COMMENT

SON OF SAM AND DOG OF SAM: REGULATING DEPICTIONS OF ANIMAL CRUELTY THROUGH THE USE OF CRIMINAL ANTI-PROFIT STATUTES

By
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In 1991, Congress enacted 18 U.S.C. § 48, which prohibits the interstate sale and distribution of depictions of animal cruelty, in response to the proliferation of animal "crush videos" on the Internet. In 2008, the Third Circuit, in United States v. Stevens*, a case involving dog fighting, held that the law was an unconstitutional restriction on free speech. In April of 2009, the Supreme Court of the United States granted certiorari. Discussions about the regulation of depictions of animal cruelty have largely focused on whether the child pornography or obscenity exceptions to the First Amendment should be extended to include violent depictions of animal cruelty. This Article suggests that instead of expanding those doctrines, criminal anti-profit statutes or "Son of Sam" laws may be constitutionally applied to regulate the profitability of these images, thereby reducing the incentive to produce such materials and creating a lesser restriction on speech.*

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I. INTRODUCTION

In recent years, animal cruelty cases have received widespread media attention.[1] Reports of dogfighting,[2] cockfighting,[3] and puppy mills[4] have appeared regularly in the news media. Perhaps the most high profile of these cases is that of football star Michael Vick, who was

[1] *See e.g.* Julie China, *Animal Law Headlines*, 55 Fed. Law. 4 (2008) (discussing the top three high profile animal law cases that occurred in 2008, one involving negligent pet food production and two involving animal cruelty); Jack Leonard, *Animal Cruelty Crackdown in Los Angeles Has Results*, http://www.latimes.com/news/local/la-me-cruelty8-2009feb08,0,7249180.story (Feb. 8, 2009) (last accessed Nov. 22, 2009) (media coverage of an animal cruelty case); Sharon L. Peters, *Fight on Animal Cruelty Unleashed on All Fronts with "Humane Education,"* http://www.usatoday.com/life/lifestyle/2008-07-29-humane-education_N.htm (July 30, 2008) (last accessed Nov. 22, 2009) (media coverage of animal-cruelty-prevention efforts).

[2] *See e.g.* David Gambacorta, *Dog-Fighting Ring Found in Germantown*, http://article.wn.com/view/2009/03/27/Dogfighting_ring_found_in_Germantown/ (Mar. 27, 2009) (last accessed Nov. 22, 2009); Sharon L. Peters, *A Fight to Save Urban Youth from Dogfighting*, http://www.usatoday.com/news/nation/2008-09-29-dogfighting_N.htm (Sept. 29, 2008) (last accessed Sept. 17, 2009).

[3] *See e.g.* Adam B. Ellick, *A Ban on Cockfighting, but Tradition Lives On*, 157 N.Y. Times A14 (July 6, 2008) (available at http://www.nytimes.com/2008/07/06/us/06fight.html (July 6, 2008) (last accessed Sept. 18, 2009)); Adam Liptak, *First Amendment Claim in Cockfight Suit*, 156 N.Y. Times A13 (July 11, 2007) (available at http://www.nytimes.com/2007/07/11/us/11roosters.html (July 11, 2007) (last accessed Nov. 22, 2009)).

[4] *See e.g.* Cheryl Wittenauer, *Missouri Tries to Shed Reputation as "Puppy Mill,"* http://www.guardian.co.uk/world/feedarticle/8442291 (Apr. 6, 2009) (last accessed Nov. 22, 2009).

charged with violating animal cruelty laws for his involvement in a dogfighting ring.[5] The case brought public attention to the issue of animal cruelty in general and to dogfighting in particular.[6]

Depictions capturing acts of animal cruelty have also received attention due to their prevalence on the Internet.[7] One such depiction is a "crush video," a film in which a female, typically in a dominatrix manner, is seen crushing a small animal with her bare feet or high-heeled shoes.[8] The animals in these videos range from mice and hamsters to dogs, cats, and even monkeys.[9] The videos appeal to people with a "very specific sexual fetish" who get sexually aroused or otherwise excited by them.[10] Richard C. Richards, a philosophy professor at California State Polytechnic University in Pomona who has studied perversions, estimates that about 1,000 American men have the "crush fetish."[11] Crush videos have been around since the 1950s but have only

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[5] *See* China, *supra* n. 1, at 4 (discussing Michael Vick). Michael Vick is a former quarterback for the Atlanta Falcons who was sentenced to twenty-three months in federal prison in December 2007 for his involvement in the dogfighting operation "Bad Newz Kennels." *Id.* Vick not only financed the operation but also assisted in the execution of underperforming dogs. *Id.* Vick now plays for the Philadelphia Eagles.

[6] *See e.g.* Jon Saraceno, *Vick's House of Dogfighting is Home to Cruelty*, http://www.usatoday.com/sports/columnist/saraceno/2007-12-09-saraceno-vick_N.htm (Dec. 9, 2007) (last accessed Nov. 22, 2009) (discussing animal cruelty and dogfighting in regards to the Vick case); William C. Rhoden, *Vick Case Exposes Rift Among Animal-Rights Advocates*, 157 N.Y. Times D2 (Mar. 12, 2008) (available at http://www.nytimes.com/2008/03/12/sports/football/12rhoden.html (Mar. 12, 2008) (last accessed Nov. 22, 2009)) (discussing the differing opinions among animal rights groups in the aftermath of the Vick trial).

[7] H.R. Rpt. 106-397 at 3 (Oct. 19, 1999).

[8] Tony Thompson, *"Crush Videos" Plumb Depths of Perversion*, http://www.guardian.co.uk/uk/2002/may/19/ukcrime.tonythompson http://www.guardian.co.uk/uk/2002/may/19/ukcrime.tonythompson(May 19, 2002) (last accessed Nov. 22, 2009). An example of a crush video would start with a small animal such as a kitten, puppy, or guinea pig lying spread-eagle on the floor. *Id.* The legs of the creature are held in place by sticky tape. *Id.* Then the legs of a woman wearing stilettos are shown circling around the terrified animal. *Id.* She speaks to the animal in a "dominatrix" tone. *Id.* The woman then proceeds to slowly break the bones of the animal by crushing it with her stilettos as the animal cries out in pain. *Id.* The video might also include footage of cigarettes being stubbed out on the animal's fur and ultimately culminates in the animal's skull being crushed, sometimes thirty minutes or an hour after the torture began. *Id.*

[9] H.R. Rpt. 106-397 at 2.

[10] *Id.* at 2–3. There are a few suggested explanations for what is apparently the arousing factor in these videos. One theory is that the contrast between doing something sexual, "which gives life," while at the same time seeing life being taken away is arousing. Thompson, *supra* n. 8. Another theory is that, because these animals are often crushed by women's feet, the videos appeal to those with foot fetishes. Pet-Abuse.com, *Stopping Crush Videos*, http://www.pet-abuse.com/pages/animal_cruelty/crush_videos.php (last accessed Nov. 22, 2009). Finally, one explanation is that "crush fetishists have fantasies that they are actually the ones being crushed." Laura Brady, *Crush Videos: Animal Torture and Murder as a Fetish*, http://www.associatedcontent.com/article/230752/crush_videos_animal_torture_and_murder_pg2_pg2.html (May 22, 2007) (last accessed Nov. 22, 2009).

[11] Edward Wong, *Long Island Case Sheds Light on Animal-Mutilation Videos*, 149 N.Y. Times B4 (Jan. 25, 2000) (available at http://www.nytimes.com/2000/01/25/nyre-

recently received media attention due to the spread of the material on the Internet.[12] The increase in visibility has created a growing market for the videos, according to a congressional report.[13]

Following media coverage of crush videos, Congress enacted 18 U.S.C. § 48 (hereinafter § 48), which prohibits the interstate sale and distribution of depictions of animal cruelty.[14] Aside from drawing attention to the animal cruelty controversy, the statute itself sparked significant debate with critics questioning whether the statute violated the First Amendment right to freedom of speech.[15]

Recently, the Third Circuit in *U.S. v. Stevens* held that the statute did in fact violate the First Amendment.[16] The *Stevens* Court determined that § 48 was a content-based restriction on speech and, analyzing it under strict scrutiny, held that it was unconstitutional.[17] Specifically, the Court found that the government interest was not sufficiently compelling nor was the statute narrowly tailored.[18] In response to the Third Circuit's decision, the Solicitor General petitioned the Supreme Court, and on April 20, 2009, the United States Supreme Court granted certiorari.[19]

Discussions about regulation of depictions of animal cruelty have largely focused on whether the child pornography[20] or obscenity[21] ex-

gion/long-island-case-sheds-light-on-animal-mutilation-videos.html) (Jan. 25, 2000) (last accessed Dec. 22, 2009)).

12 *Id.*

13 H.R. Rpt. 106-397 at 2–3.

14 18 U.S.C. § 48 (2006).

15 *See e.g*. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1092 n. 204 (2003) ("The crush video ban was in fact enacted as 18 U.S.C. § 48 (2000); its constitutionality hasn't been tested, but I believe it is unconstitutional."); Adam Liptak, *Animal Cruelty Law Tests Free Speech*, 158 N.Y. Times A12, A15 (Jan. 6, 2009) (available at http://www.nytimes.com/2009/01/06/washington/06bar.html (Jan. 5, 2009) (last accessed Nov. 22, 2009)) (discussing the First Amendment implications involved in *Stevens*).

