DEPICTIONS OF THE PIG ROAST: RESTRICTING VIOLENT SPEECH WITHOUT BURNING THE HOUSE

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I. INTRODUCTION

Pornography dominates the discussion about free speech on the Internet. Congress has twice enacted legislation aimed at preventing minors from getting access to online pornography.[1] Federal and local law enforcement agencies have dramatically increased efforts to combat the spread of child pornography.[2] The Department of Justice has renewed attempts to crack down on obscene material after years of lax enforcement.[3]

Yet the debate about online pornography has overshadowed another disturbing Internet phenomenon. The Internet has facilitated growth in the availability of extremely violent images and videos. A little online searching reveals depictions of torture, of both humans[4] and animals;[5]

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1. *See* Child Online Protection Act, Pub. L. No. 105-277, Title XIV, 112 Stat. 2681, 2681–736 (1998); Communications Decency Act of 1996, Pub. L. No. 104-104, Title V, 110 Stat. 56, 133–43 (1996).

2. *See* Jerry Markon, *Crackdown on Child Pornography*, WASH. POST, Dec. 15, 2007, at A1.

3. *See* Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233, 235–36 (2007).

4. *See* Lynn Crosbie, *Unleashing Our Inner Demons, Site by Sickening Site*, GLOBE & MAIL (Toronto, Can.), Mar. 11, 2008, at R1.

5. *See, e.g.*, Neil Connor, *Animal Video Perverts Jailed*, BIRMINGHAM POST (U.K.), May 29, 2002, at 5.

videos depicting murders[6] and executions,[7] including beheadings by Islamic militants;[8] videos of brutal amateur street fights,[9] some consensual, but many not;[10] videos of minors engaged in schoolyard fights and beatings,[11] some posted to humiliate the victims;[12] and videos of cockfighting.[13] Online retailers have sold videos of dog fights[14] and extremely violent video games, including one in which the player is tasked with making graphic snuff videos and another which allows the player to play fetch with dogs using human heads.[15]

Some of this content deserves First Amendment protection, but arguably much of it does not. Graphic violence for the sole purpose of entertainment has little social value,[16] arguably causes some viewers to behave more violently,[17] is at least as offensive as sexually obscene speech,[18] and, in some instances, may cause severe harm to the people or animals depicted. Yet lower courts have consistently struck down any attempt to restrict or otherwise regulate speech because of its violent

6. *See* Crosbie, *supra* note 4.

7. *E.g.*, Robert Lindsay, http://robertlindsay.blogspot.com (Aug. 15, 2007, 8:08 PST).

8. *E.g.*, The Memory Hole, Video of American Contractor Being Decapitated in Iraq, http://www.thememoryhole.org/war/decapitation_video.htm (last visited Dec. 18, 2008).

9. *See* Carlo Rotella, *Sucker Punch: The Art, the Poetry, the Idiocy of YouTube Street Fights*, SLATE, Nov. 26, 2007, http://www.slate.com/id/2178230.

10. *See* Paul Farhi, *On the Web, Punch and Click*, WASH. POST, June 22, 2006, at A1.

11. *E.g.*, New Zealand School Children Put Fight Videos on YouTube, WIKINEWS, Oct. 27, 2006, http://en.wikinews.org/wiki/New_Zealand_school_children_put_fight_videos_on_YouTube.

12. *E.g.*, Beth DeFalco, *Girls Charged for Posting Fight Video Online*, MSNBC, Dec. 21, 2006, http://www.msnbc.msn.com/id/16317320.

13. *See* Adam Liptak, *First Amendment Claim in Cockfight Suit*, N.Y. TIMES, July 11, 2007, at A13. The website mentioned in the article has since been taken down, but videos of the cockfights it broadcast can be found on a number of video-hosting websites. *See, e.g.*, Live Cock Fights Puerto Rico, http://video.google.com/videoplay?docid=8690874738348900672 (May 17, 2007).

14. *See* First Amended Complaint at 15–18, Humane Soc'y of the U.S. v. Amazon.com, Inc., No. 07-623 (D.D.C. June 6, 2007), *available at* http://www.hsus.org/web-files/PDF/Amended-Amazon-Complaint.pdf; *Sellers to Drop Dogfighting DVD*, CHARLESTON GAZETTE, June 21, 2006, at 3C.

15. *See* Entm't Software Ass'n v. Swanson, 519 F.3d 768, 770 (8th Cir. 2008) (describing the games *Postal 2: Apocalypse Weekend* and *Manhunt*).

16. *See* Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107, 160 (1994). *But see* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594–95 (1982) (arguing that no form of expression should be less valued than any other).

17. Susan Hurley, *Bypassing Conscious Control: Media Violence, Unconscious Imitation, and Freedom of Speech*, *in* DOES CONSCIOUSNESS CAUSE BEHAVIOR? 301, 302 (Susan Pockett et al. eds., 2006). *But see* JONATHAN L. FREEDMAN, MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION: ASSESSING THE SCIENFTIFC EVIDENCE 8 (2002) (asserting that current studies fail to demonstrate that media violence causes aggressive behavior).

18. *See* Saunders, *supra* note 16, at 113.

content.[19]

The Supreme Court has not considered the issue of restrictions on violent content since *Winters v. New York*, decided in 1948. At issue in that case was an obscenity prosecution for a magazine dedicated to "police reports and accounts of criminal deeds."[20] The statute at issue was ultimately invalidated for vagueness, but the Court seemed to leave open the possibility of restrictions of speech based on its violent content.[21]

Much has changed since 1948. Violent speech has become more graphic and goes well beyond "accounts of criminal deeds" taken from police reports. Scientific studies on the effects of exposure to violent media have given us a much better understanding of the link between violent content and violent behavior. The Internet has made distribution of such disturbing material much easier, providing a larger and more competitive market, which spurs more production and spurs producers to make material more extreme. It is time for the Court to have another look at the possibility of excluding certain forms of violent speech from First Amendment protection.

Lower courts have repeatedly declined to do so. In a notable recent case, the Third Circuit struck down as unconstitutional a federal statute prohibiting the sale of depictions of animal cruelty—a direct restriction of speech because of its violent content.[22] The defendant in the case was convicted for selling videos of dog fights.[23] The Solicitor General has filed a petition for certiorari,[24] but the Supreme Court has not yet responded as of the time of this writing.

The purpose of this Note is to consider the extent to which the Constitution would allow restrictions on violent speech and, in particular, on depictions of animal cruelty. Part II describes the language and history of the federal animal cruelty statute, and discusses the only prosecution using the statute that actually went to trial. Part III sets forth the various harms caused by violent speech and why they would justify restricting certain forms of violent speech. Part IV examines the value of violent speech by recounting the various theories of free speech and how they

19. *E.g.*, Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992); Eclipse Enters., Inc. v. Gulotta, 942 F. Supp. 801 (E.D.N.Y. 1996); Zamora v. CBS, 480 F. Supp. 199 (S.D. Fla. 1979).

20. Winters v. New York, 333 U.S. 507, 508 n.1 (1948).

21. *See infra* notes 229–30 and accompanying text.

22. United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (en banc).

23. *Id.* at 220.

24. Petition for Writ of Certiorari, *Stevens*, 533 F.3d 218 (No. 08-769).

apply to violent material. This will demonstrate that the primary difficulty with creating a coherent violent speech principle lies in distinguishing valuable from valueless forms of violent speech. Part V examines current categorical exclusions from First Amendment protection and whether they could be extended by analogy to help carve out a new exclusion for violent speech in general and animal cruelty depictions in particular. The conclusion of this Note is that the Constitution should not grant full protection for violent speech. In recognition of the special dangers of underprotecting potentially valuable speech, however, any exclusion should be limited to situations where the violent speech lacks any serious value as political speech or for the pursuit of knowledge. Although other forms of violent speech may not be worthy of First Amendment protection, it is important to overprotect speech to avoid the risk of underprotecting it.[25]

II. THE PROHIBITION OF DEPICTIONS OF ANIMAL CRUELTY

In 1999, Congress passed legislation making it illegal to "possess[] a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain."[26] The bill was introduced by California Representative Elton Gallegly in order to combat the distribution of "crush videos," which typically depicted women stepping on and killing small animals.[27] Gallegly argued that the bill was necessary because of the difficulties in finding and prosecuting the producers of the crush videos.[28] The videos rarely showed the faces of the women crushing the animals, making it difficult to locate the producers.[29] Additionally, it was difficult to prosecute defendants under existing state animal cruelty laws because it often proved impossible to ascertain the location or date of production, allowing producers to successfully contest jurisdiction or assert that the production did not take place within the given statute of limitations.[30]

The statute, 18 U.S.C. § 48, applies only to visual or auditory depictions of actual living animals being "intentionally maimed, mutilated, tortured, wounded, or killed."[31] The depicted act must be illegal in the state

25. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 213.

26. 18 U.S.C. § 48(a) (2000).

27. Richard Simon, *Law Banning Sale of "Crush Videos" Signed*, L.A. TIMES, Dec. 11, 1999, at 15.

28. *Id.*

29. *Id.*

30. H.R. REP. No. 106-397, at 3 (1999).

31. 18 U.S.C. § 48(c)(1).

in which the possession or sale takes place, but need not be illegal where the depiction was produced.[32] Thus, if a bullfight was legally filmed in Spain, but copies were sold in Virginia, where bullfighting is illegal, the sellers would potentially be subject to liability under § 48.[33] Section 48, however, has an exception for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[34] A film of a Spanish bullfight might therefore be legally sold if it was judged to have serious value.

Possible First Amendment troubles were pointed out immediately by opponents of the bill.[35] They argued that the language of the bill was overbroad and would criminalize speech that ought to be protected.[36] The dissenters also argued that the restriction on speech did not fit into any current exceptions to the First Amendment and that protection of animals was not a compelling government interest, nor was the bill narrowly tailored to achieve that interest.[37]

Recognizing these concerns, President Bill Clinton issued a signing statement in an attempt to narrow enforcement of the statute.[38] He stated that the Department of Justice would broadly interpret the exception for works of serious value and that works would be considered "as a whole."[39] He also directed the Justice Department to limit prosecutions under the statute to works "designed to appeal to a prurient interest in sex."[40]

The first prosecution for a § 48 violation to proceed to trial did not come until 2004,[41] when Robert Stevens was indicted for selling videos of dog fights.[42] Perhaps unsurprisingly, Stevens immediately challenged the constitutionality of § 48, asserting that the statute (1) could not withstand strict scrutiny, (2) was unconstitutionally overbroad, and (3) was void for

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32. *Id.*

33. H.R. REP. No. 106-397, at 12.

34. 18 U.S.C. § 48(b).

35. Editorial, *Stepping on the First Amendment*, SACRAMENTO BEE, Sept. 6, 1999, at B8. *See also* H.R. REP. No. 106-397, at 10–12 (dissenters on the House Judiciary Committee objecting to the bill on First Amendment grounds).

36. *Stepping on the First Amendment*, *supra* note 35.

37. H.R. REP. No. 106-397, at 10–12.

38. President's Statement on the Depiction of Animal Cruelty—Punishment, 1999 U.S.C.C.A.N. 324.

39. *Id.*

40. *Id.*

41. *See* Torsten Ove, *Ban on Videos of Animal Cruelty Tested*, PITTSBURGH POST-GAZETTE, Jan. 12, 2005, at A11.

42. Brief for Appellant at 5, United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (en banc) (No. 05-2497).

vagueness.[43] The U.S. District Court for the Western District of Pennsylvania rejected Stevens's arguments and held that the speech restricted by § 48 was unprotected by the First Amendment.[44]

Stevens, a resident of Pittsville, Virginia, was subsequently convicted for selling three videos of animal cruelty to law enforcement officials in Pennsylvania.[45] Two of the videos, entitled "Pick-A-Winna" and "Japan Pit Fights," depicted several dog fights, some filmed in the United States and some in Japan, where dog fighting is legal.[46] The third video, "Catch Dogs," included a dog fight from Japan and then showed dogs being used to hunt pigs.[47]

It is possible that the filming of each of the videos was entirely legal.[48] "Japan Pit Fights" depicts legal dog fights in Japan, and the American dog fights in "Japan Pit Fights" and "Pick-A-Winna" were filmed in the 1960s and 1970s, possibly in areas where dog fighting had not yet been prohibited.[49] An expert witness in the trial testified that the tapes depicted "old-time dog fights" and "[did] not depict present day dog fighting."[50] As for "Catch Dogs," hunting using dogs is legal during hunting season in Virginia[51] and many other states.[52]

Stevens appealed to the Third Circuit in 2005, but before the three-judge panel could issue a ruling, the court moved sua sponte to rehear the case en banc.[53] The full panel voted 10-3 to overturn the statute,[54] declining to create a new category of unprotected speech for depictions of animal cruelty and finding that § 48 failed strict scrutiny analysis because preventing animal cruelty was not a compelling interest and because § 48 was not narrowly tailored to serve that interest.[55] While the Third Circuit

43. *Id.* at 26.

44. *Id.* at 30.

45. *Id.* at 6.

46. *Id.* at 7.

