content-based restriction necessarily violates First Amendment); *id.* at 227 (analogizing to human interests at issue in traditional categories of unprotected expression and focusing on *Ferber*); *id.* at 222-23 (stating court had already shown § 48 does not serve compelling government interest, but would "briefly discuss the relationship between § 48 and the strict scrutiny analysis").

[270] *See id.* at 227-28.

[271] *See id.*; *see also id.* at 227 (noting Supreme Court has only found compelling interest for content-based restriction where interest related to human well-being).

[272] *But see id.* at 224 (acknowledging *Ferber* is only category of unprotected expression "remotely similar to the type of speech regulated by § 48"); *id.* at 226 (explaining *Ferber* reasoning "does not translate well to animal cruelty realm" but proceeding with analysis nonetheless).

[273] *See id.* at 229-30; *see also infra* Part III.C.

[274] *See Stevens*, 533 F.3d at 229-30.

[275] Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (striking down prohibition on virtual child pornography); *id.* at 250 ("While the Government asserts that the [virtual] images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.")

victimize an actual child.[276] Section 48 does not apply to virtual depictions of animal cruelty.[277] In any event, the argument requires the *Stevens* court to evaluate the causal link between watching animal cruelty and perpetrating that act.[278] The court did not do so and, more importantly, did not address the various other human social ills strongly correlated with animal cruelty.[279] Thus, the *Stevens* court erroneously concluded the government interest in preventing animal cruelty is not compelling in the First Amendment context.[280]

C. Stevens's *Compelling Interest Rationale Harms Important Social Policy*

The *Stevens* court incorrectly analyzed the compelling interest requirement of strict scrutiny review.[281] By concluding that the government had no compelling interest in preventing animal cruelty, the court negatively affected social policy in an important way.[282] The court's compelling interest rationale underestimated and minimized the import of the empirical connection between animal cruelty and violent crime.[283]

An extreme example of violent crime is serial murder.[284] Although most studies that examine animal cruelty focus on its connection to human violence in various contexts, several studies consider serial murder specifically.[285] A Federal Bureau of Investigations ("FBI")

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[276] *Id.*

[277] *See* H.R. REP. NO. 106-397, at 7 (1999) (limiting § 48 to depictions of real animals actually tortured, mutilated, maimed, wounded, or killed); *id.* (stating § 48 does not apply to simulated or virtual depictions of animal cruelty). *See generally* 18 U.S.C. § 48 (2000) (providing statutory text).

[278] *See supra* note 275 and accompanying text.

[279] *See Stevens*, 533 F.3d at 229-30; *see also infra* Part III.C.

[280] *See Stevens*, 533 F.3d at 226 (stating preventing animal cruelty does not rise to compelling government interest in light of First Amendment right).

[281] *See supra* Part III.B.

[282] *See Stevens*, 533 F.3d at 226.

[283] *See id.* at 229-30 (rejecting desensitization argument as insufficient to trump First Amendment rights).

[284] *See generally* MODEL PENAL CODE § 210.2(1)(a) (2001) (stating murder is crime); ROBERT K. RESSLER ET AL., SEXUAL HOMICIDE: PATTERNS AND MOTIVES (Simon & Schuster Adult Publ'g Group 1995) (discussing serial murder); Jeremy Wright & Christopher Hensley, *From Animal Cruelty to Serial Murder: Applying the Graduation Hypothesis*, 47 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 71 (2003) (same).

[285] *See, e.g.*, RESSLER ET AL., *supra* note 284 (discussing connection between serial murder and animal cruelty); Wright & Hensley, *supra* note 284 (same); The Humane Society of the United States, First Strike: The Connection Between Animal Cruelty and Human Violence, http://www.hsus.org (last visited Feb. 2, 2009) (same).

study in the late 1970s considered the link between childhood cruelty to animals and future serial murder.[286] More than half of the thirty-five convicted serial killers questioned by the FBI admitted torturing animals as children.[287] A later 1988 study tested thirty-six sexual murderers, twenty-nine of whom were also serial killers, for particular childhood characteristics.[288] Of the convicted serial killers, thirty-six percent committed acts of animal cruelty as children and forty-six percent did so as adolescents.[289]

Recent research based on five case studies of serial murderers supplemented the above data and existing literature by using social learning theory.[290] The 2003 study investigated the transition from animal cruelty to serial murder through application of the graduation hypothesis.[291] According to this theory, children who perpetrate animal cruelty eventually graduate to violence against humans.[292] Similarly, under desensitization theory, individuals exposed to animal cruelty lose the ability to empathize with the suffering of fellow man or of living beings generally.[293]

Desensitization theory draws support from an increasing body of empirical data.[294] Indeed, over thirty-five years of research suggests a

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[286] *See* Wright & Hensley, *supra* note 284, at 72-73.