16 *U.S. v. Stevens*, 533 F.3d 218, 235 (3d Cir. 2008) (en banc), *cert. granted*, 129 S. Ct. 1984 (2009).

17 *Id.* at 232–33, 235.

18 *Id.*

19 *U.S. v. Stevens*, 129 S. Ct. 1984 (2009) (grant of certiorari).

20 *See e.g.* Paul M. Smith et al., *Courtside*, 26 Comm. Law. 21, 21–22 (Mar. 2009) ("If the Supreme Court agrees to hear the case, it will have the opportunity to clarify whether *Ferber* permits a legislature to proscribe a broad variety of speech depicting illegal conduct, or whether it applies only to the unique evil of child pornography."); Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 Va. L. Rev. 1957, 1965–66 (2004) (casting doubt on whether the Supreme Court could or should justify a ban on publishing depictions of animal cruelty based on analogy to the child-pornography exception); Cheryl Hanna & Pamela Vesilind, *Preview of* United States v. Stevens*: Animal Law, Obscenity, and the Limits of Government Censorship*, 4 Charleston L. Rev 59, 70–73 (2009) (discussing how the U.S. Supreme Court could accept the government's argument that child pornography and animal cruelty are analogous).

21 *See* Michael Reynolds, Student Author, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. Cal. L. Rev. 341, 377–78 (2009) (applying the violent-obscenity standard to regulation of crush videos); *see also* Jendi Reiter, *Serial Killer Trading Cards and First Amendment Values: A Defense of Content-Based*

ceptions to the First Amendment should be extended to include depictions of animal cruelty.[22] Others have suggested that, instead of using the obscenity or child pornography doctrines, depictions of animal cruelty could be analyzed under *Chaplinsky v. New Hampshire*[23] to determine if a new category of unprotected speech should be created.[24] These discussions include surprisingly little debate about whether another free speech doctrine, the so-called "Son of Sam" laws,[25] or "criminal anti-profit" statutes, could be applied in the animal-cruelty context.

This Comment argues that criminal anti-profit statutes would better regulate depictions of animal cruelty than the current statute, which is both underinclusive and overinclusive.[26] Son of Sam legislation would be a less restrictive alternative to creating a new category of unprotected speech specifically for depictions of animal cruelty.[27] Part II of this Comment provides a discussion of current animal cruelty laws and the government's interest in prohibiting cruelty to animals. It also describes the current statute regulating depictions of animal cruelty, explains Congress' purpose in enacting it, and discusses the first prosecution to proceed to trial. Part III analyzes the

Regulation of Violent Expression, 62 Alb. L. Rev. 183, 185 (1998) (arguing for the regulation of violent speech in general by analogy to obscenity law); Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 Wm. & Mary Bill Rights J. 107, 113 (1994) (policy reasons supporting a ban on sexually obscene material provide justification for a ban on excessively violent material); Hanna & Vesilind, *supra* n. 20, at 76–81 (discussing how *Stevens* could expand the obscenity exception).

[22] *See* Eugene Volokh, *The Volokh Conspiracy, Third Circuit Rejects Proposed New "Depiction of Animal Cruelty" First Amendment Exception*, http://volokh.com/archives/archive_2008_07_13-2008_07_19.shtml (July 18, 2008) (last accessed Nov. 22, 2009) (noting that the statute does not fit within the obscenity exception and stating that the real question was whether the child-pornography doctrine should be extended).

[23] 315 U.S. 568 (1942).

[24] *See Stevens*, 533 F.3d at 236–37 (Cowen, J., dissenting); *En Banc Third Circuit Strikes Down Federal Statute Prohibiting The Interstate Sale of Depictions of Animal Cruelty*—United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (en banc), 122 Harv. L. Rev. 1239, 1245 (2009) ("[C]ourts should apply *Chaplinsky* in a manner tailored to the specific type of speech at issue."); *see also* China, *supra* n. 1, at 15 ("[T]he Third Circuit may have been punting the ultimate decision of creating a new category of unprotected speech to the Supreme Court."); Hanna & Vesilind, *supra* n. 20, at 66 ("[T]he United States primarily relies on the balancing test in *Chaplinski v. New Hampshire*.").

[25] The term "Son of Sam laws" typically references laws that prohibit criminals from profiting from their crimes by selling their version of the crime to publishers.

[26] *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417, 2421–23 (1996). A law subjected to strict scrutiny can be struck down on the narrow-tailoring prong if it does not advance the government interest, if it is overinclusive, if it is not the least restrictive alternative, or if it is underinclusive. *Id.* A law is considered overinclusive if it restricts a significant amount of speech that does not implicate the government's interest. *Id.* A law is considered underinclusive it if does not restrict a significant amount of speech that also implicates the governments interest to the same degree as the targeted speech. *Id.*

[27] *See id.* at 2422. ("A law is not narrowly tailored if there are less speech-restrictive means available that would serve the interest essentially as well as would the speech restriction.").

current treatment of depictions of animal cruelty as an expansion of either the child pornography or the obscenity exceptions to the freedom of speech. It explains the difficulty in attempting to fit animal cruelty into one of these categories. Part IV discusses the development of Son of Sam laws and their applicability to other types of speech that depict illegal activity. It explores how a Son of Sam statute could be drafted to include depictions of animal cruelty.

This Comment concludes that criminal anti-profit statutes are a less restrictive means of regulating depictions of animal cruelty than current legislation and do not suffer from the same problems of overinclusiveness and underinclusiveness. Son of Sam laws would better serve the government's interest in preventing cruelty to animals because they would prohibit all profits generated by the illegal act of animal cruelty, not just those associated with speech. They would also be less likely to restrict valuable speech than the current statute because they would apply to a narrower category of speech and would only target those individuals directly involved in the criminal acts.

II. BACKGROUND

It is a well-established First Amendment principle that the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[28] Therefore, it cannot restrict depictions of animal cruelty simply because it disagrees with the underlying acts. However, there have always been categories of speech that are of "such slight social value" that "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" and, as such, may be constitutionally restricted.[29] Thus, in order to create a statute that restricts these depictions, it is necessary to determine the government interests at stake. As will be shown, there are several interests implicated with regulating depictions of animal cruelty. First, however, it is necessary to determine what exactly is considered "animal cruelty."

A. Animal Cruelty Laws

Section 48 only regulates depictions of "animal cruelty." Therefore, in order to understand the type of speech being restricted, it is necessary to clarify what is considered animal cruelty under state legislation.[30] For example, state laws do not criminalize every type of

[28] *U.S. v. Eichman*, 496 U.S. 310, 319 (1990) (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

[29] *Chaplinsky*, 315 U.S. at 571–72; *Virginia v. Black*, 538 U.S. 343, 358–59 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992).

[30] This Comment discusses only state animal cruelty statutes. Currently, there is no federal anti-cruelty statute, although the federal government has enacted animal-protection legislation including the Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2006), and the Fish and Wildlife Act, 16 U.S.C. §§ 741–754d (2006), in addition to conservation measures.

animal killing. A depiction of a killing that is legal under state law would therefore not be restricted under the current statute.

Animal-cruelty laws have existed in the United States for hundreds of years. The first such law was enacted in 1641 when the Massachusetts colony adopted the "Body of Liberties," which prohibited "any tirrany or crueltie towards any bruite creature which are usuallie kept for man's use."[31] In 1822, Maine codified a statute which provided "[t]hat if any person shall cruelly beat any horse or cattle . . . he shall be punished" by fine and up to thirty days' imprisonment.[32] The significant phrase is "cruelly beat," which implied that a beating was only illegal if it was "cruel" and did not outlaw other actions, such as killing the animal.[33] In 1829, New York passed animal-cruelty legislation prohibiting "maliciously kill[ing]" an animal of another and "maliciously and cruelly beat[ing] or tortur[ing]" an animal "belonging to himself or another."[34] Although animals were generally considered property, the New York statute is significant because it prohibited the malicious injuring of one's own animals.[35] The ideas expressed in New York's statute were soon adopted by other states.[36] Today, all fifty states have animal cruelty statutes.[37] Forty-three of the states make certain acts of animal cruelty a felony.[38] Moreover, dogfighting[39] and cockfighting are now outlawed in all fifty states, with Louisiana's 2008 ban making it the final state to ban cockfighting.[40] The state laws vary considerably in their definition of "animal" as well as in what constitutes "cruelty."[41]

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[31] Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 Animal L. 81, 81 (1999).

[32] David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws during the 1800's*, 1993 Det. C.L. Rev. 1, 8–9 (1993) (citing Me. Laws ch. IV, § 7 (1822)).