47. *Id.*

48. *See* Plaintiff's Motion for Judgment on the Pleadings or for Summary Judgment at 8, Advanced Consulting & Mktg. v. Keisler, No. 07-21767 (S.D. Fla. Nov. 27, 2007) [hereinafter Plaintiff's Motion for Judgment on the Pleadings].

49. *See* United States v. Stevens, 533 F.3d 218, 221 (3d Cir. 2008) (en banc). Dog fighting was not prohibited in all states until 1976. Hanna Gibson, *Dog Fighting Detailed Discussion*, ANIMAL LEGAL & HISTORICAL CTR., 2005, http://www.animallaw.info/articles/ddusdogfighting.htm.

50. Brief for Appellant, *supra* note 42, at 24.

51. *See* 4 VA. ADMIN. CODE §§ 15-40–60, –70 (2008).

52. *See* Brief for Appellant, *supra* note 42, at 16.

53. Plaintiff's Motion for Judgment on the Pleadings, *supra* note 48, at 8.

54. Two of the three dissenters, Judges Cowen and Fisher, had been on the original three-judge panel. Docket, *Stevens*, 533 F.3d 218 (No. 05-2497).

55. *Stevens*, 533 F.3d at 232. The court also suggested that the statute might be void for

may have been justified in its hesitancy to create a new category of unprotected speech without any guidance from the Supreme Court,[56] the Court, should it decide to hear the case, ought to give serious consideration to whether a ban on depictions of the torture, killing, and mutilation of animals would really offend the values of the First Amendment.

III. REASONS FOR RESTRICTING VIOLENT SPEECH

There are at least two possible paths toward a violent speech First Amendment exception: First, we could assume that all violent speech has full First Amendment value that can only be overcome through strict scrutiny analysis—requiring a compelling government interest in restricting the speech and a restriction narrowly tailored to achieve that interest. This approach is probably best illustrated by the *Brandenburg v. Ohio* incitement-to-violence exception to the First Amendment.[57] Under *Brandenburg*, speech that incites imminent crime and is likely to produce such crime can be restricted, regardless of the value of the speech.[58] However, this path is not promising. Lower courts, and the Third Circuit in *United States v. Stevens*, have repeatedly denied that there is a compelling government interest in restricting violent speech.[59]

The second, and more promising path, is to recognize that certain forms of violent speech have little or no social value. We can then balance the harms caused by violent speech against its value in order to justify a "codified" exception to the First Amendment.[60] This "definitional balancing" approach was taken by the Supreme Court in child pornography and defamation contexts.[61] This is a much better approach for a violent speech exclusion because of the difficulty of overcoming strict scrutiny when there is no applicable categorical exclusion,[62] and because it allows

overbreadth because it believed that the statute might prohibit or chill protected speech. *Id.* at 235.

56. *See id.* at 225–26.

57. Brandenburg v. Ohio, 395 U.S. 444 (1969).

58. *Id.* at 447; Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 304–05.

59. *See Stevens*, 533 F.3d at 229–30. For examples of other courts rejecting restrictions on violent speech, see *infra* note 76.

60. Schauer, *supra* note 58, at 306–07.

61. *Id.* at 307–08; Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942 (1968). Note that this is not an ad hoc balancing approach requiring a case-by-case analysis. We are balancing the harms and values of whole classes of speech at the outset and then determining whether a particular case would fall into the class of unprotected speech. *See* Nimmer, *supra*, at 943–44.

62. *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1364–65 (2006).

us to consider the value of the speech, instead of assuming that all violent speech is as valuable as political speech.

The first step toward crafting a violent speech exclusion is to identify the particular harms that are caused by violent speech. After all, if violent speech causes no significant harm, then the government has no interest in curtailing the speech. But here, there are at least four reasons to restrict violent speech: (1) the demonstrated effect of violent speech on behavior, (2) the fear and desensitization caused by exposure to violent speech, (3) the offensiveness of excessively violent speech, and (4) the harm caused during production of certain forms of violent speech.

A. VIOLENT SPEECH CAUSES VIOLENT CONDUCT

Several meta-analyses[63] of research on the effects of media violence have shown that there is a growing consensus among research psychologists that there is a strong causal link between exposure to violence and aggressive behavior among minors and young adults.[64] Researchers have posited at least four theories explaining why viewing violent content causes violent behavior: First, viewers may simply learn violent behavior through observation and imitation.[65] Second, violent content may "automatize" behavior via the viewer's subconscious

63. A meta-analysis is a method of estimating the size of an effect, such as the relationship between smoking and lung cancer, by collecting and combining the measured effect sizes from all known studies on the relevant subject. George Comstock & Erica Scharrer, *Meta-Analyzing the Controversy over Television Violence and Aggression*, *in* MEDIA VIOLENCE AND CHILDREN 205, 224 n.1 (Douglas A. Gentile ed., 2003). For a criticism of the use of meta-analyses for media violence studies, see FREEDMAN, *supra* note 17, at 24–31.

64. Comstock & Scharrer, *supra* note 63, at 222. *See also* Craig A. Anderson et al., *The Influence of Media Violence on Youth*, 4 PSYCHOL. SCI. PUB. INT. 81, 93–94 (2003) [hereinafter Anderson, *Influence of Media Violence*] (concluding that there is a causal link between exposure to violent media and aggressive behavior); L. Rowell Huesmann & Laramie D. Taylor, *The Case Against the Case Against Media Violence*, *in* MEDIA VIOLENCE AND CHILDREN, *supra* note 63, at 107, 130 (same). *See generally* Haejung Paik & George Comstock, *The Effects of Television Violence on Antisocial Behavior: A Meta-Analysis*, 21 COMM. RES. 516 (1994) (same). *But see* FREEDMAN, *supra* note 17; David Gauntlett, *Ten Things Wrong with the Media 'Effects' Model*, *in* CRITICAL READINGS: VIOLENCE AND THE MEDIA 54 (C. Kay Weaver & Cynthia Carter eds., 2006) (arguing that most studies on media violence effects have common fundamental flaws); Dmitri Williams & Marko Skoric, *Internet Fantasy Violence: A Test of Aggression in an Online Game*, 72 COMM. MONOGRAPHS 217 (2005) (arguing that current research has failed to show that exposure to certain violent video games is causally linked to violent behavior). The American Psychological Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association have all agreed with the view that violent media causes aggressive behavior. FREEDMAN, *supra* note 17, at 8; Hurley, *supra* note 17, at 303.

65. Anderson, *Influence of Media Violence*, *supra* note 64, at 94–95.

associations, so that a particular stimulus may cause that person to react with violent thoughts or behavior.[66] Third, frequent exposure may desensitize the viewer, decreasing the unpleasant reactions to violence which would normally inhibit violent behavior.[67] Fourth, violent content may excite the viewer, tending to strengthen the viewer's reaction to a provocation or causing the viewer to misattribute his state of arousal to the provocation.[68] It is important to note that these effects do not involve conscious deliberation—the learned tendencies are, "at least in significant part, automatic and unconscious."[69]

The strength of the correlation between media violence and aggression is larger than the effects of asbestos exposure on cancer or of calcium intake on bone mass.[70] Furthermore, since media violence often has a very large audience, even small effects can result in major problems.[71] For example, if a certain Internet video has only a 0.1 percent probability of causing a particular viewer to go on a shooting rampage, the video need only be viewed by ten thousand people for the likelihood of a shooting rampage to approach a statistical certainty.[72] Moreover, the violent video is likely to cause many other viewers to behave aggressively in a less-severe manner.[73]

Despite the general agreement in the scientific community, public opinion, even among the well-educated, remains skeptical of any link between violent media and violent behavior.[74] In fact, as scientific support for the link has increased, news reporting on the subject has actually become less likely to support the findings.[75]

Courts have been similarly disinclined to accept scientific evidence of causation.[76] Judges reviewing the scientific studies have consistently found

66. *Id.* at 95.

67. *Id.* at 96.

68. *Id.* at 95.

69. Hurley, *supra* note 17, at 314.

70. Comstock & Scharrer, *supra* note 63, at 217–19; Hurley, *supra* note 17, at 303.

71. Anderson, *Influence of Media Violence*, *supra* note 64, at 105.

72. *See* Brad J. Bushman & Craig A. Anderson, *Media Violence and the American Public: Scientific Facts Versus Misinformation*, 56 AM. PSYCHOLOGIST 477, 482 (2001). The probability of a shooting rampage in this scenario is approximately 99.995 percent.

73. *Id.*

74. Hurley, *supra* note 17, at 303.

75. Bushman & Anderson, *supra* note 72, at 486. This pattern has been attributed to the vested interest news media has in denying the adverse effects of media violence, the misapplication of a fairness doctrine so that minority views are overemphasized, and the inability of the scientific community to effectively communicate its results. *Id.* at 486–87.

76. *See, e.g.*, Interactive Digital Software Ass'n v. St. Louis, 329 F.3d. 954, 958–59 (8th Cir.

that nothing could be concluded from them.[77] Some courts have dismissed scientific evidence on hypotheses that have already been disproved. For example, in *Entertainment Software Ass'n v. Blagojevich*, the Northern District of Illinois found that "[a]t most, researchers have been able to show a correlation between playing violent video games and a slightly increased level of aggressive thoughts and behavior. . . . [I]t is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games."[78] However, the consensus among psychologists is that this "reverse hypothesis" has been adequately addressed by media violence studies.[79]

There are at least two possible explanations for the disconnect between the scientific community and the courts on this issue. First, courts are not expected to make a comprehensive review of the scientific literature and must decide cases on the evidence presented. Opposing experts and skillful cross-examination can make an issue seem hotly disputed in the courtroom, even if it is generally agreed upon in the scientific community. Second, courts rely on precedent, which may lead to some lag time between scientific findings and agreement by the courts. Prior courts make their findings on the scientific data at the time, which may have been less refined and the conclusions less compelling. Later courts may then rely on or be influenced by earlier courts' findings, regardless of whether new data is in the record.[80] Therefore, while the evidence of a proposition may grow

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2003); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 578–79 (7th Cir. 2001); Video Software Dealers Ass'n v. Schwarzenegger, No. C-05-04188 RMW, 2007 WL 2261546, at *11 (N.D. Cal. Aug. 6, 2007); Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 653 (E.D. Mich. 2006).

77. *See, e.g.*, *Granholm*, 426 F. Supp. 2d at 653 ("Dr. [Craig] Anderson's studies have not provided *any* evidence that the relationship between violent video games and aggressive behavior exists." (emphasis added)). This conclusion came despite Dr. Anderson's numerous studies explicitly finding exactly the opposite—namely, a strong link between aggressive behavior and exposure to violent video games. Craig A. Anderson et al., *Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 199, 199 (2004) [hereinafter Anderson, *Violent Video Games*]; Craig A. Anderson & Brad J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 PSYCHOL. SCI. 353 (2001); Anderson, *Influence of Media Violence*, *supra* note 64, at 93. Even critics of media violence studies acknowledge that there is a correlation between exposure to media violence and aggressive behavior. *E.g.*, FREEDMAN, *supra* note 17, at 46.

78. Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1074 (N.D. Ill. 2005).

79. Hurley, *supra* note 17, at 304–05. The court's reverse causation argument is even more puzzling given that the participants in the main study in the record were randomly assigned to violent or nonviolent video games, leaving aggressive individuals with no choice of games to play. Anderson, *Violent Video Games*, *supra* note 77, at 208.

80. *See, e.g.*, Entm't Merchants Ass'n v. Henry, No. CIV-06-675-C, 2007 WL 2743097, at *6 n.4 (W.D. Okla. Sept. 17, 2007) ("Even had such studies or findings [demonstrating harmful effects of violent media] been submitted, courts generally have found even extensive research purporting to show

in the scientific community, a cascade of contrary precedent in the courts may slow judicial acceptance of the proposition.

Despite wide agreement among psychologists, the effect of violent speech on an individual basis is probably neither certain enough nor the incited behavior severe enough to overcome fully valued speech under a strict scrutiny analysis. It would be very dangerous to restrict core First Amendment speech because there is some probability that it will spur an audience member to behave in a criminally violent manner at some point in the future. If the speech has little or no value and there is a significant probability that it will cause many viewers to behave more aggressively, however, then it is no longer obvious that the speech should be protected.

B. VICTIM EFFECTS

In addition to causing aggressive behavior, exposure to violent material may have other detrimental psychological effects.[81] For one, frequent exposure to violence can cause viewers to have an overly bleak view of society. Some psychologists have called this "mean world syndrome."[82] Viewers, especially those who identify with groups that are frequently depicted as victims, are likely to have higher degrees of fear and distrust.[83] These viewers are likely to overestimate the prevalence of crime and their own likelihood of being a victim. They tend to spend more on self-protection costs, such as guns and alarms, and are generally more supportive of harsh crime policies, such as the death penalty and longer prison sentences.[84]

Second, the desensitization effect of exposure to violent material can cause viewers to have less empathy for victims of violence.[85] Some studies have shown that viewers of violent media are less likely to be willing to

violent video games' harmful effects to be tenuous, speculative, and uncompelling in any case."); *Video Software Dealer's Assn.*, 2007 WL 2261546 at *6, *8 (noting that many courts had enjoined restrictions on minors' access to violent media because "the nexus between exposure to violent videos and feelings of aggression or antisocial behavior has not been adequately shown," and that this "reflect[s] a strong judicial antagonism toward such laws").