[287] *See id.*

[288] *See id.* at 73-74.

[289] *See id.* at 74.

[290] *See id.* at 75-76 (explaining methodology of study and stating purpose of study is to examine connection between childhood animal cruelty and adult serial murder through graduation hypothesis).

[291] *See id.*

[292] *See id.* at 83 (explaining graduation hypothesis framework).

[293] *See* H.R. REP. NO. 106-397, at 4 (1999) (explaining individuals may become so desensitized to suffering of animals that they lose ability to empathize with human suffering); 145 CONG. REC. S15220-03, at S15221 (1999) (asserting children and adults become desensitized to violence after viewing destructive images); 145 CONG. REC. H10267-01, at H10271 (1999) (discussing desensitization of young people as gateway to violent acts); *see also* RICHARD JACKSON HARRIS, A COGNITIVE PSYCHOLOGY OF MASS COMMUNICATION 268 (4th ed. 2004) (explaining that repeatedly seeing video violence while in relaxed environment results in weakening of normative response to real violence).

[294] *See* 145 CONG. REC. S15220-03, at S15220 (indicating there is well-established link between acts of violence against animals and subsequent acts of violence against people); *id.* at S15221 (noting law enforcement agencies, including FBI, have long recognized link); 145 CONG. REC. H10267-01, at H10271 (noting enjoyment from killing animals is often rehearsal for targeting humans and animal violence is predictive of child and spousal abuse); *id.* at H10263 (stating numerous statistics demonstrate individuals who commit violent acts against animals are same individuals who commit violent acts against humans).

strong link between childhood animal cruelty and adult violent behavior such as domestic abuse and sexual offenses.[295] Considering the potentially extreme consequences of societal indifference to such research, society has a significant interest in preventing animal cruelty.[296] Acting on behalf of society, the government has an equally compelling interest.[297] Section 48 deters human violence by discouraging desensitization of individuals to animal cruelty.[298] By prohibiting the creation, sale, or possession of depictions of animal cruelty, fewer individuals will make and see such depictions.[299] Less exposure theoretically results in fewer persons subject to desensitization.[300] Thus, by concluding the government did not have a compelling interest in preventing animal cruelty, the *Stevens* court harmed important social policy.[301]

Some individuals seek to discredit the research associating animal cruelty and violent behavior.[302] They cite the early behavioral research to justify this contention.[303] Early studies suggested that three childhood characteristics — bed-wetting, fire setting, and animal cruelty — indicated future adult violent behavior.[304] Subsequent years

[295] *See* Sara C. Haden & Angela Scarpa, *Childhood Animal Cruelty: A Review of Research, Assessment, and Therapeutic Issues*, 14 FORENSIC EXAMINER 23, 24 (2005) (noting over 35 years of behavioral research).

[296] *See* HARRIS, *supra* note 293, at 268 (arguing desensitization to violence has substantial effect on society). *See generally* RESSLER ET AL., *supra* note 284 (providing comprehensive discussion of serial murder and its impact on society); Wright & Hensley, *supra* note 284 (discussing impact of individual serial killers on surrounding community).

[297] *See* HARRIS, *supra* note 293, at 268. *See generally* RESSLER ET AL., *supra* note 284; Wright & Hensley, *supra* note 284.

[298] *See* United States v. Stevens, 533 F.3d 218, 229 (3d Cir. 2008) (en banc) (citing argument that § 48 deters future animal cruelty as well as other antisocial behavior by reducing desensitization effect).

[299] *See id.* (noting drafters of § 48 believed fewer individuals would see and make depictions of animal cruelty and thus, would not be subject to desensitization).

[300] *See id.*

[301] *See id.* at 226.

[302] *Cf.* ROY F. BAUMEISTER, EVIL: INSIDE HUMAN VIOLENCE AND CRUELTY 286 (Holt McDougal 1999) (citing critique of desensitization theory as failing to prove connection between exposure to violence and actual violent behavior).

[303] *See generally* Haden & Scarpa, *supra* note 295, at 25 (discussing early behavioral research).