[33] *Id.* Maine's 1822 code, like others of the period, only applied to commercial animals such as horses and cattle and not to dogs or other domestic animals. *Id.* This reflects the view that animals were considered property. *Id.* However, the Maine statute applied even if an owner beat his own horse or cattle, which shows a significant advancement in the field of animal cruelty because individuals were previously not limited in how they used their own property. *Id.*

[34] *Id.* at 9 (citing N.Y. Rev. Stat. tit. 6, § 26 (1829)). Like the Maine statute, the New York statute only applied to commercial animals, specifically, "any horse, ox or other cattle, or any sheep." *Id.* at 9–11.

[35] *Id.* at 9.

[36] Favre & Tsang, *supra* n. 32, at 12. States that adopted ideas from New York's animal cruelty statute included Michigan in 1838 (Mich. Rev. Stat. § 8.22 (1838)); Connecticut in 1838 (Conn. Stat. ch. II (1838)); Vermont in 1854 (1854 Vt. Laws No. 51 Sec. 1)); and Minnesota in 1858 (Minn. Stat. § 96.18 (1858)). *Id.* at 12 nn. 50–53.

[37] Laura Cadiz, *Fifteen Volumes of Animal Law*, 15 Animal L. 1, 3 (2008). For a comprehensive list of the animal cruelty laws in all fifty states, see *Stevens*, 533 F.3d at 223 n. 4.

[38] Cadiz, *supra* n. 37.

[39] *Id.*

[40] Humane Socy. of the U.S., *Louisiana Bans Cockfighting*, http://www.hsus.org/acf/news/louisiana_bans_cockfighting.html (Aug. 15, 2008) (last accessed Nov. 22, 2009).

[41] Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 Animal L. 69, 70 (1999).

A threshold question concerns the state's definition of "animal" because that will determine the scope of the statute.[42] Several states define the term very broadly to include "any living creature except a human being."[43] This broad definition seems to include domestic household pets, farm animals, animals raised for consumption, and even insects.[44] The majority of statutes define "animal" as "nonhuman vertebrates" or as "nonhuman vertebrates with the exception of fish."[45] Some states limit their definition to domestic animals and previously captured wild animals.[46] Still others have their own definition.[47] In regard to § 48, the House Committee said that "animal" should be interpreted according to its common, rather than scientific, meaning.[48] The Committee did not intend for the law to include insects, invertebrates, crustaceans, or fish.[49]

There are several problems with statutes that broadly define "animal." For one, it may trivialize anti-cruelty laws by "equating the swatting of a housefly with the burning of a cat."[50] Second, it may criminalize behavior that is generally accepted by society, such as the extermination of pests.[51] For these reasons, the term "animal" as used in this Comment will not include insects, invertebrates, or crustaceans.[52]

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42 Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 Iowa L. Rev. 1, 30 (2001).

43 *See e.g. id.* at 30 n. 173 (Colorado ("any living dumb creature"); Florida ("any living dumb creature"); Minnesota ("every living creature except members of the human race"); Nevada ("every living creature except members of the human race"); New Jersey ("the whole brute creation"); New York ("every living creature except a human being"); North Dakota ("every living animal except the human race"); Rhode Island ("every living creature except a human being"); Vermont ("all living sentient creatures, not human beings")).

44 Livingston, *supra* n. 42, at 30.

45 *Id.*

46 *Id.* at 30–31.

47 *See e.g. id.* at 30 n. 177 (Georgia excludes from definition of "animal" any fish or "any pest that might be exterminated or removed from a business, residence, or other structure"; Pennsylvania defines "domestic animal" as any "dog, cat, equine animal, bovine animal, sheep, goat or porcine animal").

48 H.R. Rep. 106-397 at 7.

49 *Id.*

50 Livingston, *supra* n. 42, at 31. **R**

51 *Id.*

52 Fish are included in the definition of "animal" as used in this Comment but only in a situation where the act of animal cruelty is performed on a fish kept as an individual's pet or property. It does not include wild fish or the activity of fishing. Abusers in domestic violence settings might kill their victims' pet fish as a way to threaten and terrorize their human victims; however, this could only constitute animal cruelty in a state that included fish in its definition of "animal." *See People v. Garcia*, 812 N.Y.S.2d 66, 68–69 (App. Div. 2006). In *Garcia*, the defendant threw the family aquarium at the television, shattering the aquarium, and said to his domestic partner, "That could have been you." *Id.* There were three fish, named after each of the children. *Id.* The defendant stomped on the fish named after nine-year-old Juan, causing the children to cry. *Id*. The next day, the defendant violently beat the mother of the children and attempted to strangle her. *Id.* He also beat Juan before being arrested. *Id.* at 69. *See also* Aimee Green, *Port-*

It is worth noting that while their definitions of "animal" may be broad, many states have exemptions[53] for activities such as hunting and fishing,[54] slaughtering animals for food,[55] veterinary practices,[56] pest control,[57] using animals in research laboratories,[58] and using animals for entertainment purposes such as in rodeos, zoos, and circuses.[59] Prosecutors use their discretion under these statutes and usually reserve only the most extreme cases for prosecution.[60] Therefore, less-recognized instances of animal cruelty are usually never prosecuted.[61]

In defining "cruelty," the statutes generally use two categories: "neglect" and "abuse."[62] In states that have felony anti-cruelty statutes, abuse is typically a felony and neglect is a misdemeanor.[63] "Abuse involves the offender's clear intent to harm the animal, while neglect does not necessarily involve such intent."[64] Several statutes define "intent" to include willfulness or malice.[65] For crimes such as dogfighting and cockfighting, many states impose a strict-liability standard without reference to a culpable state of mind.[66] Animal-cruelty laws often have a requirement that the killing or the pain and suffering of the animal be "unnecessary."[67] This ultimately distin-

land Man Gets Probation after Stabbing Ex-girlfriend's Pet Fish, http://www.oregonlive.com/news/index.ssf/2009/10/portland_man_gets_probation_fo.html (Oct. 13, 2009) (last accessed Nov. 22, 2009) (reporting that a man beat his ex-girlfriend and then stabbed her pet Betta fish, leaving it impaled in her apartment).

53 It is important to note these exceptions in the state animal-cruelty laws because, in discussions on potential overbreadth, it has been argued that the statute could apply to technical violations like hunting and fishing. *Stevens*, 533 F.3d at 235 n. 16 (majority opinion); *id*. at 248 (Cowen, J., dissenting).

54 Frasch et al., *supra* n. 41, at 77.

55 *Id.* at 78.

56 *Id.* at 76.

57 *Id.* at 78.

58 *Id.* at 76–77.

59 *Id.* at 78–79.

60 Frasch et al., *supra* n. 41, at 75–76. Most special-interest groups "have nothing to fear" from state anti-cruelty statutes as long as they obey the relevant laws. *Id.* Laws banning animal cruelty "are intended to protect animals from the kinds of behavior that no responsible hunter or farmer would defend." *Id.*

61 *Id.* at 69–70. Anecdotal evidence reveals that prosecutors are often reluctant to bring charges due to "limited resources, inexperienced staff, incomplete or botched investigations, pressure from the community to focus on other crimes, and personal or political bias against taking animal abuse seriously as a violent crime." *Id.*

62 Beth Ann Madeline, Student Author, *Cruelty to Animals: Recognizing Violence Against Nonhuman Victims*, 23 U. Haw. L. Rev. 307, 316 (2000).

63 *Id.*

64 *Id.* In using the phrase "animal cruelty," this Comment only refers to abuse, not animal neglect. In theory, if individuals who neglect animals make depictions of the neglect and sell it for commercial gain, then it would be within the scope of this Comment. However, there is no evidence of this practice or of a market for such depictions.

65 Livingston, *supra* n. 42, at 31. **R**

66 *Id.* at 32.

67 *See e.g*. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding unconstitutional, in violation of the free exercise clause, city ordinances

guishes certain types of killings that are deemed "necessary" and leaves room for exceptions such as slaughtering animals for consumption, veterinary practices, and pest control. Therefore, in order to constitute cruelty, the act must be an unnecessary killing or infliction of unnecessary pain and suffering on an "animal" and be committed with the requisite intent, without falling into any of the exceptions listed above.

B. The Government Interests

After having determined the meaning of "animal cruelty" as defined by state laws, it is necessary to identify the government interests at stake. This Section will discuss the government interests in preventing acts of animal cruelty and in regulating the depictions of such acts.

There are several different interests associated with criminalizing acts of animal cruelty.[68] They include: (1) protecting animals from harm; (2) preventing future physical harm to humans; (3) protecting humans from infliction of emotional harm; (4) protecting property interests; and (5) preventing behavior that is deemed morally wrong.[69] In the case of certain types of animal cruelty, particularly dogfighting and cockfighting, there is also an interest in preventing other illegal activities like gambling, weapons possession, and gang activity that correlate with the acts of animal cruelty.[70] The interest in preventing harm to the animals themselves is significant because it marks a shift from earlier anti-cruelty laws where animals were primarily seen as property.[71] Further, when an interest in preventing harm to animals is recognized, animal-cruelty crimes are no longer victimless crimes.[72]

While all interests listed are important, scholars have paid particular attention to the interests of preventing future physical harm to

that prohibited "unnecessary" killing of animals); *Regalado v. U.S.*, 572 A.2d 416 (D.C. 1990) (construing District of Columbia statute prohibiting infliction of "unnecessary" cruelty on an animal); *Reynolds v. State*, 842 So. 2d 46 (Fla. 2002) (upholding conviction under statute prohibiting infliction of "unnecessary" pain and suffering on an animal); *People v. Farley*, 33 Cal. App. Supp. 3d 1 (1973) (reversing conviction for subjecting horses to "needless suffering and unnecessary cruelty").