81. *See* Victor C. Strausburger & Barbara J. Wilson, *Television Violence*, *in* MEDIA VIOLENCE AND CHILDREN, *supra* note 63, at 57, 78.

82. George Gerbner, *Television Violence: At a Time of Turmoil and Terror*, *in* CRITICAL READINGS: VIOLENCE AND THE MEDIA, *supra* note 64, at 45, 49–50.

83. *Id.*

84. *Id.* Excessive spending on self-protection is generally an inefficient use of resources and has little social benefit. *Cf.* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1198 (1985).

85. Douglas A. Gentile & Craig A. Anderson, *Violent Video Games: The Newest Media Violence Hazard*, *in* MEDIA VIOLENCE AND CHILDREN, *supra* note 63, at 131, 134.

help victims.[86] This effect can actually increase the crime rate by decreasing the likelihood of intervention in an ongoing crime and the likelihood of cooperation with police investigations.

And lastly, exposure to violent material can cause symptoms of severe fear and anxiety. Studies have reported viewers suffering from sleeplessness, depression, nightmares, and symptoms of post-traumatic stress.[87] These effects can linger for years after the viewing.[88] They may result in decreased productivity and may require increased spending on health care.

In spite of the negative externalities associated with these psychological effects, they are rarely, if ever, mentioned in courts as a justification for restricting violent speech. Courts and legislatures focus almost exclusively on the aggression effect. Of course, few courts are likely to consider these effects as an interest compelling enough to overcome fully valued speech. Again, however, if the speech at issue is not of great value, these effects may justify some restrictions.

C. OFFENSIVENESS

Extremely violent speech is likely to be offensive to an unwilling audience. The Supreme Court recognized in *FCC v. Pacifica Foundation* that offense to unwilling listeners can justify restrictions on speech, at least where the offensive speech "intrudes" on the privacy of the unwilling listener.[89] In *Pacifica*, a radio station had broadcast a monologue by George Carlin which included "patently offensive words dealing with sex and excretion."[90] The FCC received a complaint after the broadcast was heard by a man while driving with his young son.[91] The Court held that offensive material may be regulated when it is broadcast in a manner that would invade the privacy of listeners.[92]

Therefore, in certain communications media, namely television and radio broadcasting, it may be acceptable to regulate violent speech because of offense to the unwilling audience. However, the Court's holdings in

86. Bruce D. Batholow et al., *The Proliferation of Media Violence and Its Economic Underpinnings*, *in* MEDIA VIOLENCE AND CHILDREN, *supra* note 63, at 1, 16.

87. Joanne Cantor, *Media and Fear in Children and Adolescents*, *in* MEDIA VIOLENCE AND CHILDREN, *supra* note 63, at 185, 186–87.

88. *Id.* at 187–88.

89. FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

90. *Id.* at 745.

91. *Id.* at 730.

92. *See id.* at 750.

Erznoznik v. Jacksonville and *Sable Communications, Inc. v. FCC* cast doubt on whether that justification is applicable to other forms of communication. In *Erznoznik*, the Court struck down a city ordinance that prohibited films with nudity at drive-in theaters.[93] Even though the nudity could be seen from public streets and sidewalks, the Court reasoned that passersby could avoid the offensive speech by simply averting their eyes.[94] In *Sable Communications*, the Court held that the FCC could not regulate nonobscene content on "dial-a-porn" services because callers are highly unlikely to be unwilling listeners.[95]

The Court's language in *Paris Adult Theater I v. Slaton*, however, suggests that the offensiveness of certain material may not end when the viewer averts his eyes. The mere knowledge that such material is readily available may be offensive to people. As the Court notes, "what is commonly read and seen and heard and done intrudes upon us all, want it or not."[96]

Depictions of violence distributed via the Internet, the main topic of this Note, are unlikely to be seen by unwilling viewers. Images and videos of violence on the Internet do not invade the privacy of one's home in the manner that television and radio broadcasting might.[97] One must generally search for and intentionally download videos and images, making it unlikely, though not impossible, that a user will accidentally come across extremely violent videos or imagery.[98] Of course, the knowledge that depictions of extreme violence are readily available to anyone with a computer may offend many people. This may seem to be a relatively weak justification for restricting speech, but when measured against speech with de minimis value, a weak justification may be enough.

D. PROTECTING SUBJECTS FROM HARM DURING PRODUCTION

Some types of speech necessarily involve some sort of harm during the production of the speech. For example, the "crush videos" that 18 U.S.C. § 48 sought to prohibit require the death of small animals. If the speech requires a particular harm in order to exist, then restriction of that speech can be justified as a means to reduce that harm. The Supreme Court

93. Erznoznik v. Jacksonville, 422 U.S. 205, 206 (1975).

94. *Id.* at 212.

95. Sable Commc'ns, Inc. v. FCC, 492 U.S. 115, 127–28 (1989).

96. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973).

97. *See* Reno v. ACLU, 521 U.S. 844, 869 (1997).

98. Email spam or accidental clicks can expose an Internet user to unwanted material. This effect, however, is likely small, and a simple click can usually eliminate the unwanted speech.

accepted this justification for restricting speech in *New York v. Ferber*, in which the Court categorically excluded child pornography from First Amendment protection.[99] The Court found that the production of child pornography was "harmful to the physiological, emotional, and mental health of the child."[100] From this, the Court reasoned that child pornography could be banned as a means of drying up the demand for such harmful conduct.[101]

Additionally, in certain instances the distribution of violent speech may cause the subject psychological or emotional harm. The victim of a brutal assault may suffer further indignity knowing that the video of the assault is widely available on the Internet for anyone to view.[102] The family of a beheading victim might suffer similar harm if the video of the beheading is posted online.[103] This potential harm was recognized by the *Ferber* Court as another justification for banning child pornography.[104] The Court noted that that the permanent record of a child's participation in pornography can "haunt him in future years, long after the original misdeed took place. . . . [The child] must go through life knowing that the recording is circulating within the mass distribution system for child pornography."[105]

These justifications for restricting violent speech, however, are very narrow and would only apply in certain circumstances. Dramatized violence, filmed with actors and fake gore, could not be restricted under this justification no matter how graphically violent it was.

On the other hand, this may be the strongest justification for restricting certain violent speech. Unlike the debate over the effect of violent speech on behavior, there can be little disagreement that animal snuff videos harm the animals depicted or that a video of child abuse harms the child depicted.

IV. THE VALUE OF VIOLENT SPEECH

Having identified the core concerns with violent speech, it now remains to assess the value of different forms of violent speech. This value can be measured by reference to the different theories of free speech and

99. New York v. Ferber, 458 U.S. 747, 763–64 (1982).
100. *Id.* at 758.
101. *Id.* at 759.
102. *See* DeFalco, *supra* note 12.
103. *See* Margaret Wente, *Terror, Lies, and Videotape*, GLOBE & MAIL (Toronto, Can.), May 16, 2002, at A19.
104. *Ferber*, 458 U.S. at 759.
105. *Id.* at 759 n.10.

how violent speech fits or does not fit these theories. As we shall see, most violent speech probably has high social and political value. Some, however, has low value, and for some violent speech, we would struggle to find any value at all.

A. THE SEARCH FOR TRUTH AND THE MARKETPLACE OF IDEAS

Perhaps the most commonly recited argument for free speech is that free discussion and trading of ideas will lead to the discovery of truth.[106] Using the analogy of economic markets or the adversarial fact-finding process, the idea is that truth can only emerge through rigorous challenge of competing ideas. Frederick Schauer likens this process to a cross-examination or to Adam Smith's "Invisible Hand" choosing the best from a pool of freely competing ideas.[107]

Under the marketplace analogy, censoring ideas and opinions will hinder competition, decreasing the efficiency of the truth-finding process even when the suppressed idea was false. As John Stuart Mill wrote, silencing an opinion is "robbing the human race . . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."[108] For adherents to the marketplace rationale, the cure for undesirable speech is more speech to expose or prove wrong the undesirable speech, rather than suppressing the speech.[109]

The Supreme Court has repeatedly referred to the marketplace rationale as a reason for such strong protection of speech. Justice Holmes, in his dissent in *Abrams v. United States*, argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[110] Holmes's contemporary, Justice Brandeis, echoed this sentiment in his concurrence in *Whitney v. California*, stating that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[111] The language of the marketplace rationale is repeated throughout First Amendment

106. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15 (1982).

107. *Id.* at 16.

108. JOHN STUART MILL, ON LIBERTY: IN FOCUS 37 (John Gray & G. W. Smith eds., 1991) (1859).

109. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

110. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

111. *Whitney*, 274 U.S. at 375.

jurisprudence.[112]

Criticisms of the marketplace rationale generally fall into one of two categories: arguments about marketplace theory and pragmatic arguments about the reality of the marketplace. With respect to marketplace theory, critics note that the marketplace rationale assumes that the discovery of truth and the attainment of knowledge are valued above all else.[113] In instances where there is a high degree of certainty in the truth and where the minority opinion causes great external harm, however, the search for truth provides poor justification for allowing the minority opinion to be heard.[114]

Those considering the reality of the marketplace point out that differing viewpoints and opinions do not compete on a level playing field. As Owen Fiss argues:

> [I]n a capitalist society, the protection of autonomy will on the whole produce a public debate that is dominated by those who are economically powerful. The market . . . does not assure that all relevant views will be heard, but only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise.[115]

If truth is to be measured by how widely accepted an idea becomes, then views that reach a greater number of people will have an intrinsic advantage over views unable to reach a wide audience.

Critics also note that an essential assumption of the marketplace

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112. *E.g.*, N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 801 (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); Dennis v. United States, 341 U.S. 494, 588–89 (1951) (Douglas, J., dissenting) ("Free speech has destroyed [Communism] as an effective political party. . . . [Communists] are miserable merchants of unwanted ideas; their wares remain unsold.").

113. SCHAUER, *supra* note 106, at 23. "Discovery of truth" is not meant to limit the marketplace rationale to speech that contains a confirmable proposition. It can also refer to the development of music or art, where ideas from previous works can be compared, combined, and built upon to create newer works and ideas. Successful works can, in turn, be further developed, while unsuccessful works will generally be discarded. In this sense, the marketplace furthers a development towards "truth" that would be hindered by suppression of even the least successful works.

114. *Id.* at 29. Schauer uses the example of slavery to illustrate this point. There is wide public consensus that the abolition of slavery is morally correct—the extra certainty that society gains from allowing dissent is minimal. Allowing opinions that slavery is morally justified is likely to offend many people and may cause racial strife. On balance, Schauer argues, society's minimal gain in knowledge would seem to be outweighed by the potential harm of the speech. *Id.*

115. OWEN M. FISS, LIBERALISM DIVIDED 16, 17 (1996).

rationale, that people will act and think rationally, is not necessarily supported by empirical evidence.[116] History has shown that false ideas have frequently won out over true ones, even where the true ideas are allowed to disseminate freely.[117] The counterargument is that truth will overcome falsity in the long run, as evidenced by the fact that our knowledge of falsity overcoming truth in the short run means that truth won out in the long run.[118] The problem, noted by Harry Wellington, "is that the short run may be very long."[119]

In certain instances, the marketplace rationale seems to be a weak justification for the protection of graphically violent speech. First, violent speech without context does not advance knowledge through the presentation of any discernible idea or opinion. Second, the effects that violent speech has on the thoughts and behavior of viewers are largely automatic and noncognitive. Thus, such effects are generally not susceptible to counterspeech, which requires reasoning and deliberation.[120]

In addition, the criticisms of the marketplace rationale apply to graphically violent speech. First of all, the minimal gain in knowledge often is outweighed by the harm caused by violent speech. For example, the use of torture is almost universally condemned.[121] A video depicting torture may help affirm the validity of the condemnation, but the gain in certainty is likely to be small. Meanwhile, the harms of showing the torture video—causing aggressive behavior, offending viewers, and harming the torture victim—may be substantial.[122]

Second, the ubiquity of violence in mass media skews the market, so that the effects of violent speech are given a leg up over any conceivable

116. SCHAUER, *supra* note 106, at 26–27.

117. This country's experience with slavery is the first example that springs to mind.

118. SCHAUER, *supra* note 106, at 27.

119. Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979).

120. *See supra* Part III.A. *Cf.* HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY 121 (1969) ("[P]rurient motion pictures, pornographic paperbacks, and obscene magazines do not make arguments which are to be met by intelligent defense.").

121. There are 145 countries party to the United Nations Convention Against Torture, which prohibits torture under all circumstances. *See* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); Office of the U.N. High Commissioner for Human Rights, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Apr. 18, 2008), http://www2.ohchr.org/english/bodies/ratification/9.htm.