[304] *See, e.g.*, Daniel S. Hellman & Nathan Blackman, *Enuresis, Firesetting, and Cruelty to Animals: A Triad Predictive of Adult Crime*, 122 AM. J. PSYCHIATRY 1431 (1966) (presenting results of study of aggressive violent criminals, 45% of which had history of at least two of three triad behaviors); John M. MacDonald, *The Threat to Kill*, 120 AM. J. PSYCHIATRY 125 (1963) (referring to grouping of three childhood behaviors as triad behaviors and suggesting association to adult violence).

of research, however, showed a decrease in the significance of these behaviors.[305] Indeed, a 1984 study of children in a psychiatric hospital found no significant correlation among the three behaviors.[306] Individuals skeptical of animal cruelty studies note that researchers who previously supported the triad behaviors theory later argued against its predictive value.[307] Because these behaviors were not ultimately predictive of violence, they reason that studies correlating animal cruelty and future human violence are also invalid.[308]

Although the above argument accurately recounts the early behavioral research, it fails to draw the correct conclusion.[309] In fact, studies exploring animal cruelty continue to suggest a link between that behavior and human violence, independent of bed-wetting and fire setting.[310] A 2001 study, for example, found animal cruelty predicted repetitive fire setting in a group of juvenile fire setters; there was no association between fire setting and bed-wetting.[311] Moreover, in 1987, the American Psychiatric Association recognized animal cruelty as a symptom of conduct disorders in its diagnostic manuals.[312] Later versions of the manuals continue to assert that the link between animal cruelty and human violence is valid.[313] Thus, the government has a compelling interest in preventing animal cruelty, which comports with important social policy.[314]

CONCLUSION

This Note has presented a basic framework for free speech jurisprudence and discussed its recent application by the Third Circuit Court of Appeals.[315] Under that framework, judicial suspicion of content discrimination has resulted in a heighted standard of

[305] *See* Haden & Scarpa, *supra* note 295, at 25.

[306] *See* Heath G. Adair et al., *Firesetting, Enuresis, and Animal Cruelty*, 1 J. CHILD & ADOLESCENT PSYCHOTHERAPY 97, 97-100 (1984).

[307] *See* Haden & Scarpa, *supra* note 295, at 25.

[308] *See id.*

[309] *See id.* (contrasting early behavioral research with current focus on particular behavior of animal cruelty).

[310] *See, e.g.*, Michael L. Slavkin, *Enuresis, Firesetting, and Cruelty to Animals: Does the Ego Triad Show Predictive Validity?*, 36 ADOLESCENCE 461, 461-66 (2001) (presenting recent study examining connection between animal cruelty and human violence).

[311] *See id.* at 461.

[312] *See* Wright & Hensley, *supra* note 284, at 72.

[313] *See id.*

[314] *See* sources cited *supra* note 296 and accompanying text.

[315] *See supra* Parts I-III.

review.[316] Strict scrutiny review presents a high hurdle to overcome, and thus serves a fundamental purpose of the First Amendment.[317] The *Stevens* court appropriately applied strict scrutiny review because § 48 was a content-based regulation directed towards the primary effects of protected speech.[318] The court correctly held § 48 was unconstitutional because it failed the narrow tailoring requirement of that review.[319] In reaching the correct result, however, the court erroneously suggested the government had no compelling interest in preventing animal cruelty in the First Amendment context.[320] Considering the significant impact of violence on society, such rationale harms social policy.[321]

Perhaps reflecting the importance of the underlying policy concerns in addition to the contentious legal issues, the Supreme Court has granted review in this case.[322] Indeed, the twenty-two amici briefs filed since the Court granted certiorari — eight in support of the government, thirteen in support of Stevens, and one in support of neither party — suggest a heightened societal interest in the case's ultimate resolution.[323] Whether the Supreme Court facially invalidates

[316] *See supra* Part I.A.

[317] *See supra* Parts I.A, III.A.

[318] *See supra* Part III.A.

[319] *See supra* Part III.A.

[320] *See supra* Part III.B.

[321] *See supra* Part III.C.

[322] United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (en banc), *cert. granted*, 129 S. Ct. 1984 (Apr. 20, 2009) (No. 08-769); *see also* Brief of Amicus Curiae the Humane Society of the United States in Support of Petitioner, United States v. Stevens, No. 08-769 (U.S. filed Jan. 14, 2009), 2009 WL 106673 (supporting government's filing of petition for writ of certiorari).