[68] *See* Luis E. Chiesa, *Why Is It a Crime to Stomp on a Goldfish?—Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 Miss. L.J. 1, 24–40 (2008).

[69] *Id.*

[70] Erin N. Jackson, *Dead Dog Running: The Cruelty of Greyhound Racing and the Bases for its Abolition in Massachusetts*, 7 Animal L. 175, 193 (2001) (discussing other illegal activities related to dogfighting); American Socy. for the Prevention of Cruelty to Animals, *Cockfighting*, http://www.aspca.org/fight-animal-cruelty/cockfighting.html (last accessed Nov. 22, 2009) (discussing other illegal activities associated with cockfighting).

[71] *See* discussion *supra* Section II(A).

[72] Chiesa, *supra* n. 68, at 38. If animal-cruelty statutes are not seen as victimless crimes, then they can be classified as a more "serious" crime for constitutional line drawing. *See* discussion *infra* Section IV(D)(4).

humans and protecting humans from infliction of emotional harms.[73] Studies have shown that children who are cruel to animals are more likely to exhibit aggressive or violent behavior towards humans.[74] In fact, some of the most notorious serial killers, including Jeffrey Dahmer and Ted Bundy, tortured and killed animals in their youth before turning to human victims.[75] People who abuse animals may also do so with the intent of causing emotional harm to humans.[76] This is often the case in domestic-violence settings where abusers use pets as a tool to control the women and children in the household.[77]

C. The Statute Prohibiting the Sale and Distribution of Depictions of Animal Cruelty

Given that several important, if not compelling, government interests are involved in preventing acts of animal cruelty and prohibiting distribution of the depictions of those acts, this Section will discuss 18 U.S.C. § 48, which attempts to achieve those interests. In 1991, Congress passed § 48, which made it a crime to knowingly create, sell, or possess "a depiction of animal cruelty" with "the intention of placing that depiction in interstate or foreign commerce for commercial gain."[78] The statute defines depictions of animal cruelty by referencing state animal cruelty laws that criminalize the acts themselves.[79] However, unlike state animal-cruelty laws, the statute does not criminalize the underlying act, only its depiction. Further, the statute applies in the state where the creation, sale, or possession of the depiction took place, regardless of whether the cruelty depicted actually occurred in that state.[80] There is an exception for "any depiction that has serious

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[73] *See e.g.* Lockwood, *supra* n. 31, at 81 (There is a connection between animal abuse and human violence.); Chiesa, *supra* n. 68, at 28–29 (Companion animals receive heightened legal protection because they have the strongest ties to humans.).

[74] *See* Will Coxwell, Student Author, *The Case for Strengthening Alabama's Animal Cruelty Laws*, 29 Law & Psychol. Rev. 187, 188 (2005) (citing various studies). This increased likelihood to engage in violent and aggressive behavior is called the "violence graduation hypothesis." *Id.* Children who commit acts of animal cruelty are more likely to graduate to violent acts against humans as they mature. *Id.* "This graduation may occur because of deterioration in the individual's psychological health, the reinforcing nature of earlier abusive acts toward animals, or because of the greater opportunities for significant violence toward humans as one gets older." *Id.*

[75] *Id.* at 190.

[76] *Cf.* Chiesa, *supra* n. 68, at 28–29.

[77] Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 Yale J.L. & Feminism 97, 98 (2001).

[78] 18 U.S.C. § 48(a) (2006).

[79] 18 U.S.C. § 48(c) (2006). As defined by the statute, a depiction of animal cruelty is "any visual or auditory depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal Law or the law of the State in which the creation, sale, or possession takes place." *Id. at* (c)(1).

[80] 18 U.S.C. § 48(a), (c) (The punishment for a violation of the statute is a fine or imprisonment of "not more than 5 years," or both.).

religious, political, scientific, educational, journalistic, historical, or artistic value."[81]

The bill was introduced with the purpose of targeting the sale and distribution of "crush" videos.[82] However, the broad language of § 48 makes it applicable not only to crush videos but also to other depictions of animal cruelty, such as dogfighting and cockfighting.[83] Although acts of animal cruelty were already illegal in all fifty states, proponents of the statute argued that it was necessary to assist states in prosecuting under their anticruelty laws.[84] Prosecuting crush-video production under state animal-cruelty laws is difficult for three reasons.[85] First, there is difficulty in identifying the actor.[86] Women in crush videos are typically shown from the waist down,[87] and the only identifying features are their voices.[88] Second, it is hard for the prosecutor to show that the act took place within the court's jurisdiction and within the statute of limitations.[89] Production of crush videos is by nature a clandestine operation that usually takes place inside the videomaker's home.[90] Therefore, it is difficult to determine the time and

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[81] 18 U.S.C. § 48(b) (2006).

[82] Michael Collins, *Rep. Gallegly Tapped for Congress Animal-Protection Group*, http://www.venturacountystar.com/news/2009/Mar/2/rep-gallegly-tapped-for-congress-animal-group/ (Mar. 2, 2009) (last accessed Nov. 22, 2009). According to Representative Elton Gallegly, it is "not just animals that suffer when someone abuses a defenseless creature," and society as a whole suffers because animal abuse is often linked to other crimes. *Id.*

[83] Depictions of dogfighting and cockfighting are depictions of one animal inflicting physical pain on another, as opposed to a human inflicting physical pain on an animal, as seen in crush videos. As such, these depictions arguably might not be within the reach of the statute, which is aimed at preventing humans from inflicting pain on animals. Moreover, dogfighting and cockfighting do not fall into the general category of "animal cruelty" in state statutes, but are given their own provisions. *See e.g.* Or. Rev. Stat. § 167.428 (2007); Ala. Code § 2-1-29 (West 1996). However, the conduct of the dogs in these videos is a result of "human factors that contribute to dangerous canine behavior." *See* Jamey Medlin, Student Author, *Pit Bull Bans and the Human Factors Affecting Canine Behavior*, 56 DePaul L. Rev. 1285, 1292–1313 (2007). Such human behavior includes specifically breeding canines to be aggressive and irresponsible ownership leading a dog to become more aggressive. *Id.* Irresponsible ownership can take the form of abuse, improper socialization with humans and other dogs, failure to spay or neuter dogs, and general neglect. *Id. See also* Lee Hall, *Interwoven Threads: Some Thoughts on Professor MacKinnon's Essay of Mice and Men*, 14 UCLA Women's L.J. 163 (2005) (discussing generally the problems that result when humans domesticate animals).

[84] H.R. Rpt. 106-397 at 3.

[85] Aaron Lake, Student Author, *1999 State and Federal Legislative and Administrative Actions*, 6 Animal L. 153, 164 (2000).

[86] *Id.*

[87] Pet-Abuse.com, *supra* n. 10.

[88] *See* Lake, *supra* n. 85, at 164; H.R. Rpt. 106-397 at 3.

[89] *Id.*

[90] *See e.g. People v. Thomason*, 101 Cal. Rptr. 2d 247, 249 (Cal. App. 2000). In *Thomason*, the defendant made crush videos with a female actress and filmed the videos in the home of the actress's parents. *Id.* The investigator had learned through a chat room and through conversations with the defendant that he engaged in the business of producing crush videos of rats, mice, and baby mice ("pinkies"). *Id.*

place of the act from the video.[91] Third, although the underlying acts of cruelty are illegal under state laws, the production, sale, and distribution of the videos are not.[92] Therefore, prosecution would only be possible under state laws if the person was caught in the act "through an undercover operation."[93] Such an undercover operation is unlikely since prosecutors are often reluctant to bring charges of animal cruelty due to limited resources.[94]

In Congress, opponents of the bill argued that although people may find depictions of the intentional maiming, mutilating, wounding, or killing of animals "disturbing," the fact that society finds particular speech offensive is not a sufficient reason to suppress it.[95] Opponents also raised constitutional concerns.[96] They argued that the depictions could not be categorized as obscene under the obscenity exception to the First Amendment.[97] They also asserted that there was no compelling interest and, even if there were, the bill was not narrowly tailored.[98]

Perhaps recognizing these constitutional challenges, President Bill Clinton issued a signing statement with the purpose of narrowing the scope of the statute.[99] He stated that the exception for works of serious value should be interpreted broadly by the Department of Justice and that the work should be "considered as a whole."[100] As a guide to interpreting the statute, the President also stated that the scope should be limited to material "designed to appeal to a prurient interest in sex."[101]

D. United States v. Stevens

Having discussed the provisions of § 48 and the history behind its enactment, this Section discusses the first case to proceed to trial

91 *See* Lake, *supra* n. 85, at 164.

92 H.R. Rpt. 106-397 at 3.

93 *Id.*

94 Frasch et al., *supra* n. 41, at 70, and accompanying text.

95 H.R. Rpt. 106-397 at 10–12 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

96 *Id.* (dissenters on the House Judiciary Committee citing First Amendment grounds for objecting to the bill).