122. In some contexts, however, a torture video might be very valuable—for example, a video exposing torturous acts by government agents. Here the main value lies not in exposing the brutality of torture, but instead that the government was engaged in it.

counterspeech.[123] The marketplace bias can even be seen in the debate about the effects of violent speech. The scientific community, an idea marketplace generally less susceptible to the access inequalities of mass media, seems to have concluded, with a reasonably high degree of certainty,[124] that exposure to violent conduct causes aggressive behavior.[125] Yet issues of access to mass media communications have not allowed this scientific "truth" to overcome the "false" view in the market of public opinion.[126]

Third, the marketplace rationale's assumption of rational deliberation on the part of the "consumers," even if true in reality seems inapplicable when the effects of the speech "operate unconsciously and automatically."[127] The pathways by which violent speech causes violent conduct generally bypass conscious deliberation on the part of the viewer.[128]

The marketplace rationale for free speech can be a strong justification for certain categories of speech—scientific or political speech, for example. Indeed, most violent speech is intertwined with a political or social message that has true value under this rationale. With regard to excessively graphic violence standing alone, however, the marketplace justification loses much of its power.

B. FREE SPEECH AS ESSENTIAL TO SELF-GOVERNANCE

The free speech theory of democratic self-governance, generally credited to Alexander Meiklejohn, argues that the principal value of the First Amendment was its necessity to the democratic process.[129] If voters are to decide policy matters and come to wise decisions, it is important for

123. Given that many of the effects of violent speech are generally involuntary and not subject to conscious deliberation, it is difficult to conceive of an effective form of counterspeech. Susan Hurley speculates that providing scientific data of the effects of violent media might help mitigate these effects. Hurley, *supra* note 17, at 322–23. Even if such information was effective in countering the effects of violent speech, it is hard to imagine it pulling the same TV ratings as an episode of *24* or getting box office numbers comparable to the *Saw* series of films.

124. *See supra* Part III.A. This is not to say that there is no dissent, just that metastudies have shown the dissenters to be a small minority. Neither do I argue that the majority opinion is an "objective truth"; merely that it has emerged from a robust and vigorous debate as the more widely accepted opinion.

125. *See supra* Part III.A.

126. *See supra* notes 74–75 and accompanying text.

127. Hurley, *supra* note 17, at 322.

128. *See supra* notes 65–67 and accompanying text.

129. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948).

them to understand all relevant facts and interests.[130] Therefore, no opinions should be silenced on the belief that they are false or unwise.[131]

Others have argued that free speech is essential as a check on government power. First, free speech allows the public to uncover abuses of state power and protest against them to bring about change.[132] Second, by keeping open the "channels of political change," free speech prevents a government from entrenching itself.[133]

It has also been argued that free speech provides a "safety valve" for political dissent, which might otherwise manifest itself in violence or instability.[134] Allowing citizens to speak may keep them from using other, less desirable means of dissenting.[135]

The main criticism of the self-governance theory is that it only justifies protection of political speech and only values art or literature to the extent that it adds to political discourse.[136] Supporters of the self-governance theory might argue that private speech that does not benefit society in any way, and in fact may be harmful to society, is not deserving of any special protection under a free speech principle.[137] Since history demonstrates that the "overriding goal of the [First A]mendment . . . is to protect politics from government," nonpolitical speech should not get the same degree of protection as political speech.[138]

Under the self-governance theory, violent speech generally falls into the nonpolitical camp and would therefore be afforded less protection by the First Amendment. Of course, violence can be, and often is, placed in a context that gives it political value. Reporting from war zones or depictions of ethnic cleansing can spur needed political action. Depictions of violence without context, however, have little discernible political value. Such depictions do not help the people check the power of the government by advocating change or uncovering abuses of power. Violent speech without context does not inform the public of facts and opinions to help them

130. *Id.* at 25.

131. *Id.* at 26.

132. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

133. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105–07 (1980).

134. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

135. SCHAUER, *supra* note 106, at 78.

136. Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 900 (1949) (reviewing MEIKLEJOHN, *supra* note 129).

137. MEIKLEJOHN, *supra* note 129, at 104–05.

138. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 262 (1992).

deliberate on political matters.

Finally, it has been suggested that violent speech has political value because it provides a "safety valve," a sort of catharsis, so that viewers who would otherwise commit acts of violence are instead sated by simply viewing the violence.[139] Thus, society would be more stable by allowing violent speech because it lessens the overall amount of actual violence. This theory, however, seems unsupported by scientific studies on the effects of exposure to violent content, most of which suggest that viewing violent content increases, rather than decreases, violent behavior.[140]

C. AUTONOMY AND SELF-REALIZATION

Some have suggested that the main justification for free speech is its value in facilitating individual self-realization. As opposed to the marketplace and self-governance arguments, both of which can be described as instrumentalist approaches to free speech,[141] the autonomy approach generally values free speech as an end in itself. The idea is that a person who has complete freedom to develop her faculties will be happier and more fulfilled than a person whose development is hindered by restrictions on what she may speak or hear.[142] Therefore, all externalities being equal, the government should not base restrictions of speech on its political or social value. The self-realization argument was used by Brandeis when he stated in *Whitney* that "the final end of the State was to make men free to develop their faculties."[143]

The main criticism of the self-realization argument is that it fails to give an adequate reason for valuing speech over other conduct.[144] Self-realization can be reached through a variety of means of development, many of which are pure conduct and do not involve speech—for example, hunting, playing sports, or knitting.[145] Yet it is not claimed that a self-realization theory prohibits government regulation of these sorts of conduct. Although communication may be an important aspect of self-realizing conduct, in the sense that the individual will need information in

139. Bushman & Anderson, *supra* note 72, at 479–80.

140. *See* Strausburger & Wilson, *supra* note 81, at 78; *supra* Part III.A.

141. SCHAUER, *supra* note 106, at 47.

142. *Id.* at 54.

143. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

144. SCHAUER, *supra* note 106, at 56. *See also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) ("[D]evelopment of individual faculties and the achievement of pleasure . . . do not distinguish speech from any other human activity.").

145. *See* Bork, *supra* note 144, at 25.

order to carry out the conduct, conduct itself—learning by doing—is a highly effective means of self-realization. Thus, the self-realization theory "makes it difficult to understand what is special about speech."[146]

Furthermore, critics argue that the autonomy approach is not supported by First Amendment jurisprudence, Justice Brandeis's comment in *Whitney* notwithstanding. They argue that an autonomy approach would not allow the Court to draw distinctions based on the value of speech.[147] Yet the Court grants less protection to many forms of speech, such as commercial speech, which is considered low value, or obscenity and child pornography, which are excluded from the First Amendment entirely because of their lack of value.[148] As Cass Sunstein points out, the law on libel incorporates an explicit value judgment: public figures are held to a higher standard in a libel action than private figures because criticism of well-known people is more important than criticism of the average person.[149] If the Court could not draw distinctions based on the value of speech, these particular types of speech would have to be afforded the same presumptive protection that political speech is entitled to.[150]

Violent speech is an example of the shortcomings of autonomy theory. While it might be argued that watching a video of a dog fight will help develop one's faculties, it might be argued with equal force that shooting a dog will also help develop faculties. In both cases, there is similar harm: a dog has been killed or injured and the viewer/shooter likely has an increased tendency to commit violent acts in the future.[151] The self-

146. Sunstein, *supra* note 138, at 304. It is also important to note that the autonomy theory of the First Amendment does not rest on the idea that speech is purely self-regarding—that sticks and stones may injure, but words can never hurt. All restrictions of speech are based on some harm the speech is thought to cause. As Schauer notes, a "Free Speech Principle based on the premise that speech causes no harm is a Free Speech Principle of very narrow range." SCHAUER, *supra* note 106, at 63.

147. Sunstein, *supra* note 138, at 303. *See also* Redish, *supra* note 16, at 595 ("Although recognition of the self-realization value leads to the view that all forms of expression are equally valuable for constitutional purposes, this does not necessarily imply that all forms of expression must receive absolute, or even equal protection in all cases.").

148. Sunstein, *supra* note 138, at 302.

149. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 9–10 (1993).

150. *See id.* at 303. This is not to say that all speech would necessarily be protected under such a single-tier First Amendment. The presumption of protection could be overcome by showing a compelling government interest in preventing harm associated with a particular form of speech. Under a self-realization theory, however, the value of the speech would always have to be weighted the same—one side of the scale would be a constant. This is not consistent with Supreme Court precedent. *See generally* New York v. Ferber, 458 U.S. 747 (1982) (establishing a categorical exclusion based in part on child pornography's lack of social value); Miller v. California, 413 U.S. 15, 15 (1973) (basing the obscenity categorical exclusion on obscene speech's lack of "serious literary, artistic, political, or scientific value").

151. Of course, the viewer did not kill the dog as the shooter did, but it was necessary for a dog to

realization value of each action does not seem to justify protecting those activities in light of the harm caused.

D. GOVERNMENT INCOMPETENCE AND SLIPPERY SLOPES

The last main argument for the protection of speech focuses on the special dangers of allowing government to regulate speech, rather than focusing on the intrinsic value of protecting speech.[152] Schauer argues that history shows "that governments are particularly bad at censorship, that they are less capable of regulating speech than they are of regulating other forms of conduct."[153] He notes historical examples of religious persecution, suppression of then-seditious, now-celebrated views, and banning of great works of art.[154]

There are several possible reasons for this governmental incompetence at regulating speech. First, a government regulating political speech has a particular interest in suppressing speech that threatens its power.[155] Thus, a government is likely to want to restrict speech for its own self-interest rather than in the interests of society. For example, a government may attempt to suppress criticism or news reporting on violent-speech grounds.[156] Second, distinctions between permissible and impermissible speech may be especially difficult to draw.[157] This line-drawing problem can arise from linguistic overinclusiveness or from the limited capacity of people to fully understand a complex regulation.[158] This can lead to the suppression of valuable speech—law enforcement may prosecute beyond what is constitutionally permissible—and to the chilling of valuable speech—people may self-censor to avoid coming close to a vague line between protected and unprotected speech.

In addition, there are substantial concerns of the slippery slope. The basic slippery slope argument is that we should oppose decision *A*, even though we agree with it, because it will increase the likelihood of decision

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be killed in order for the viewer to watch the dog fight. Thus, the nonaccidental viewer is at least as culpable for the dog's death as nonaccidental viewers of child pornography are for the sexual abuse of the children onscreen.

152. SCHAUER, *supra* note 106, at 80.

153. *Id.* at 81.

154. *Id.*

155. *Id.* at 82.

156. *Cf.* KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 138 (2003) (describing the use of obscenity laws to suppress works when the real motivation may have been to suppress criticism of society or the government).

157. SCHAUER, *supra* note 106, at 83.

158. *Id.* at 84–85.

B, which we oppose.[159] Here, although we may agree with a limited violent speech categorical exclusion, we might not want to take that step because it may lead to an expanded violent speech exclusion or other categorical exclusions that we may oppose.

The main criticism of the slippery slope argument is that all laws require line drawing and this should not make us hesitant in the present situation.[160] The slippery slope argument could apply to any change in law, and consistent acceptance of the argument would guarantee an eternal status quo.[161] It has been described as a "'legal fiction' that allows one to disclaim responsibility for the results of one's decision not to regulate."[162]

Slippery slope arguments, however, do have real force and cannot simply be dismissed as a legal fiction.[163] In the case of a violent speech categorical exclusion, there are two types of slippery slopes, as identified by Eugene Volokh, of which we must be particularly mindful. First, there is the "multi-peaked preference" slippery slope, where the intermediate position is untenable because judges will prefer either of the extreme positions (status quo or expanded regulation) over the intermediate one (limited regulation).[164] Judges might prefer an expanded violent speech exclusion, initially based on psychological effects and low value, because of the difficulties and administrative costs of determining value or the types of psychological effects that would allow regulation of speech.[165] Judges might also be persuaded by equality arguments—for example, if violent speech can be excluded because of psychological effects and low value, then it is only fair that hate speech be excluded from First Amendment protection as well.[166]

Second, we should consider "attitude-altering" slippery slopes, where the intermediate position *A* will change attitudes and allow acceptance of the extreme position *B*.[167] In our case, a limited violent speech exclusion based on particular psychological effects and low value might change judicial attitudes on low-value speech, paving the way for other categorical

159. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 (2003).

160. *See* SCHAUER, *supra* note 106, at 83–84.

161. Volokh, *supra* note 159, at 1030.

162. *See* Jendi Reiter, *Serial Killer Trading Cards and First Amendment Values: A Defense of Content-Based Regulation of Violent Expression*, 62 ALB. L. REV. 183, 203 (1998).

163. *See* Volokh, *supra* note 159, at 1136–37.

164. *See id.* at 1049.

165. *See id.* at 1061.

166. *See id.* at 1056–61.

167. *Id.* at 1077.

exclusions based on low value.[168] Additionally, adding another exception to the general rule against content-based regulation of speech might alter attitudes and weaken support for the general rule.[169] Perhaps this effect can be reduced by attempting to fit a violent speech exclusion into an existing exclusion rather than creating a "free-standing" categorical exclusion.