[323] *See* Brief of Amici Curiae Ass'n of American Publishers, Inc. et al. Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2331225; Brief for the Cato Institute as Amicus Curiae Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2331221; Brief of Constitutional Law Scholars Bruce Ackerman et al. as Amici Curiae Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2331222; Brief of the DKT Liberty Project et al. as Amici Curiae Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2247129; Brief of First Amendment Lawyers Ass'n as Amicus Curiae Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2331224; Brief of the National Coalition Against Censorship & The College Art Association as Amici Curiae Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2248370; Brief of Amicus Curiae National Rifle Ass'n of America, Inc. Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2349021; Brief of Amicus Curiae National Shooting Sports Foundation, Inc. Supporting Respondent, United

§ 48 as unconstitutional, invalidates it in part, or, conversely, elects to create a new category of unprotected expression, it remains important for the Court to recognize prevention of animal cruelty as a compelling governmental interest.[324]

Animal cruelty is a form of antisocial behavior closely correlated to human violence.[325] The government's interest in addressing this correlation in the context of crush videos is overwhelmingly important.[326] Thus, if Congress redrafted § 48 to serve narrowly the

States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2349019; Brief of Professional Outdoor Media Ass'n et al. as Amici Curiae Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2247128; Brief of Amici Curiae Safari Club International & Congressional Sportsmen's Foundation Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2331223; Amicus Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 27, 2009), 2009 WL 2349021; Brief Amicus Curiae of Endangered Breed Ass'n & American Dog Breeders Ass'n Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 24, 2009), 2009 WL 2388115; Brief Amici Curiae of the Reporters Committee for Freedom of the Press & Thirteen News Media Organizations Supporting Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 23, 2009), 2009 WL 2219305; Brief of Amicus Curiae the American Society for the Prevention of Cruelty to Animals Supporting Petitioner, United States v. Stevens, No. 08-769 (U.S. filed June 15, 2009), 2009 WL 1703216; Brief Amicus Curiae of Animal Legal Defense Fund Supporting Petitioner, United States v. Stevens, No. 08-769 (U.S. filed June 15, 2009), 2009 WL 1703212; Brief of the Center on the Administration of Criminal Law as Amicus Curiae Supporting Petitioner, United States v. Stevens, No. 08-769 (U.S. filed June 15, 2009), 2009 WL 1703213; Brief of Florida et al. as Amici Curiae Supporting Petitioner, United States v. Stevens, No. 08-769 (U.S. filed June 15, 2009), 2009 WL 1703214; Brief of Amicus Curiae the Humane Society of the United States Supporting Petitioner, United States v. Stevens, No. 08-769 (U.S. filed June 15, 2009), 2009 WL 1681460; Brief for Amicus Curiae Northwest Animal Rights Network Supporting Petitioner, United States v. Stevens, No. 08-769 (U.S. filed June 15, 2009), 2009 WL 1703215; Brief of Washington Legal Foundation & Allied Educational Foundation as Amici Curiae Supporting Petitioner, United States v. Stevens, No. 08-769 (U.S. filed June 15, 2009), 2009 WL 1703211; Brief for a Group of American Law Professors as Amicus Curiae Supporting Neither Party, United States v. Stevens, No. 08-769 (U.S. filed June 12, 2009), 2009 WL 1681459; Brief Amicus Curiae of International Society for Animal Rights Supporting Petitioner, United States of America, United States v. Stevens, No. 08-769 (U.S. filed June 10, 2009), 2009 WL 1655154; *see also* Reply Brief for the United States, United States v. Stevens, No. 08-769 (U.S. filed Aug. 19, 2009), 2009 WL 2564714; Brief for the Respondent, United States v. Stevens, No. 08-769 (U.S. filed July 20, 2009); Brief for the United States, United States v. Stevens, No. 08-769 (U.S. filed June 8, 2009), 2009 WL 1615365.

[324] *See generally supra* Part III.B-C (arguing en banc Third Circuit erred in not finding compelling governmental interest in prevention of animal cruelty and discussing link to human social ills).

[325] *See supra* Part III.C.

[326] *See supra* Part I.B.

purpose of targeting crush video distribution, the statute should survive strict scrutiny review.[327] Indeed, such a statute may even fall within obscenity, a traditionally unprotected category of speech.[328] Admittedly, it remains unclear where exactly courts draw the line between protected depictions and those the government may constitutionally proscribe.[329] Crush videos, however, simply fall on the latter side of the line.[330] There is no First Amendment right to profit from animal cruelty.[331]

[327] *See supra* Part I.A-B.

[328] *See generally* Miller v. California, 413 U.S. 15 (1973) (recognizing obscene material is unprotected by First Amendment and articulating standard where expression may be subject to state regulation).

[329] *See supra* text accompanying notes 16, 30.

[330] *See supra* Part I.B.

[331] *See* U.S. CONST. amend. I.