97 *Id.*

98 *Id.*

99 Statement by President of the United States, 34 Weekly Compilation of Presidential Documents 2557 (WL 33178029) (Dec. 9, 1999).

100 *Id.*

101 *Id.*

under the statute,[102] *U.S. v. Stevens*.[103] It also demonstrates the potential problems of § 48. As the Third Circuit found, the law as written does not pass the narrowly tailored prong of strict scrutiny.[104]

In *Stevens*, the defendant was charged with distributing three videos of pit bulls.[105] The defendant ran a business called "Dogs of Velvet and Steel" and a website, Pitbulllife.com.[106] The defendant advertised the videos in the underground publication *Sporting Dog Journal*,[107] which posts the results of illegal dogfighting matches.[108] The first two videos show footage from the 1960s and 1970s of dog fights in the United States and recent footage of pit bulls fighting in Japan, where dogfighting is legal.[109] The third is an instructional video on how to use pit bulls to "catch" wild animals such as hogs or boars.[110] The video contains a "gruesome depiction" of a pit bull attacking the jaw of a domestic farm pig.[111]

The Third Circuit reversed the defendant's conviction, holding that § 48 was unconstitutional.[112] First, the court determined that § 48 regulated protected speech.[113] Then, the court analogized the statute to child pornography but declined to expand the unprotected category to include depictions of animal cruelty.[114] Finally, after determining that the speech regulated by § 48 was protected, the court analyzed the content-based restriction using strict scrutiny.[115]

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[102] *Id*. ("Stevens is the first prosecution in the nation under § 48 to proceed to trial"); *See also Ban on Animal-Cruelty Videos is Unconstitutional*, Natl. L.J. 14 (Col. 2) (July 7, 2008) ("[A] divided 3d U.S. Circuit Court of Appeals ruled on July 18, reversing the first conviction under the law."). Two defendants, Thomas Capriola and Gary Lynn Thomason, were previously tried in separate cases for producing crush videos. However, they were prosecuted under state animal-cruelty laws and not under 18 U.S.C. § 48 because the statute was passed after the defendants were arrested. *See People v. Thomason*, 101 Cal. Rptr. 2d 247 (2000); Edward Wong, *Animal-Torture Video Maker Avoids Jail*, 150 N.Y. Times B8 (Dec. 27, 2000) (available at http://www.nytimes.com/2000/12/27/nyregion/animal-torture-video-maker-avoids-jail.html (Dec. 27, 2000) (last accessed Dec. 22, 2009)).

[103] 533 F.3d 218.

[104] *Id.* at 233–35.

[105] *Id.* at 220–21.

[106] Pet. for Writ of Cert., No. 08-769 at 4, *Stevens*, 533 F.3d 218 (Dec. 15, 2008), *cert. granted*. Attempts to access Pitbulllife.com as of December 18, 2009 reveal that the domain name no longer houses this material.

[107] *Stevens*, 533 U.S. at 220–21.

[108] Pet. for Writ of Cert., No. 08-769 at 4, *Stevens*, 533 F.3d 218.

[109] *Stevens*, 533 U.S. at 221. As with crush videos, it is often difficult to prosecute dogfighting and cockfighting because they are by nature clandestine operations. Therefore, the ability to use the depictions of dogfighting is arguably useful in prosecuting the individuals involved. *See generally State v. Shelton*, 741 So. 2d 473 (Ala. Crim. App. 1999) (where probable cause and exigent circumstances warranted police search and seizure of evidence of dogfighting activities).

[110] *Stevens*, 553 U.S. at 221.

[111] *Id.*

[112] *Id.* at 235.

[113] *Id.* at 232.

[114] *Id.*

[115] *Id.*

Specifically, the court found that the government interest was not compelling and that the statute was not narrowly tailored.[116]

Stevens illustrates some of § 48's problems. Aside from the constitutional issues, discussed below, the statute is not achieving its intended purpose. For one, *Stevens* is not a crush-video case; however, the broad language of the statute should nonetheless apply to the depictions of dogfighting and dogs being used to hunt boars and pigs in *Stevens*. Conversely, from § 48's legislative history, it is unclear whether § 48 was in fact intended to cover dogfighting.[117] Further, unlike in crush videos, the difficulty in identifying the actors involved is not present in *Stevens.* In *Stevens*, the defendant appeared and gave commentary in all three videos.[118] Likewise, the difficulty in proving the acts took place in the court's jurisdiction, or within the timeframe of the statute of limitations, is not present in *Stevens*. Finally, there were no underlying acts that could have been prosecuted. It is possible that all of the acts depicted in the three videos were legal. The first video was filmed in Japan, where dogfighting is legal. The second video contained footage from the 1960s and 1970s that could have been filmed before dogfighting was illegal in every state. The third video used a dog to assist in hunting, which is legal in the state where it was filmed. All of this calls into question whether the statute is in fact achieving its intended purpose of preventing illegal acts of animal cruelty.

E. The Constitutionality of Section 48

Not only is the statute not achieving its intended purpose, but, as the court held in *Stevens*, § 48 is unconstitutional. However, this Comment will show that, contrary to the holding of *Stevens*,[119] the statute is not unconstitutional for failure to implicate a compelling government interest. Rather, it is unconstitutional solely by virtue of not being narrowly tailored.

As discussed *supra*, there are several government interests implicated with depictions of animal cruelty.[120] In finding that the govern-

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116 *Stevens*, 533 F.3d at 232. The majority in *Stevens* also sought to "sound an alarm" that the exceptions clause could be interpreted by prosecutors as an affirmative defense because the legislative history of the statute states that a "defendant bears the burden of proving the value of the material by a preponderance of the evidence." *Id.* at 231 n. 13 (citing H.R. Rpt. 106-397 at 8). The court went on to state that in the free-speech context, it is not recommended to use an affirmative defense "to save an otherwise unconstitutional statute." *Id. See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (describing the problem with imposing on the defendant "the burden of proving his speech is not unlawful."). However, the Solicitor General argued in the petition for certiorari that the exceptions clause is not an affirmative defense but rather an element of the crime that the government must prove in order to prosecute. Pet. for a Writ of Cert, No. 08-769 at 13, *Stevens*, 533 F.3d 218.

117 *See* H.R. Rpt. 106-397.

118 *Stevens*, 533 F.3d at 221.

119 *Id.* at 232 ("Section 48 . . . serves no compelling government interest . . . .").

120 *See supra* Section II(B).

ment interest was not compelling, the majority in *Stevens*[121] relied on the Supreme Court case *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[122] In *Lukumi*, the plaintiff was a church of the Santeria religion, which performs animal sacrifices during rituals.[123] The church challenged city ordinances that prohibited the ritual slaughter of animals but that had exceptions for almost all other types of animal killings, including kosher slaughter.[124] As the *Stevens* dissent correctly pointed out,[125] the reason the Supreme Court struck down the ordinances in *Lukumi* was because they were "gerrymandered" to specifically target Santeria, which led to the conclusion that their object was the suppression of religion.[126] Moreover, the *Lukumi* concurrence explicitly stated:

> A harder case would be presented if petitioners were requesting an exception from a generally applicable anti-cruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals.[127]

Therefore, § 48 cannot be invalidated on the grounds that the asserted government interest is not compelling. However, this still leaves the narrowly tailored prong.

As the *Stevens* majority determined, § 48 is overinclusive.[128] This is due to the statute's broad reach. It prohibits the interstate sale of depictions of animal cruelty if the act is illegal in the state where the sale or possession takes place, even if the act took place in a foreign country where it was legal.[129] Thus, the sale in the United States of

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121 533 F.3d at 226–27 ("The Supreme Court in *Lukumi* held that city ordinances that outlawed animal sacrifices could not be upheld based on the city's assertion that protecting animals was a compelling government interest.").

122 508 U.S. 520 (1993).

123 *Id.* at 525. The Santeria religion was formed during the nineteenth century when the Yoruba people were brought to Cuba from western Africa as slaves. *Id.* at 524. Santeria is a fusion of Roman Catholicism and traditional African religion and involves the devotion to spirits, called "orishas," and Catholic saints. *Id.* In the Santeria religion, the "orishas" depend on animal sacrifices for survival. *Id.* at 525. The sacrifices are performed "at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration." *Id.* Animals sacrificed include "chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles." *Lukumi*, 533 F.3d at 525. After most rituals, the sacrificed animal is cooked and eaten. *Id.*

124 *Id.* at 536.

125 533 F.3d at 240 (Cowen, J., dissenting).

126 *Lukumi*, 508 U.S. at 542.

127 *Stevens*, 533 F.3d at 240 (Cowen, J., dissenting) (quoting *Lukumi*, 508 U.S. at 580 (Blackmun, J., concurring)) (emphasis omitted).

128 *Stevens*, 533 F.3d at 233–34 ("If the government interest is to prevent acts of animal cruelty, the statute's criminalization of depictions that were legal in the geographic region where they were produced makes § 48 overinclusive.").