These slippery slope arguments certainly have force in our case; it is without question that even a limited violent speech exclusion will increase the likelihood of further regulation of speech. This does not, however, require the abandonment of violent speech regulation. It requires us to attempt to limit the violent speech exclusion in such a way as to reduce the likelihood of slippage.

Furthermore, a limited violent speech exclusion may be seen as a compromise that actually reduces the likelihood of a more expansive violent speech exclusion. There seems to be a lot of political support for regulation of violent speech.[170] And as scientific evidence of the psychological effects of violent speech increases in strength and persuasiveness, the pressure on judges to accept regulation may increase. This may result in a violent speech exclusion that sweeps in valuable forms of violent speech. A more limited exclusion, by eliminating the most egregious examples of violent speech, might take some of the wind out of the sails of those who would seek more expansive regulation.

E. HIGH-VALUE AND LOW-VALUE VIOLENT SPEECH

Low value itself is no justification for restricting speech. There would be no governmental interest in banning completely benign speech, even if it lacked any value. On the other hand, the power of the justifications for protecting valueless speech is vastly reduced. Therefore, if the valueless

168. *See id.* at 1098–99.

169. *Id.* at 1093–94.

170. Since 2000, at least eight states and two cities have attempted to enact restrictions on violent video games. CAL. CIV. CODE §§ 1746–46.5 (Deering Supp. 2008); 720 ILL. COMP. STAT. ANN. 5/12A-1 to -25 (West Supp. 2008); LA. REV. STAT. ANN. § 14:91.14 (Supp. 2008), *invalidated by* Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006); 2005 MICH. PUB. ACTS 108, *invalidated by* Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006); MINN. STAT. ANN. § 325I.06 (West Supp. 2008), *invalidated by* Entm't Software Ass'n v. Swanson, 519 F.3d 768 (8th Cir. 2008); OKLA. STAT. ANN. tit. 21, § 1040.75 (West Supp. 2009); TENN. CODE ANN. § 39-17-911 (2003); WASH. REV. CODE ANN. § 9.91.180 (West Supp. 2008), *invalidated by* Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); Interactive Digital Software Ass'n v. St. Louis County, Missouri, 329 F.3d 954 (8th Cir. 2003) (invalidating a St. Louis County ordinance making it illegal to sell graphically violent video games to minors); Am. Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001) (invalidating an Indianapolis city ordinance that limited minors' access to violent video games).

speech is not completely benign, then even a little potential for harm may tilt the balance toward allowing a restriction on speech. After all, if the speech is valueless to society, there is little harm in restricting it.[171]

Common sense tells us that depictions of violence without any other context do not have the same value as the speeches of Martin Luther King, Jr., for example. Alone, a video of a dog fight or a beheading is "no essential part of any exposition of ideas" and is of "slight social value as a step to truth."[172] It does not add to the marketplace of ideas or help the citizenry in their task of self-governance. Its only possible value lies in the self-realization theory. When the speech causes some significant harm to a third party, however, the self-realization value alone seems to be a weak justification for its protection.

Most violent speech is not presented without context. Graphic descriptions of violence are ubiquitous in literature, religious texts, historical accounts, films, television, and just about every medium. Violence can provide a very valuable emphasis for a particular idea. It may be used to emphasize the horrors of war, the immorality of abortion, or the evil of killing animals for fur. Violence may be used in an instructional manner, such as to teach self-defense or to demonstrate butchering techniques. Reporting of newsworthy events may necessarily involve depictions of violence. Censoring depictions of violence during World War II or the conflict in Vietnam would have resulted in a greatly ill-informed populace.

Even the aforementioned dog fight and beheading can be very valuable in the right context. A dog fight in a film might be used as a cultural reference or as a metaphor for how cruelly humans treat each other.[173] As for beheadings, it would prove difficult to recount the French Revolution and Reign of Terror without at least some description of the method by which enemies of the revolution were dispatched.

It would seem that the context in which violent speech is placed is a dominant factor in determining its value. Even the most graphically violent depiction may be valuable in the right context. Violence without context

171. *See* Reiter, *supra* note 162, at 192 ("It is at least worth asking whether the Republic would be in peril if teenage gum-chewers were unable to trade a Jeffrey Dahmer for a Ted Bundy, or if national television broadcasts did not suggest inventive new methods of sexual assault."). Restricting such speech, however, can have negative consequences—in particular, the risk of the slippery slope as discussed in Part IV.D, *supra*.

172. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

173. *See* AMORES PERROS (Altavista Films 2000).

might be "a pig in the parlor instead of the barnyard."[174]

A recent example of how context can shape the value of the speech can be seen in the movie *The Passion of the Christ*,[175] which was described by longtime film critic Roger Ebert as "the most violent film I have ever seen."[176] The film portrays the last twelve hours of the life of Jesus, including very graphic depictions of him being beaten, flogged, and nailed to a cross, with the accompanying audio of screaming and crunching bones.[177] Film critic David Edelstein described the movie as "a two-hour-and-six-minute snuff movie."[178] Yet because the brutality and gore took place in the context of a religious story with the intent of emphasizing the sacrifice that the religious figure made for his beliefs, the brutality and gore seem to have significant value. If, however, the film depicted the same violence on an unknown person and without the context of a story, one would struggle to find any value in the depiction.[179]

Therefore, if we are to base a restriction of violent speech on its lack of value, it is essential to provide a test that is able to adequately distinguish between highly valuable violent speech and violent speech with little or no value. We do not want to "burn the house to roast the pig."[180] Valuable speech might still be regulable if the risk of harm outweighs the value; nonvaluable speech, on the other hand, may be restricted even when the risk of harm is much smaller.

V. THE VIOLENT SPEECH EXCEPTION TO FIRST AMENDMENT PROTECTION

Given the justifications for restricting violent speech and, in particular, the view that certain forms of violent speech have little or no social or political value, a categorical exclusion from First Amendment protection seems appropriate. In forming this exception, it is useful to analogize to existing exceptions. The three doctrines closest to the justifications for

174. FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

175. THE PASSION OF THE CHRIST (Icon Productions 2004).

176. Roger Ebert, *The Passion of the Christ*, http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=2004402240301 (Feb. 24, 2004).

177. *Id.*

178. David Edelstein, *Jesus H. Christ: The Passion, Mel Gibson's Bloody Mess*, SLATE, Feb. 24, 2004, http://www.slate.com/id/2096025.

179. *See* Ebert, *supra* note 176 (speculating that "[i]f it had been anyone other than Jesus up on that cross," the film would have gotten a higher rating for violence from the Motion Picture Association of America).

180. FCC v. Pacifica Found., 438 U.S. 726, 766 (1978) (Brennan, J., dissenting) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

restricting violent speech are incitement of violence, obscenity, and child pornography, which this Note will also refer to as the "harmful production" doctrine.

A. INCITEMENT OF VIOLENCE

The most commonly recited justification for laws restricting violent speech is the effect that violent content has on the behavior of viewers, especially minors. Section 48 was enacted partly on the reasoning that viewers may be desensitized to animal cruelty and be more likely to commit violent acts against animals, which may in turn lead to violence against humans.[181]

Therefore, it is no wonder that many courts considering restrictions on violent speech have looked to First Amendment jurisprudence on speech that incites violence.[182] Many courts have analyzed such restrictions under the Court's incitement test in *Brandenburg v. Ohio*.[183]

1. Current Incitement Doctrine

The Court in *Brandenburg* held that government could not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[184] The case concerned the prosecution of a Ku Klux Klan leader for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[185] The Court overturned the statute because it did not properly take into account the likelihood or imminence of any unlawful action.[186]

A close look at the language of *Brandenburg* reveals the narrowness

181. H.R. REP. No. 106-397, at 4 (1999). *See also* Elton W. Gallegly, *Beyond Cruelty*, U.S. FED. NEWS, Dec. 16, 2007 (noting that Jeffrey Dahmer, Ted Bundy, and the "Unabomber" Ted Kaczynski all had a history of torturing and killing animals).

182. The doctrine on incitement can be considered as a form of strict scrutiny rather than a categorical exclusion. In the quest for a categorical exclusion of violent speech, however, the emphasis on the effects of violent speech on behavior demands that one considers the Court's incitement reasoning.

183. *See, e.g.*, James v. Meow Media, Inc., 300 F.3d 683, 698–99 (6th Cir. 2002); Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823, 831 (M.D. La. 2006); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1279–81 (D. Colo. 2002); Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 182 (D. Conn. 2002).

184. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

185. *Id.* at 444–45.

186. *Id.* at 447–49.

of its applicability. The test only prohibits government from "proscrib[ing] *advocacy* of the use of force or of law violation" unless the government can demonstrate imminence and likelihood.[187] Courts that have applied the *Brandenburg* test to violent content seem to have overly focused on the second half of the test, while ignoring the first half—that it only applies to speech that advocates violence.

Courts have also taken language from *Ashcroft v. Free Speech Coalition*, stating that "government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time,'" because "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," to bolster the argument for applying *Brandenburg* to cases where speech causes illegal activity without directly advocating it.[188] In *Free Speech Coalition*, the Court was considering the possibility that virtual child pornography might cause viewers to sexually abuse children.[189] The Court dismissed that justification because there was no "attempt, incitement, solicitation, or conspiracy" to sexually abuse children.[190]

The Court's sweeping language and use of the *Brandenburg* test in *Free Speech Coalition* is unsatisfying. Speech may cause others to do harm by means other than direct advocacy. For example, speech that gives detailed information on how to commit a particular crime may cause a person to commit the crime "at some indefinite future time," even if the speaker did not intend such a result.[191] For such speech, *Brandenburg* is a poor tool for analysis. In particular, the imminence requirement, a key component of the advocacy test, seems unnecessary in the case of crime-facilitating speech. If someone posts instructions for building a nuclear weapon on the Internet, it should not matter if the speech makes a terrorist attack likely within a few days or a few years. Either way, it greatly increases the likelihood of an extremely harmful attack.[192] It should also not matter whether the poster intended such speech to cause an attack.[193]

2. Incitement in the Context of Violent Speech

Similarly, *Brandenburg* is a poor test for violent speech cases. Violent

187. *Id.* at 447–48 (emphasis added).
188. Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).
189. *Id.*
190. *Id.*
191. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1107–08 (2005).
192. *See id.* at 1209–10.
193. *See id.* at 1194–95.

speech causes violence in an entirely different manner than direct advocacy, which requires consideration of an entirely different set of factors. First, the reasoning for the imminence requirement in the advocacy context does not apply to the violent speech context. For advocacy of imminent violence, the short time frame prevents the marketplace of ideas from moderating the effect of the advocacy—counterspeech is not given a chance to compete. As Justice Holmes stated in his *Abrams* dissent, "[o]nly the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'"[194] Speech that advocates violence in some indefinite future is susceptible to counterspeech, and so should not be restricted.

Violent content, on the other hand, is not susceptible to counterspeech in the same manner, because its effects on behavior occur largely through unconscious and involuntary processes rather than through rational deliberation.[195] Extra time for counterspeech is unlikely to moderate the "incited" violent behavior, which can occur in both the short term and the long term.[196] Although advocacy speech can also cause violent conduct through unconscious, nondeliberative processes, such as excitement caused by the speaker's tone and energy, these effects quickly dissipate,[197] so that imminence remains a good distinction. The violence-inducing effects of viewing violent speech, however, can occur in the long term, through observational learning and imitation, automatization, and desensitization. Requiring imminence in this context leaves out consideration of these effects.

Second, the *Brandenburg* test contains no consideration of the value of the advocacy speech. The speech is presumed to have full First Amendment value, but is overcome by the interest of preventing unlawful activity. In cases where violent speech is determined to have no social value, such a strong interest in restricting the speech should not be necessary. The *Brandenburg* test, which weighs the possible harms of violence-inducing speech against presumably valuable speech, does not strike a proper balance if the speech is presumed to be valueless.

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194. Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting). *See also* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.").

195. *See supra* Part III.A.

196. Anderson, *Influence of Media Violence*, *supra* note 64, at 94.

197. *See id.* at 95–96 (explaining that the arousal or excitement effect of viewing media violence lasts only a few minutes).

Although the Supreme Court did cite *Brandenburg* for a similar situation in *Free Speech Coalition*, some language in its two-paragraph discussion of the issue suggests that the Court did not rely on *Brandenburg*'s imminence or intent requirements. The Court noted that "[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[198] This language suggests that, were the Court to find a substantial and strong connection between the speech and the resultant illegal activity, it might allow restrictions of the speech without a showing of intent to incite or imminence of effect.

Without intent or imminence, the likelihood of violence remains the main consideration in determinations regarding whether to restrict nonadvocating, violence-inducing speech. To this we should add a consideration of the gravity of the potential violence, which may have been implicit in the *Brandenburg* test. Balanced against this should be a consideration of the value of the speech sought to be restricted.[199] When speech is valuable, either the likelihood or the gravity of the potential harm must be very great and should generally be analyzed under strict scrutiny. If the speech has little or no social value, a lower likelihood or gravity of harm may justify categorical exclusion from the First Amendment.

Even under this simple test, courts have often found that there has not been an adequate showing that harm is likely or that the behavior caused would be seriously grave.[200] In most cases, this is the correct balance because the violent speech has been used in a way that gives it value. In some cases, however, where the speech is violent for the sake of violence and conveys no message or idea, then the balance may be off. For example, a video game where the main pursuit is to make snuff films in the goriest manner possible[201] has little or no redeeming value. Therefore, it is not appropriate to require a showing that the video game is likely to cause the player to commit an illegal activity. A much lesser showing, supported by scientific findings, that the aggregate effect of many people playing violent video games is increased violent behavior, even when the effect is

198. Ashcroft v. Free Speech Coal., 535 U.S. 234, 253–54 (2002).

199. This is not an argument that the likelihood of violence caused by violent speech satisfies strict scrutiny. We are still in the definitional balancing stage, where we can compare the value of the speech against the potential harm. *See* Nimmer, *supra* note 61, at 942 & n.24.

200. *E.g.*, Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1074 (N.D. Ill. 2005).

201. Entm't Software Ass'n v. Swanson, 519 F.3d 768, 770 (8th Cir. 2008) (describing the game *Manhunt*).

moderate, should be enough to allow restriction of the valueless game.[202]

Under this reasoning, the Constitution could allow regulation of visual depictions of violence as long as there is (1) a scientific showing in the legislative record that exposure to such depictions will cause a substantial aggregate increase in violent behavior among the viewers, and (2) a requirement that the particular depiction at issue, taken as a whole, lacks serious religious, political, scientific, educational, journalistic, or historical value. In order to limit the risk of overbreadth and prosecutorial discretion, the definition of "violence" should only include an act of mutilation, maiming, or dismemberment of a human, or of an animal if the act was illegal in the jurisdiction where the speech was prohibited.[203] Under this hypothetical categorical exclusion, the only issues that would have to be litigated in an individual case would be (1) whether the speech at issue fit into the definition of violent speech that the legislature had found to cause violent behavior, and (2) whether the speech at issue lacked value.

3. Section 48 Under the Incitement Categorical Exclusion

With this in mind, § 48 would not withstand scrutiny under this hypothetical incitement rationale. First of all, the "value" clause in § 48 does not require consideration of the work as a whole. This would allow a violent scene to be restricted even if it was intertwined with a highly valuable piece of political speech. It would give the government a tool to restrict valuable speech—ostensibly because of its violent content—for political reasons. Second, although the House Judiciary Committee mentioned "an increasing body of research" linking animal abuse to other violent behavior, they neither elaborated on the research, nor made any connection between *viewing* the animal abuse and increased violent behavior. Although that research may exist, there was no scientific showing that would justify restricting depictions of animal cruelty solely on the incitement to violence rationale.

B. OBSCENITY

Section 48's exception for works with serious societal value immediately calls into mind the obscenity doctrine. In fact, President

202. *Cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60–61 (1973) (stating that for obscene speech having no value, courts should not question the legislative judgment on the effects of obscenity even if the scientific data is not conclusive).

203. This definition would exclude visual depictions of relatively nonviolent homicides and would avoid the stickiness of having to define "torture."

Clinton almost certainly had in mind the obscenity doctrine when he attempted to narrow enforcement of the statute to cases where the work appealed to a prurient interest in sex.[204]

1. Current Obscenity Doctrine

Obscene speech has never been protected by the First Amendment.[205] Under current obscenity law, speech can only be restricted if it satisfies three tests:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[206]

Obscenity doctrine is generally limited to speech that depicts or describes ultimate sexual acts, masturbation, excretory functions, or lewd exhibition of the genitals.[207]

Regulation of obscene material has been justified on a variety of grounds. First, obscenity can be offensive to many people, even if it does not cause "temporal" harm.[208] As Judge Posner put it, "[o]ffensiveness is the offense."[209] This justification can apply even when the obscene speech is consumed only by consenting adults.[210] People may be offended simply knowing that such material is commonly available.[211]

Second, obscenity may not be deserving of First Amendment protection because it is not "speech" for free speech purposes.[212] Schauer argues that hardcore pornography is "more accurately treated as a physical rather than a mental experience."[213] He uses the example of a depiction of sexual intercourse with "no variety, no dialogue, no music, no attempt at artistic depiction, and not even any view of the faces of the participants."[214]

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204. President's Statement on the Depiction of Animal Cruelty—Punishment, *supra* note 38.

205. *See* Roth v. United States, 354 U.S. 476, 484–85 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

206. Miller v. California, 413 U.S. 15, 24 (1973) (citation omitted).

207. *See id.* at 25.

208. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 574–75 (7th Cir. 2001).

209. *Id.* at 575.

210. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57–59 (1973).

211. *See id.* at 59.

212. SCHAUER, *supra* note 106, at 181.

213. *Id.* at 182.

214. *Id.* at 181.

Such a film is merely a "sex aid"—a tool designed to arouse the viewer.[215] Obscenity is not speech, Schauer argues, because its intent and effect is to engage organs other than the mind.[216]

Third, many have argued that obscene speech causes illegal or otherwise undesirable conduct.[217] A report by Attorney General Edwin Meese in 1986 ("Meese Commission Report") concluded that there was a causal link between exposure to pornography that was violent or degrading toward women and an increase in aggressive behavior toward women.[218] Catharine MacKinnon argues for stricter controls on pornography on the basis that it causes male violence against women.[219]

Fourth, obscenity may be restricted because it causes harm to the "total community environment."[220] The existence of obscenity in the community can affect "the tone of the society . . . [and] the style and quality of life, now and in the future."[221] Moreover, MacKinnon argues that pornography perpetuates society's subordination of women by providing sexualized depictions of men dominating women.[222]

2. Violent Speech as Obscenity

Violent speech as obscenity first came before the Court in *Winters v. New York*, decided before the Court had confronted sexual obscenity in *Roth v. United States*.[223] In *Winters*, the Court considered a New York statute that prohibited the distribution of "[o]bscene prints and articles."[224] Included in the definition of "obscene" were publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."[225] While striking

215. *Id.*

216. *See id.* at 182.

217. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60–61 (1973).

218. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 324, 332 (1986) [hereinafter MEESE COMM'N REPORT]. It should be noted that the accuracy of these conclusions has been vigorously disputed. *See, e.g.*, Daniel Linz, Edward Donnerstein & Steven Penrod, *The Findings and Recommendations of the Attorney General's Commission on Pornography: Do the Psychological "Facts" Fit the Political Fury?*, 42 AM. PSYCHOLOGIST 946, 952 (1987) (arguing that violent behavior can result from exposure to violent material "whether sexually explicit or not").

219. *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1302–03 (1991).

220. *Paris Adult Theatre I*, 413 U.S. at 58.

221. *Id.* at 59.

222. MacKinnon, *supra* note 219, at 1302–03.

223. Winters v. New York, 333 U.S. 507 (1948).

224. *Id.* at 508.

225. *Id.*

the statute down as unconstitutionally vague, the Court stated that speech aimed at entertaining deserved as much protection as speech aimed at informing, noting that "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right."[226] Although the Court could find "nothing of any possible value to society in these magazines [describing and depicting violence], they are as much entitled to the protection of free speech as the best of literature."[227] Therefore, the Court seemed to take an absolutist approach to violent speech—such speech should be fully protected even if it has no value—an approach it did not apply in the obscenity cases.[228]

The *Winters* Court did not foreclose the regulation of violent speech, however, provided that the regulation met the required specificity.[229] The Court emphasized that its holding did not prevent a state from "punish[ing] circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment, by the use of apt words to describe the prohibited publications."[230]

Several legal scholars have argued that the current obscenity doctrine should be expanded to cover excessively violent speech.[231] The common definition of "obscene" includes anything that is disgusting or offensive, and is not limited to sexual or excretory matters.[232] Kevin Saunders points out that the etymology of obscene also supports the inclusion of violent matter.[233] Obscene may derive from *ob caenum*—"on account of filth"—or from *ab scaena*—"off the stage."[234] Either way, violence would be included, because extreme violence could be considered filth (*ob caenum*), or because in the origins of Western drama, violence often took place off stage (*ab scaena*).[235]

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226. *Id.* at 510.

227. *Id.*

228. Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 198–99 (2001).

229. *See* Video Software Dealers Ass'n v. Schwarzenegger, No. C-05-04188 RMW, 2007 WL 2261546, at *5 (N.D. Cal. Aug. 6, 2007).

230. Winters v. New York, 333 U.S. 507, 508 (1948).

231. *E.g.*, Saunders, *supra* note 16, at 113. *See also* Reiter, *supra* note 162, at 185 (proposing regulation of violent speech by analogy to obscenity law).

232. SCHAUER, *supra* note 106, at 179. *See also* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 574–75 (7th Cir. 2001) ("Obscenity is to many people disgusting, embarrassing, degrading, disturbing, outrageous, and insulting . . . .").

233. SAUNDERS, *supra* note 156, at 151.

234. *Id.*

235. *Id.* at 152–53. In times when violence did occur on stage—notably in Roman drama, where actual humans may have been killed on stage—sexual acts were also depicted on stage—"nothing was *ab scaena*." *Id.* at 153.

Violence likely fits within the justifications for the regulation of sexually obscene material. First, sufficiently violent material can be at least as offensive to one's sensibilities as sexually obscene material. Judge Posner surmises that "violent photographs of a person being drawn and quartered could be suppressed as disgusting, embarrassing, degrading, or disturbing . . . [and] might even be described as 'obscene,' . . . even if they have nothing to do with sex."[236] Joel Feinberg notes that an image in a film of "blood spurting out of [] bullet holes . . . was a naturally revolting sight—so offensive and shocking to the senses as to be obscene."[237]

Second, violence for the sake of violence is not speech, similar to the way hardcore pornography is not speech.[238] Most violent speech is aimed at arousing the viewer, not intellectually engaging him. It increases the viewer's heart rate and the electrical conductivity of the viewer's skin, and causes other physiological indicators of excitement or arousal.[239] This adrenaline rush is what the viewer of a dog fight is looking for. In this sense, viewing a video of a dog fight is really no different than actually attending a dog fight, which is illegal in many states.[240] Moreover, the dogs likely have no intent to communicate to the viewers, unlike the participants in hardcore pornography. To define a depiction of a dog fight as speech in the context of the First Amendment "is being bizarrely literal or formalistic."[241]

Schauer is hesitant to extend his "sex aid" obscenity rationale to violent speech.[242] His reasoning is that graphic violence can be used in valuable ways, such as a depiction of violent death in battle to underscore the horrors of war.[243] However, Schauer's sex aid rationale was premised on pornography with no supporting context.[244] Therefore, a more apt comparison would be to a graphically violent death with no story, no dialogue, and no artistry. After all, just as violence may be used to emphasize valuable speech, sexually explicit speech may be used in a

236. *Kendrick*, 244 F.3d at 575 (citations omitted).

237. 2 JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 115 (1985).

238. *See* SAUNDERS, *supra* note 156, at 155–56.

239. Anderson, *Influence of Media Violence*, *supra* note 64, at 95.

240. *Cf.* Schauer, *supra* note 58, at 181. *See also, e.g.*, CAL. PENAL CODE § 597c (West 1998) (prohibiting attendance at animal fights); 18 PA. CONS. STAT. ANN. § 5511 (2004) (same); VA. CODE ANN. § 3.1-796.124 (1994) (same).

241. SCHAUER, *supra* note 106, at 181.

242. *Id.* at 185.

243. *Id.*

244. *See supra* note 214 and accompanying text.

valuable manner, such as to lampoon a public figure.[245]

Third, as discussed in Part III.A, there is significant scientific evidence that exposure to violent speech causes aggressive behavior. This effect may even be more significant than the possible effect obscene pornography has on its viewers. The Meese Commission Report found a strong causal link between exposure to violent pornography and subsequent aggressive behavior, yet was unable to conclude that there was any causal link between nonviolent, nondegrading pornography and aggressive behavior.[246] This at least suggests that it is the violent content of the pornography, rather than the sexual content, that has adverse effects.

Fourth, violent speech can have a harmful effect on the "tone of society."[247] Even if violent content does not directly cause people to behave violently, frequent exposure to violence in the media can breed unnecessary fear in society.[248] This fear can occur even for violent speech not in the mass media. Merely knowing that other individuals can and do enjoy watching helpless animals being crushed to death can negatively affect one's opinion of society.

While current obscenity doctrine is limited to sexually explicit or excretory material, current enforcement of obscenity laws seems to suggest that violence plays a large role in determining whether speech is obscene. In nearly all recent federal obscenity cases, the speech at issue was either child pornography or violent adult pornography.[249] A recent obscenity prosecution in Pittsburgh involved depictions of women being gang raped and having their throats slit.[250] In another case in 2005, defendants were convicted of selling obscene material for videos purporting to be actual rapes.[251] Federal prosecutors have even secured a guilty plea on an obscenity charge from a woman who wrote stories of young girls being

245. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 48 (1988).

246. MEESE COMM'N REPORT, *supra* note 218, at 337–38.

247. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973).

248. *See supra* Part III.B.