129 18 U.S.C. § 48(c)(1) (This statute prohibited the creation, sale, or possession of "any visual or auditory depiction . . . of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal

depictions of a bullfight in Spain or of a dogfight in Japan, where the activities are legal, would be prohibited by the statute. The statute cannot possibly prevent the underlying acts of animal cruelty that take place in countries where the acts are legal. The statute is therefore overinclusive because the prohibition on the sale of such depictions does not advance the government's interest of preventing acts of animal cruelty.

Further, the statute is overinclusive because it has the potential to restrict valuable speech. Although the law has an exception for works with "*serious* religious, political, scientific, educational, journalistic, historical, or artistic value,"[130] the test is subjective and some fact finders could decide that the work does not have "serious" value but merely aims to "shock, titillate, and get ratings."[131] For example, a video of a bullfight taking place in Spain might well be deemed to have serious value. A harder case would be a depiction of an underground cockfight in Puerto Rico. Like Spain, Puerto Rico has a long history of the sport, and many have argued that it is part of Puerto Rico's culture.[132] However, because the tradition of cockfighting in Puerto Rico might not be as well-known to American juries as bullfighting in Spain, there is a risk it could be deemed to lack serious historical or educational value, whereas the bullfighting in Spain would not. This could lead to dissimilar results in similar cases and could put juries in the position of placing value judgments on the activities of another culture.

The statute is also underinclusive.[133] The statute uses a "drying up the market" theory to justify restrictions on the creation, sale, and distribution of depictions of animal cruelty. The theory is that if the financial component were removed on the sale-and-distribution end, then it would eliminate the incentive to create the material and to commit the underlying act. However, the statute does not remove all financial incentives and is therefore underinclusive because it does not

law or the law of the State in which the creation, sale, or possession takes place, *regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State.*") (emphasis added).

130 *Id.* at § 48(b) (emphasis added).

131 Volokh, *The Volokh Conspiracy*, *supra* n. 22.

132 *Cf.* Raymond Hernandez, *A Blood Sport Gets in the Blood; Fans of Cockfighting Don't Understand Its Outlaw Status*, 144 N.Y. Times B1 (Apr. 11, 1995) (available at http://www.nytimes.com/1995/04/11/nyregion/blood-sport-gets-blood-fans-cockfighting-don-t-understand-its-outlaw-status.html (Apr. 11, 1995) (last accessed Dec. 22, 2009)) (noting that cockfighting "is ubiquitous in Puerto Rico").

133 In *Stevens*, the majority found § 48 underinclusive because it did not prohibit the personal possession or the intrastate sale of the animal cruelty depictions. 533 F.3d at 233. Although the failure of the statute to reach intrastate sales may be underinclusive, its inapplicability to personal possession is not. The statute uses a "drying up the market" theory to prevent acts of animal cruelty. The theory is that if the commercial incentive to produce such depictions is removed, it will deter production and therefore also deter the underlying act. However, this theory does not apply to personal possession. *See e.g. N.Y. v. Ferber*, 458 U.S. 747, 760 (1982) (discussing a "drying up the market" theory in relation to child pornography).

target the non-speech components. For example, Thomas Capriola, a Long Island man who produced crush videos, used his website and ads in pornographic magazines to sell the bloodied high heels that were used to kill the animals.[134] In the case of dogfighting, the main revenue generator is the gambling and sale of illegal drugs, activities which are associated with dogfighting.[135] Both of these illustrations generate profits and therefore incentivize the underlying act of animal cruelty, yet § 48 would reach neither of these two scenarios. Thus, it is underinclusive because it does not eliminate all sources of profits and cannot accomplish the goal of "drying up the market" for animal cruelty.

III. HOW CURRENT CATEGORIES OF UNPROTECTED SPEECH HAVE BEEN APPLIED TO DEPICTIONS OF ANIMAL CRUELTY

Since § 48 is likely unconstitutional as written, it is necessary to determine whether depictions of animal cruelty could fit into two currently existing exceptions to the First Amendment that tend to be discussed with respect to depictions of animal cruelty. This Part explores the two categorical exceptions most applicable to the animal cruelty context: child pornography and obscenity. It shows that the most appropriate way to regulate animal cruelty depictions is not by expanding these categories.

A. Child Pornography

In discussions about § 48, depictions of animal cruelty are most often analogized to child pornography.[136] In fact, both the majority and the dissent in *Stevens* relied heavily on child-pornography precedent.[137] However, the court in *Stevens* declined to extend the child-pornography reasoning beyond children.

1. Child Pornography Doctrine

Child pornography is the most recent category of speech classified as unprotected. It is also the "least contested area of First Amendment jurisprudence."[138] In *New York v. Ferber*,[139] the Supreme Court held that child pornography, whether obscene or not, is not protected by the First Amendment.[140]

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134 Wong, *supra* n. 11 (Mr. Capriola also sold the videos on his website entitled "Crush Goddess.").

135 Jackson, *supra* n. 70, at 193.

136 *See e.g.* Volokh, *The Volokh Conspiracy*, *supra* n. 22 (discussion comparing depiction of animal cruelty to child pornography).

137 *Stevens*, 533 F.3d at 226; *id.* at 247 (Cowen, J., dissenting).

138 Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 925 (2001).

139 458 U.S. 747.

140 *Id.* at 764–65. The defendant in *Ferber* owned a bookstore that sold sexually oriented material. After the defendant sold videos of young boys masturbating to under-

In *Ferber*, the Court found it evident that there was a compelling interest in "safeguarding the physical and psychological well-being of a minor."[141] The Court observed that child pornography is "intrinsically related to the sexual abuse of children" because the materials produced are a permanent record of the child's participation, and their circulation exacerbates the harm to the child.[142] Using a "drying up the market" theory, the Court noted that the "distribution network for child pornography must be closed" in order to control its production.[143] It went on to explain that although the production of the materials is a "low-profile, clandestine industry," the distribution of those material is relatively visible.[144]

The Court then determined that the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties."[145] Finally, in regard to its potential effect on valuable speech, the Court found the possibility that speech with any value would be prohibited by the restriction was "exceedingly modest, if not *de minimus.*"[146]

After *Ferber*, the Court expanded the child-pornography exception to allow for prosecution of mere possession of child pornography in *Osborne v. Ohio*.[147] The Court distinguished the case from *Stanley v. Georgia*,[148] where it struck down a Georgia law prohibiting the possession of obscene material. The *Osborne* Court based its distinction on the underlying rationales in each of the cases.[149] In that case, the Court held that possession of child pornography may be constitutionally prohibited because it protects the victims of child pornography by destroying the market for the use of children, whereas with obscenity, Georgia was merely concerned that the obscenity would poison the minds of its viewers.[150]

In *Ashcroft v. Free Speech Coalition*,[151] the Court limited the child-pornography doctrine for the first time by finding that the doctrine only applies where actual children were used as the subjects of pornography.[152] The issue in that case was whether the government could ban "virtual" child pornography, which was produced with either

cover law enforcement officers, he was convicted under a New York statute that prohibited persons from promoting sexual performances by children under the age of sixteen through the distribution of material depicting those performances. *Id.* at 751–52.

141 *Id.* at 756–57.

142 *Id.* at 756.

143 *Id.* at 759–60.

144 *Ferber*, 458 U.S. at 760.

145 *Id.*

146 *Id.* at 762.

147 495 U.S. 103 (1990).

148 394 U.S. 557, 564–68 (1969).

149 495 U.S. at 108–10.

150 *Id.*

151 535 U.S. 234 (2002).

152 *Id.* at 250–51.

adults who looked like minors or computer-generated imaging.[153] The Court held that the government could not ban such material because it recorded no crime, created no victims, and was not "intrinsically related" to the sexual abuse of children.[154]

2. Child Pornography Applied to Depictions of Animal Cruelty

Child pornography shares many of the same characteristics as depictions of animal cruelty. Unlike adults, neither animals nor children are deemed to be able to consent to acts of abuse.[155] Depictions of child pornography and animal cruelty are both clandestine operations with public distribution mechanisms; therefore, anti-production statutes are hard to enforce. Drying up the market in each instance would be an effective way to target production because it eliminates the financial incentives.

However, there are several difficulties with attempting to expand the child-pornography doctrine to depictions of animal cruelty. For one, under the child-pornography doctrine, the finding of a compelling interest is crucial.[156] Therefore, if the Supreme Court ultimately found that the interest in preventing cruelty to animals did not rise to the level of "compelling," it would be fatal to an expansion of the child-pornography doctrine.[157] Another difficulty is that the nature of the harms involved with depictions of animal cruelty, while similar in some respects to child pornography, is too dissimilar to justify an expansion of the doctrine. For example, with child pornography the resulting harm to the child is deemed to be so severe as to justify its prohibition, even if the work has some redeeming literary, artistic, or political value.[158] This justifies a restriction, even for mere possession, because the harms are exacerbated by the knowledge that a record of the child's participation exists.[159] In contrast, the plain language of § 48 indicates that the resulting harm of animal cruelty does not outweigh the redeeming value, as evidenced by the statute's exceptions clause. Therefore, a case-by-case determination would need to be conducted in every case as to whether the work has serious value. This could lead to different results in different jurisdictions and arbitrary enforcement. Moreover, although animals suffer continuing harms

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153 *Id.* at 239–40.

154 *Id.* at 250.

155 Catherine MacKinnon has noted the irony that humans can be deemed to consent to their participation in snuff films, whereas animals are presumed to not be able to consent. Hall, *supra* n. 83, at 178–79. **R**

156 *Stevens*, 533 F.3d at 226 (noting that the compelling interest analysis in the *Ferber* test overlaps with strict scrutiny).

157 *Id.* at 226–31; *but see* Reynolds, *supra* n. 21, at 385 (noting that it is not clear from *Ferber* whether a compelling interest is necessary because if there were a compelling interest and the government can narrowly tailor a law towards that interest, there is no need for a categorical exclusion). **R**

158 *Ferber*, 458 U.S. at 761–62.

159 *Id.* at 759.

from abuse, the harm is not exacerbated by the record of their participation, and therefore prohibition of possession is not justified. As these differences illustrate, depictions of animal cruelty do not fit well into the child-pornography doctrine.

B. Obscenity

Depictions of animal cruelty, like other depictions of violent behavior, have been analogized to the obscenity exception to the First Amendment.[160] Proponents of expanding the obscenity category have argued that obscenity should include not only sexual content but also violent content.[161] The Court in *Stevens* briefly discussed obscenity as applied to animal cruelty but ultimately declined to extend the category beyond sexual material.[162]

1. Obscenity Doctrine

Obscenity has long been considered unprotected speech.[163] Originally, the obscenity category included not only depictions of sexual acts but also of violence.[164] In 1948, the Supreme Court, in *Winters v. New York*,[165] analyzed a New York statute that prohibited the distribution of obscene materials. Such "obscene" materials included "criminal news, police reports, or accounts of criminal deeds, pictures or stories of deeds of bloodshed, lust or crime."[166] These materials did not necessarily appeal to prurient interests, and their prohibition was mainly based on concerns about their violent content. The Court in *Winters* ultimately held that the statute was unconstitutionally vague.[167] However, *Winters* left open the possibility that obscenity could include violent content which depicts criminal activity.

Since *Winters*, the Court has narrowed the doctrine to only apply to "prurient" interests.[168] However, the Court did not specifically rule out the idea that violent, non-sexual material can be obscene.[169] The current category of obscenity is defined by *Miller v. California*,[170]

160 Reynolds, *supra* n. 21 and sources therein.

161 *Id.*

162 533 F.3d at 231–32.

163 *See Roth v. U.S.*, 354 U.S. 476, 484–85 (1957) (claiming there is a "universal judgment that obscenity should be restrained"); *Chaplinsky v. N.H.*, 315 U.S. at 571–72 (explaining that "the lewd and obscene" is unprotected speech).

164 *Winters v. N.Y.*, 333 U.S. 507 (1948).

165 *Id.* at 508.

166 *Id.*

167 *Id.* at 510.

168 *Miller v. California*, 413 U.S. 15, 24 (1973).

169 *But see Video Software Dealers Assn. v. Schwarzenegger*, 2009 WL 415582 (9th Cir. 2009). The Ninth Circuit held that violent video games were not "obscene" under the legal definition of the term and declined to expand the definition of obscenity to include violent video games directed at minors. *Id.*

170 413 U.S. 15 (1973).

which gives guidelines for the trier of fact to determine when speech may be considered obscene.[171] Under *Miller*, these guidelines are:

> [W]hether 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.[172]

Although *Miller* stated that "sexual conduct" would be defined by state law, it gave examples of such behavior, which might include representations of ultimate sexual acts, masturbation, excretory functions, and lewd exhibition of the genitals.[173]

2. Obscenity Applied to Depictions of Animal Cruelty

The statute regulating depictions of animal cruelty could be tailored to fall within the obscenity doctrine. For example, the exceptions clause in § 48 closely mirrors the language in the *Miller* test.[174] However, the requirement that the work be "taken as a whole" would need to be added to remedy its overinclusiveness. For example, a video depicting a bullfight might be deemed obscene if taken out of context, but if it were part of a documentary on Spanish culture it most likely would be considered valuable speech.[175] Finally, there is the matter of appealing to the "prurient" interest. President Clinton included the language "prurient interest" and "taken as a whole" in his signing statement in an apparent attempt to bring the statute more closely in line with the obscenity exception.[176] However, by adding the "prurient interest" language, the scope of the statute would be limited to crush videos. If the goal of the statute is to prevent other types of cruelty, such as dogfighting and cockfighting, limiting the statute to depictions which only appeal to the prurient interest would not achieve this goal.

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171 *Id.* at 24.

172 *Id.* (citations omitted).

173 *Id.* at 25. In *Miller*, the Supreme Court suggested that "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, *actual or simulated*" would be considered obscene. *Id.* (emphasis added). However, simulations would likely not be considered obscene today, as evidenced by the Supreme Court drawing a line between actual and simulated acts in the child pornography context. *See Ashcroft*, 535 U.S. 234. There are scholars, however, who argue for the categorization of simulations such as violent video games as obscene.

174 *Compare* 18 U.S.C. § 48(b) (2006) ("[A]ny depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value" is excepted from § 48.) *with Miller v. California*, 413 U.S. at 24 (The *Miller* test is whether an average person applying community standards would find that the work, taken as a whole, appeals to the prurient interest; the work depicts, in a patently offensive way, sexual conduct specifically described in state law; and the work lacks serious literary, artistic, or political value.).

175 Reynolds, *supra* n. 21, at 378.

176 Statement by President, *supra* n. 99.

There are several problems with attempting to expand the obscenity category to include depictions of animal cruelty, particularly with respect to the Internet. For one, works are deemed to be obscene according to "contemporary community standards." However, community standards become difficult to determine in the Internet age. With advances in technology there is less of a distinction between conservative and liberal communities than when *Miller* was decided.[177] Further, technology has helped to create a more national culture.[178] Using the community-standards test in the modern environment could lead to arbitrary enforcement.[179] Therefore, because crush videos and other depictions of animal cruelty are distributed over the Internet, it would be difficult to determine whether they are obscene according to community standards when there is no clearly defined community.

The typical rationale behind the obscenity doctrine does not readily apply to depictions of animal cruelty on the Internet.[180] Obscenity is concerned with offending the sensibilities of the unwilling recipient. Obscene material that is distributed via "bookstores, newsstands, and movie theaters" is in the forefront in the community's view.[181] In contrast, conduct on the Internet is largely conducted privately in the individual's home or office.[182] There is therefore less danger of offending the sensibilities of unwilling recipients on the Internet, since it is out of the view of the community and because most individuals purchasing these depictions are willing recipients.[183]

This is the case with depictions of animal cruelty on the Internet, particularly crush videos. They are often filmed at an individual's house and sold via the Internet to willing participants. Depictions of dogfighting and cockfighting, though not necessarily shown on the Internet, are also primarily shown to a limited group of willing recipients. Thus, the obscenity doctrine's underlying rationale would seem not to apply to depictions of animal cruelty.

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177 *See* Jill Barton, Student Author, *Runaway Grand Jury: Activists Attempt to Redefine Obscenity Law in Kansas*, 77 UMKC L. Rev. 249, 250, 264 (2008) (asserting that the community-standards test is unnecessary as advances in technology help create a national culture); *but see* John Fee, *Obscenity and the World Wide Web*, 2007 BYU L. Rev. 1691, 1720 (2007) ("It appears that those who argue that the World Wide Web is distinguishable for constitutional purposes from other methods of publishing . . . do not appreciate the arguments that *Miller* resolved.").

178 Barton, *supra* n. 177, at 250, 264.

179 Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. Intl. L.J. 277, 349 (2008) (noting the special difficulties with the community-standards element of the obscenity test in the Internet age and the potential for arbitrary enforcement).

180 *See generally* Eric Handelman, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 Alb. L. Rev. 709, 731 (1995) (stating rationale for prohibiting dissemination of obscene materials does not apply to the Internet because the *Miller* standard is incompatible with the Internet).

181 *Id.*

182 *Id.*

183 *Id.*

C. Problems with Expanding an Existing Category or Creating a New Category

In addition to expanding the current categories of unprotected speech, some have debated whether a new category should be created for depictions of animal cruelty.[184] However, creating a new category would cause some of the same problems as the expansion of an existing category. There are three reasons why depictions of animal cruelty should not be categorically considered unprotected speech.

First, over time, courts have tended to restrict, not expand, the existing categories.[185] This is demonstrated by courts' treatment of the obscenity and child-pornography doctrines discussed *supra*. From *Winters* to *Miller*, the Supreme Court narrowed the definition of obscenity to include only the prurient interest.[186] Likewise, in *Ashcroft*, the Supreme Court declined to extend the child pornography doctrine to virtual child pornography.[187] This has also been the case with doctrines such as the libel, "incitement," "fighting words," and commercial-speech exceptions to the First Amendment right to freedom of speech.[188] Therefore, depictions of animal cruelty would face an uphill battle against this tendency to narrow the current exceptions.