249. *See, e.g.*, United States v. McDowell, 498 F.3d 308, 311 (5th Cir. 2007) (describing an obscenity prosecution for "sexual torture" videos depicting sadomasochism); United States v. Marcus, 487 F. Supp. 2d 289, 292–97 (E.D.N.Y. 2007) (describing an obscenity prosecution for depictions of extreme nonconsensual sadomasochism), *vacated by* 538 F.3d 97 (2d Cir. 2008); Government's Response and Memorandum to Defendant's Motion to Dismiss at 2, United States v. Little, 2008 WL 2959751 (M.D. Fla. Nov. 7, 2007) (No. 8:07-cr-170-T-24) (describing an obscenity prosecution for a video depicting rape, slapping, and gagging); Richards & Calvert, *supra* note 3, at 235 (describing an obscenity prosecution for a video depicting prisoners being tortured).

250. Michael McGough, Editorial, *Not So Slippery a Slope*, PITTSBURGH POST-GAZETTE, Dec. 26, 2005, at B7.

251. United States v. Ragsdale, 426 F.3d 765, 768–69 (5th Cir. 2005).

molested, tortured, and killed.[252] In the rare case that did not involve violent or child pornography, the defendant had distributed pornography to a minor.[253] The implication is that pornography is not obscene unless it involves violence or children. In fact, in the pornography industry, it was commonly felt that the best way to avoid an obscenity charge was to avoid portraying violence in tandem with sexual acts.[254] If pornography without violence is not considered obscene, perhaps it is the violent content, more than the sexual content, which people find patently offensive.

Using obscenity as a model for crafting a violent obscenity exclusion provides a doctrine allowing restriction of speech only upon showing that (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a morbid interest in death, maiming, mutilation, or other forms of physical violence; (2) the work depicts or describes, in a patently offensive way, violent conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, scientific, educational, historical, or journalistic value.

3. Section 48 Under the Violent Obscenity Standard

Under the violent obscenity test, § 48 is missing a key component. Part of the obscenity rationale is that the speech at issue, "*taken as a whole*, lacks serious . . . value."[255] This is important, as it helps protect speech that gains value by being placed in the correct context. A sexually explicit video that might be obscene by itself might be protected if it were part of a study on sexual behavior. Similarly, a film of a bull fight on its own might be considered obscene, but placed in a documentary on Spanish culture ought to be protected. Unfortunately, § 48 omits the all-important "taken as a whole" language from the exception for valuable speech.[256]

In addition, § 48 does not require that a depiction of animal cruelty be patently offensive. Animal cruelty is defined in the statute as any violence or killing of an animal that is illegal in the state where the depiction is

252. Paula Reed Ward, *Writer's "Monsters" Lead to Obscenity Sentence*, PITTSBURGH POST-GAZETTE, Aug. 8, 2008, at A1.

253. *E.g.*, United States v. JoDon, 19 Fed. Appx. 443, 444 (8th Cir. 2001). The prosecutors likely did not initiate these prosecutions because of the obscene nature of the material, but rather because of the defendant's actions and intent toward the minor.

254. Jon Mooallem, *A Disciplined Business*, N.Y. TIMES MAG., Apr. 29, 2007, at 28.

255. Miller v. California, 413 U.S. 15, 24 (1973) (emphasis added).

256. *See* 18 U.S.C. § 48(b) (2000). *See also* Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/posts/1184174039.shtml (July 11, 2007, 13:13 PST) (noting the importance of the omission).

being possessed or sold.[257] It is conceivable that an act of animal cruelty could be depicted in a manner that is not patently offensive. For example, it is illegal in some states to slaughter a horse for food.[258] Such a slaughter would likely be deemed animal cruelty in those states. However, a slaughter taking place in a different state presumably could be filmed in a respectful manner that would not be patently offensive—no close shots or dwelling on gore, for example. Even so, such a depiction violates § 48 on its face. Since § 48 makes no distinction between offensive and inoffensive depictions of animal cruelty, it would fail under the obscenity analysis.

C. CHILD PORNOGRAPHY AND HARMFUL PRODUCTION

Given that the main rationale for the enactment of § 48 was the protection of the animals being filmed, the First Amendment exclusion for child pornography seems to be the most closely analogous free speech doctrine.

1. Child Pornography Doctrine

Child pornography was excluded from First Amendment protection in *New York v. Ferber*.[259] In deciding that even nonobscene child pornography was unprotected, the Court balanced the government interests in suppressing child pornography against the value of the speech. The Court recognized that the government had a compelling interest in "safeguarding the physical and psychological well-being of a minor," and that the production of child pornography harmed the children depicted.[260] It noted that the distribution of child pornography was "intrinsically related to the sexual abuse of children" by establishing a market that encouraged production and provided a permanent record of the sexual abuse, causing continuing harm to the child.[261] Furthermore, the Court noted that the difficulty in prosecuting the producers of the pornography made it necessary for the government to prohibit the distribution.[262] The Court weighed the value of child pornography against these factors, finding it to be "exceedingly modest, if not *de minimis*."[263] Notably, the Court found it unlikely that child pornography could have significant value in any context,

257. 18 U.S.C. § 48(c)(1).
258. *E.g.*, CAL. PENAL CODE § 598c (West 2008).
259. New York v. Ferber, 458 U.S. 747 (1982).
260. *Id.* at 756–57.
261. *Id.* at 759.
262. *Id.* at 759–60.
263. *Id.* at 762.

even as "a literary performance or scientific or educational work," thereby dismissing any overbreadth claim.[264]

Twenty years later, in *Free Speech Coalition*, the Court affirmed that the *Ferber* reasoning only applied where children were actually used as the subjects of child pornography.[265] The *Ferber* Court had hinted at this, noting that if a depiction of a child engaging in sexual conduct was necessary, it could be carried out by a young-looking adult actor.[266] In *Free Speech Coalition*, the Court was called upon to decide whether the government could ban "virtual" child pornography, which was either produced with adults who looked like children or using computer generated imagery.[267] In neither case was the pornography "intrinsically related" to actual sexual abuse of children.[268]

Osborne v. Ohio extended *Ferber* to allow prosecution of mere possession of child pornography rather than just production or distribution.[269] The Court found that the reasoning of *Ferber*—limiting the demand for child pornography by banning the market—justified criminalizing private possession of the material.[270] The court distinguished *Stanley v. Georgia*, which held that a person could not be prosecuted for private possession of obscene material,[271] because of the difference in the underlying justifications for restricting child pornography as opposed to obscenity.[272]

2. Harmful Production as a Categorical Exclusion

A harmful production doctrine, as analogized from *Ferber*, seems a natural fit for certain forms of violent speech, because violence by

264. *Id.* at 762–63.

265. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 250–51 (2002).

266. *Ferber*, 458 U.S. at 763.

267. *Free Speech Coal.*, 535 U.S. at 239–40.

268. *Id.* at 250. The Court considered the argument that virtual child pornography had a tendency to cause its viewers to commit sexual abuse of children, but dismissed the argument while citing *Brandenburg*. *Id.* at 253–54. More recently, the Court held that an offer to distribute child pornography was not protected by the First Amendment, whether or not the depictions offered actually constituted child pornography. United States v. Williams, 128 S. Ct. 1830, 1842 (2008). However, this case does not really affect child pornography jurisprudence; it simply stands for the proposition that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *Id.* at 1841. *See also* United States v. Stevens, 533 F.3d 218, 220 n.1 (3d Cir. 2008) (en banc) (noting the narrowness of the *Williams* holding); Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/posts/1211221587.shtml (May 19, 2008 14:26 PST) (same).

269. Osborne v. Ohio, 495 U.S. 103, 111 (1990).

270. *Id.* at 110–11.

271. Stanley v. Georgia, 394 U.S. 557, 559 (1969).

272. *Osborne*, 495 U.S. at 108.

definition causes harm.[273] Depictions of actual violence would seem, at first blush, to at least land in the *Ferber* ballpark.

It is useful at this point to note that *Ferber* seems to be limited to harmful production as distinct from illegal production. Not all criminal acts directly cause harm and not all harmful acts are illegal. For example, no court would extend *Ferber* to allow restriction of speech depicting adults smoking marijuana or a car driving down the road with expired registration tags. Although these activities are illegal, any harm that flows from the violation of these laws is attenuated, far down the causal chain. The illegal production confusion seems to come from the fact that if an act causing harm is deemed to be so grave that even its depiction should be criminalized, then the act itself is almost sure to be illegal.

Even so, child pornography laws do apply to depictions of acts that may not be illegal at the time and place of filming. Federal child pornography law prohibits depictions of sexual acts by anyone under the age of eighteen.[274] However, the age of consent in some states is as low as sixteen, and some states allow minors to engage in consensual sex with other minors.[275] These acts are not illegal, but to film them and distribute the film across state lines would be.[276] Furthermore, the age of consent in some foreign countries can be as low as thirteen.[277] Despite the fact that a sexual act with a thirteen-year-old may be legal in that country, possessing any depiction of the act in the United States would subject the possessor to criminal liability.

While it might be appealing to apply a *Ferber*-like harmful production doctrine to any violent speech which causes harm to the subjects, there are a few potential problems that may make the doctrine overbroad. These are helpful to discuss, because they may highlight ways to narrow the doctrine so that it does not underprotect potentially valuable speech.

The first problem concerns depictions of harm to which the victims have consented. Intuitively, it seems improper to protect people from a harm to which they have consented, especially by using the drastic means of restricting speech. Many sports, for example, contain a high degree of

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273. OXFORD DICTIONARY OF ENGLISH 1968 (2d ed., rev. 2006) (defining violence as "behaviour involving physical force intended to hurt, damage, or kill someone or something").

274. 18 U.S.C. §§ 2252, 2256(1) (2000).

275. *E.g.*, N.J. STAT. ANN. § 2C:14-2 (West 2004); 18 PA. CONS. STAT. ANN. § 3122.1 (West 2000).

276. 18 U.S.C. § 2252.

277. *See, e.g.*, INTERPOL, Sexual Offences Laws—Japan, http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaJapan.asp (2006).

risk of injury. It seems unlikely that the Constitution could allow prohibition of depictions of a mixed martial arts fight or even a game of American football. A woman may consent to taking part in violently degrading pornography, which may cause her physical or psychological harm both at the time of filming and later in life, when the recording is floating around on the Internet. Consent may come in illegal contexts as well, such as unsanctioned street fighting, videos of which are widely available online.[278] In these situations, it is tempting to say that the depictions should be protected because the subjects consented to the activities, as opposed to child pornography or animal cruelty videos, where the subjects cannot consent.

Another difficulty with consent is that it is often impossible to determine from a depiction alone whether the subject consented to the harm. A rape scene may depict an actual heinous crime or may merely show competent acting. One participant in a street fight might not be as willing as his opponent to come to blows, but that would not always be apparent from the video. Even if the subjects have not consented, these situations are probably best left to criminal prosecution of the underlying conduct rather than censorship of the depictions. The nonconsenting subject is generally free to report the incident to police, and the videos themselves can be a valuable tool for law enforcement.

Consent may not be entirely persuasive as a means of distinguishing protected speech from unprotected. There are several types of harms to which legislatures have determined that people may not consent. People may not use certain drugs, in part because of the harm they cause the user. The aforementioned street fights are illegal because of the potential harm to participants. A depiction of such a fight, therefore, could not be protected by the First Amendment on the basis that the participants consented. Similarly, though a minor teenager may consent to a sexual act, the depiction remains unprotected speech.

To make this point clearer, imagine a hypothetical death match. Two contestants are given weapons and told to fight to the death, with the winner receiving a large cash prize. Both are very willing participants. Imagine that this contest takes place in a country that does not prohibit it. The organizers would like to broadcast the fight in the United States over the Internet. Would prohibition of such a broadcast offend the First Amendment? If not, it clearly does not matter that both fighters consented.

278. Rotella, *supra* note 9.

A second possible problem with an unbound harmful production doctrine is that it does not distinguish between the varying levels of severity of harm caused.[279] A depiction of a woman disciplining her child with a spanking would be just as subject to prohibition as a depiction of the same child involved in a sexual act. Therefore, severity of the harm seems to be a good place to constrain the harmful production doctrine.[280] In fact, *Ferber* partially rested on the fact that the harm at issue was so severe.[281]

While consent may be a poor line to draw to constrain harmful production, it may turn out to be helpful in determining the severity of a harm. Harms done to children and animals are always likely to be considered more severe than the same harm done to a consenting adult, because of the lack of consent on the part of the children or animals. Between two consensual activities, say the death match and a boxing match, harm severity helps draw the line between the activity whose depiction could be banned and the one whose depiction should be protected. In a death match, the harm is the death of a human being; in boxing, the harm is likely to be much less severe.

Volokh argues that the severity line could preclude § 48 from being upheld under the *Ferber* rationale on the basis that sexual abuse of a child is a much more severe harm than physical abuse of an animal.[282] While it is generally true that people value the safety of children over the safety of animals, it is at least worth asking whether consensual sex between minors, the depiction of which would be illegal, causes harm more severe than the torture and mutilation of a cat or dog. It would seem that child abuse and animal abuse overlap on the severity scale, with some acts of animal abuse being worse than some acts of child abuse and vice versa. Public reaction to the revelation of Michael Vick's involvement in a dog fighting ring suggests that many people consider animal cruelty to be quite severe.[283]

Another possible problem with using harmful production is its workability in an age where anyone with a video camera and decent editing software can make very realistic virtual violence. Good acting or computer-generated imagery may make it impossible for a viewer to determine

279. *See* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1965–66 (2004) (arguing that in the child pornography context, lines must be drawn based on the severity of sexual abuse of minors).

280. *See id.*

281. *See* New York v. Ferber, 458 U.S. 747, 757 (1982).

282. *See* Posting of Eugene Volokh to The Volokh Conspiracy, *supra* note 256.

283. *See* Joel Stein, Op-Ed., *Gone to the Dogs*, L.A. TIMES, Aug. 10, 2007, at A23 (noting that the public outcry about Vick's involvement in dog fighting overshadowed another athlete's assault on a woman).

whether a given video or image depicts an actual incident. This problem was alluded to in *Free Speech Coalition* in the case of virtual child pornography.[284] Shifting the burden to the defendant to prove that there was no harm in production is unlikely to pass constitutional muster.[285] However, the Court recently ruled in *United States v. Williams* that legislation may prohibit offers or solicitations of child pornography, regardless of whether the depictions at issue constituted child pornography.[286] Therefore, legislatures could get around the problem of virtual violence by making it illegal to offer or solicit depictions of actual harm.

A final problem with the extension of harmful production beyond child pornography is that some cases of violent harmful production may be valuable, as opposed to child pornography, which is unlikely to be valuable in any context.[287] Any news reporting from a war zone will inevitably depict acts of death and destruction. Needless to say, allowing suppression of this speech is a very bad idea. As with the other hypothetical violent speech exclusions, it is necessary to determine the value of the speech at issue.

Unlike obscenity, however, which requires consideration of a work as a whole, the question here is whether the depiction is intrinsically valuable. A depiction of real torture should not be protected because it is part of a Hollywood film which might have some literary value—the depiction is not valuable when it is possible to achieve the same result without harming anyone.[288] If the torture clearly shows real soldiers torturing prisoners, however, we can presume that the depiction is instrumentally valuable because it informs the public of government abuse.

Keeping in mind that lines should be drawn based on the severity of harm and the intrinsic value of the depiction, the doctrine we are left with will categorically exclude speech from First Amendment protection when it depicts an act which causes any person or animal severe pain and suffering, mental or physical, or death, such that no reasonable person could consent to the harm or risk of harm. Furthermore, it must be shown that the restriction is necessary to halt production of the depictions because of difficulties in prosecuting the underlying acts. And the depiction should not have any serious religious, political, scientific, educational, journalistic,

284. Ashcroft v. Free Speech Coal., 535 U.S. 234, 259 (2002) (Thomas, J., concurring).
285. *Id.* at 255–56 (majority opinion).
286. United States v. Williams, 128 S. Ct. 1830, 1842 (2008).
287. *See* New York v. Ferber, 458 U.S. 747, 762–63 (1982).
288. *See id.*

historical, or artistic value.

3. Section 48 as Harmful Production

The Third Circuit ruled that the *Ferber* exclusion could not be extended to exclude depictions of animal cruelty from First Amendment protection. The decision mainly rested on the differences between children and animals, but the language of the court demonstrates a hesitancy to, as a lower court, create a new exception to the First Amendment.[289] This hesitancy aside, however, there is little reason why § 48 would not pass constitutional muster under a harmful production rationale.

First, the government has a legitimate and possibly compelling interest in preventing cruelty to animals.[290] The Third Circuit found that the Court in *Church of the Lukumi Babalu Aye v. City of Hialeah* at least "hinted" that prevention of animal cruelty is not compelling enough to overcome fundamental human rights, such as the right to free exercise of religion.[291] However, *Lukumi* never confronted such a question. It assumed that protection of animals was a compelling interest, yet found that the ordinance was not narrowly tailored to serve that interest, demonstrating that the true intent of the ordinance was to suppress the practice of Santeria.[292] In fact, Justice Blackmun's concurrence specifically notes that

> [t]he result in [*Lukumi*] does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. 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.[293]

The Third Circuit also argues that preventing animal cruelty cannot be a compelling interest, because only interests related to humans have been found to be compelling.[294] This is both debatable and inapposite. Incitement of imminent unlawful activity is a compelling interest, yet there

289. United States v. Stevens, 533 F.3d 218, 220, 225–26 (3d Cir. 2008) (en banc).

290. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993); *Stevens*, 533 F.3d 218, 237–38 (3d Cir. 2008) (Cowen, J., dissenting). *See also* Cavel Int'l, Inc. v. Madigan, 500 F.3d 551, 557 (7th Cir. 2007) ("States have a legitimate interest in prolonging the lives of animals that their population happens to like."). All fifty states have laws against animal cruelty. *Stevens*, 533 F.3d at 223 & n.4.

291. *Stevens*, 533 F.3d at 226–27; H.R. REP. No. 106-397, at 3 (1999). The issue in *Lukumi* was whether a city ordinance that prohibited animal sacrifice violated the free exercise rights of those who practiced Santeria. *See Lukumi*, 508 U.S. at 524–28.

292. *See Lukumi*, 508 U.S. at 534, 546.

293. *Id.* at 580 (Blackmun, J., concurring).

294. *Stevens*, 533 F.3d at 227.

is no requirement that the unlawful activity be directed towards humans. Presumably, advocating immediate illegal animal cruelty would be just as subject to prohibition as would advocacy to murder. And, more to the point, the reason that most compelling interests involve humans is because the Supreme Court has never had the occasion to consider whether protecting animals is a compelling interest.[295] That the Court has never considered the issue has no bearing on the Court's stance on the issue.

The Third Circuit then argues that there is not a sufficient link between the interest in protecting animals and § 48, because § 48 is not limited to depictions of animal cruelty from which investigators could not identify the perpetrators.[296] The court reasoned that the compelling interest had to be the prevention of animal cruelty that existing animal cruelty laws underenforce.[297] This is a new addition to the *Ferber* analysis. There is no requirement in *Ferber* that child pornography laws be limited to depictions that existing child abuse laws would not otherwise reach. In fact, as discussed above, there is no requirement that the act depicted even be illegal, as is required by § 48. The Third Circuit's analysis seems to be an effort to squeeze a narrow tailoring argument into *Ferber*, even though *Ferber* is plainly not strict scrutiny.[298]

Moreover, it is not clear from *Ferber* that a compelling interest is necessary to establish a categorical exclusion. After all, if the government has a compelling interest in restricting speech and can narrowly tailor a law to serve that interest, then there is no need to craft a categorical exclusion. The law will simply withstand strict scrutiny. In *Ferber*, however, the Court noted that there was de minimis social value in depictions of actual children engaged in sexual activity.[299] Such a finding is irrelevant to strict scrutiny, which presumes full First Amendment value. This value finding, unless it is considered dictum, potentially means that government's interest in restricting the speech at issue does not need to rise to the level of compelling at the definitional balancing stage.

On the second point, the Third Circuit correctly notes that the depiction of the animal cruelty does not cause any psychological harm on the animal in the same way that a depiction of sexual abuse might cause harm to a child.[300] However, this second factor is a relatively minor point

295. The Court in *Lukumi* studiously avoided the issue. *See Lukumi*, 508 U.S. at 580.
296. *Stevens*, 533 F.3d at 229.
297. *Id.* at 228.
298. *See* Schauer, *supra* note 58, at 304–06.
299. New York v. Ferber, 458 U.S. 747, 762 (1982).
300. *Stevens*, 533 F.3d at 230.

of the Court's holding in *Ferber*. Whether or not the child is truly affected by the existence of a depiction of abuse, the primary rationale behind *Ferber* is the desire to prevent the underlying abuse in the first place. The constitutionality of § 48 should not turn on this factor.

Third, halting distribution is necessary to halt production of animal cruelty videos because of the difficulty in prosecuting the actual offenders. Videos of dog fights, cock fights, or crush videos typically omit the faces of the perpetrators.[301] Furthermore, it may be impossible to determine the time and place of the recording in order to establish jurisdiction.[302] The Third Circuit notes that dog fighting currently generates most of its revenue through live events and gambling.[303] While that may be true, the fact that Robert Stevens was selling dog fighting videos demonstrates there is at least some economic incentive to produce them, even if it was not the primary incentive to produce them. The Third Circuit also overlooks the fact that a market for depictions of animal cruelty may already be developing. For example, a company in Florida is looking to broadcast legal cock fights from Puerto Rico to the United States over the Internet.[304]

It should be noted that § 48 is more limited in scope than child pornography doctrine in that it prohibits only commercial distribution of the depictions rather than mere possession.[305] Thus, someone could freely distribute animal cruelty videos on the Internet as long as he made no money from the endeavor. Under the hypothetical harmful production rationale, however, § 48 could be expanded to prohibit possession as well.

Fourth, the depictions prohibited by § 48 lack any serious value.[306] Although the statute omits the "taken as a whole" language for determining value, under the harmful production rationale, this is not necessary. Just as *Ferber* was willing to restrict child pornography even when used in a scientific study or literary production, so too can animal cruelty videos be banned. If a depiction of animal cruelty was necessary, it could be simulated without the torture or killing of a live animal.[307]

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301. *See id.* at 234; H.R. REP. No. 106-397, at 3 (1999). The Third Circuit, however, notes that in the *Stevens* case, the faces of spectators could be seen in some of the videos. *Stevens*, 533 F.3d at 234.

302. H.R. REP. No 106-397, at 3.

303. *Stevens*, 533 F.3d at 230 & n.10.

304. Liptak, *supra* note 13.

305. 18 U.S.C. § 48(a) (2000).

306. *See id.* § 48(b).

307. *Cf.* New York v. Ferber, 458 U.S. 747, 763 (1982) ("[I]f [child pornography] were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." (footnote omitted)).

The Third Circuit, however, views the value clause as inseparable from the rest of the *Miller v. California* obscenity test.[308] There is no reason why this should be the case. A judgment of whether speech has utterly no social value, a high standard for a prosecutor to prove,[309] is not inextricably intertwined with a determination of whether the speech is sexually explicit or offensive. As noted above, the Supreme Court has made value judgments on speech in several instances, such as commercial speech and defamation. Not all speech should be fully valued under the First Amendment. Notably, the Third Circuit makes no attempt to speculate as to the supposed value of depictions of dog fighting.

The court does seem worried that a value clause could be attached to any restriction on speech to make it constitutionally permissible.[310] While this may be a valid concern in some instances, within the contours of the *Ferber* framework, a statute has to meet the other criteria. It must be aimed at preventing some severe harm to a person—or, in this limited case, an animal—and the restriction on a depiction of the activity must be necessary to prevent that harm, either by "drying up the market" or because of difficulties in enforcing restrictions on the underlying acts.

Therefore, if we take the view that protecting animals from cruelty is important enough to outweigh the value of depictions of animal cruelty, then it seems clear that § 48 would fit into a *Ferber*-like harmful production exclusion from the First Amendment.

VI. CONCLUSION

Excessively violent speech is a growing problem in modern society. Scientific research is showing more evidence that exposure to violent speech causes viewers to behave more violently. Modern electronics and the Internet allow amateur depictions of gruesome violence to be disseminated worldwide. Many of these depictions involve actual harm done to humans and animals. Moreover, most of these depictions add little, if any, value to society.

It is time for the Supreme Court to revisit the problem of violent speech under the First Amendment. If the Court chooses to review 18 U.S.C. § 48, it should take a stand against extremely violent speech and

308. *Stevens*, 533 F.3d at 231–32. *See supra* text accompanying note 206.

309. The Third Circuit rightly questions whether it is appropriate to view the clause as an affirmative defense rather than an element of the crime that the prosecutor must prove beyond a reasonable doubt. *Id.* at 231 n.13.

310. *Id.*

send a message that producers cannot continue to push the boundaries of graphic violence and expect to be protected by the First Amendment. Depictions of dog fighting and other blood sports do not deserve protection, and to grant it is to pervert the true values of the First Amendment.

The three violent-speech-restricting doctrines laid out in this Note are intended to have narrow application, in recognition that some violent speech can be very useful. All three require a showing that the work is essentially valueless. The value determination, howver, is not an entirely bright line, leading to a possible chilling effect on valuable violent speech. On the other hand, this concern might be overstated given the success of obscenity law in distinguishing between valuable and valueless speech.[311] Furthermore, the speech likely to be chilled is that which comes closest to the line of being valueless. We might query whether chilling that speech is entirely undesirable.

These exclusions may also not be as broad as some would like, but it is important to recognize that in the context of free speech, overprotection is better than underprotection. Yet underprotection can be dangerous as well. If the First Amendment is continually invoked to protect the most sickening and brutal depictions of violence, then respect for free speech may wane. A narrower First Amendment may better protect its core values.

311. *See* Reiter, *supra* note 162, at 192.