Second, if a category were to be expanded, it is more likely that it would be expanded to include violence against humans, not animals. The Supreme Court has never recognized a compelling interest in regard to animals, and courts in general have shown reluctance to recognize rights for animals when a competing fundamental human right is at issue.[189] The law largely regards animals as property, although this may be slowly changing. Therefore, a major legal shift would be required for courts to recognize not only the rights of animals but that their rights might, at times, supersede the human right to free speech.[190] Some legal scholars have advocated for a violent-speech ex-

184 *Stevens*, 533 F. 3d at 236–37; *see also* Introduction, *supra* Part I.

185 Ryan P. Kennedy, Ashcroft v. Free Speech Coalition: *Can We Roast the Pig Without Burning Down the House in Regulating "Virtual" Child Pornography?*, 37 Akron L. Rev. 379, 401–02 (2004) ("After creating a number of categories of speech that were precluded from First Amendment protection the Supreme Court has set about a course of narrowing their scope.").

186 For a complete discussion, see *supra* Parts III(A)–III(B)(1).

187 For a complete discussion, see *supra* Parts III(A)(1).

188 *See* Kennedy, *supra* n. 185, at 402–03 (discussing how the Supreme Court has narrowed each of these categories). **R**

189 *Stevens*, 533 F.3d at 224 ("The common theme among these cases is that the speech at issue constitutes grave threat to human beings"); *but see* Hall, *supra* n. 83, at 176–77 (Catherine MacKinnon argues that people place greater concern on helping animals through their condemnation of crush videos than they do in helping women. She argues that there is no law that bars "depicting cruelty to women" and that depictions of such material are given constitutional protection under the First Amendment.). **R**

190 *See* Richard M. Lebovitz, *The Accordion of the Thirteenth Amendment: Quasi-Persons and the Right of Self-Interes*t, 14 St. Thomas L. Rev. 561, 567 (2002) (proposing that as "quasi-persons," animals should be entitled to the right of self-interest but without compromising the rights of persons).

ception to the First Amendment. If they succeed in creating such a category, depictions of animal cruelty would be more likely to fall within that category, rather than the obscenity doctrine or child-pornography doctrine, or the creation of its own category.

Third, by expanding either of the current exceptions, the restriction would only target the speech components of the act of cruelty without addressing the non-speech elements. This is important because if a statute only restricts speech, then it is considered a content-based restriction and is thus subjected to strict scrutiny,[191] a notoriously difficult standard to meet. More importantly, if the goal is to remove the acts' financial incentive, then a categorical exception would always be underinclusive because it would fail to reach the non-speech financial incentives. As discussed *supra*, a restriction limited to speech would not reach the illegal gambling proceeds from dogfighting nor would it reach revenue derived from the sale of merchandise related to the illegal acts in crush videos, such as stilettos.

IV. SON OF SAM LAWS

Given that § 48 does not readily fit into the existing free-speech exceptions of child pornography and obscenity, the question remains as to whether these depictions can be constitutionally regulated. This Part shows that another free speech doctrine, the Son of Sam laws, not only may be constitutionally applied to depictions of animal cruelty but that doing so would be less restrictive of potentially valuable speech and more tailored to the government interest.

A. The History of Son of Sam Laws

In order to determine whether Son of Sam laws could be applied to depictions of animal cruelty, it is first necessary to describe what these laws entail and the history and purpose behind them. Son of Sam, or criminal anti-profit laws, are based on the general principle that criminals should not profit from their crimes.[192] The laws typically seek to prevent criminals from profiting based on their notoriety from previously committed crimes.[193] Proponents of such laws argue that while the First Amendment provides a general right to speech, "it does

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191 *Stevens*, 533 F.3d at 232.

192 Tracey B. Cobb, *Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 Hous. L. Rev. 1483, 1488 (2003).

193 *Id.* at 1488–89. The typical scenario would be a serial killer that becomes famous and then writes a book about his life and the acts he committed. *Id.* The laws often require that an entity contracting with an accused or convicted criminal supply a copy of the contract to the State or—as in New York—to the crime victims board. *Simon & Shuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991). The money is then placed in an escrow account. Cobb, *supra* n. 192, at 1489. The victims of the crimes would then have a five-year period in which to bring a civil action against the alleged perpetrator. *Id.* If the victims prevailed in the civil suit, the funds from the illegal activity would be used to satisfy the judgment rendered. *Id.* If after five years no actions were pending, the funds would be paid to the accused. *Id.*

not provide that a speaker is entitled to compensation for his speech."[194] To date, forty-eight states and the federal government have enacted Son of Sam laws.[195]

The name "Son of Sam" comes from serial killer David Berkowitz, who terrorized New York during the summer of 1977.[196] The hunt for the killer received widespread media publicity.[197] When Berkowitz was finally identified as the killer, publishers offered to pay substantial amounts of money for his story.[198] In response, the New York legislature passed Executive Law § 632-a, also known as the Son of Sam law.[199]

B. Simon & Schuster

Simon & Shuster involved the first "Son of Sam" law brought before the United States Supreme Court.[200] The case involved a book based on the life of Henry Hill, a member of the Mafia who, during his twenty-five years as a criminal, "was behind some of the most daring crimes of the day."[201] The book, *Wiseguy: Life in a Mafia Family*, was written by Nicholas Pileggi, who conducted a series of interviews with

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194 Jeanne E. Dugan, *Crime Doesn't Pay—Or Does It?:* Simon and Schuster, Inc. v. Fischetti, 65 St. Johns L. Rev. 981, 990 (1991); *but see Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (holding that statutes that impose a financial burden on the speaker based on the content of the speech are presumptively inconsistent with the First Amendment).

195 Melissa J. Malecki, *Son of Sam: Has North Carolina Remedied the Past Problems of Criminal Anti-Profit Legislation?*, 89 Marq. L. Rev. 673, 681 (2006). Seven states have repealed their Son of Sam laws. *Id.* The only states yet to pass any legislation are New Hampshire and Vermont. *Id.* at n. 54; *see e.g.* 18 U.S.C. § 3681; *but see* Associated Press, *Vermont Considers Son-of-Sam Law*, http://www.wcax.com/global/story.asp?s =10092677 (Mar. 20, 2009) (last accessed Nov. 22, 2009) (Vermont's legislature considered a Son of Sam law in response to a 2008 killing in Rutland, Vermont).

196 *Simon & Shuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. at 108. Although the name "Son of Sam" originates from the New York serial killer, the idea that wrongdoers should not profit from their misdeeds substantially predates that case. Legal scholars tend to trace the modern laws back to the 1889 case of *Riggs v. Palmer*, 115 N.Y. 506 (1889). Malecki, *supra* n. 195, at 675 n. 11. **R**

197 *Simon & Shuster*, 502 U.S. at 108.

198 *Id.* A surprising fact about David Berkowitz is that New York's Son of Sam statute, the law that was specifically created so he could not profit from his crimes, was never applied to him. *Id.* at 111. The Court determined that he was mentally incompetent to stand trial and therefore did not fall under the necessary category of a convicted felon in order for the statute to apply. *Id.* Another fact, perhaps not so surprising, is that Berkowitz killed animals before he killed humans. Lockwood, *supra* n. 31, at 83. Prior to his serial murders, Berkowitz killed his grandmother's parrot and shot a neighbor's dog. *Id.*

199 *Simon & Shuster*, 502 U.S. at 111. Berkowitz did write a book, entitled *Son of Sam*, which was published in 1981. *Id.* at 112–14. Although the statute did not apply to him, Berkowitz voluntarily gave his share of the royalties from the book to his victims or to their estates. *Id.*

200 *Id.*

201 *Id.* at 112. (Henry Hill was involved in the 1978–1979 Boston College point-shaving scandal and stole approximately $6 million from Lufthansa Airlines in 1978, among other things).

Hill over a period of years.[202] It chronicled the "day-to-day existence of organized crime" and was later adapted into the movie *Goodfellas*, which subsequently won numerous awards.[203] The publisher, Simon & Shuster, Inc., had an agreement whereby both Hill and Pileggi received payments from the book.[204] When the New York State Crime Victims Board learned of the book's existence, they determined that Simon & Shuster, Inc. had violated the law by not turning over its contract with Hill and that all payments scheduled to be made to Hill should be turned over to the Crime Victims Board.[205] Simon & Shuster, Inc. brought suit seeking a declaration that New York's Son of Sam law was an unconstitutional violation of the First Amendment.[206]

The Supreme Court in *Simon & Schuster* held that the New York statute was unconstitutional because it was not narrowly tailored.[207] Specifically, the Court held that the statute was overinclusive because it applied to works on any subject that expressed the thoughts or recollections of the author about the crime, even if they were only tangential or incidental.[208] The Court also found that the definition of a "person convicted of a crime" was too broad because it included "any author who admits in his work to having committed a crime"[209] whether or not the author was ever accused or convicted. However, the Court recognized that the government had a compelling interest in seeing that criminals do not profit from their crimes.[210] Therefore, the Court left open the possibility that narrowly tailored "Son of Sam" laws could be constitutional.[211]

The Supreme Court in *Simon & Schuster* analyzed the New York statute using strict scrutiny because it was a content-based restriction on speech.[212] The law was deemed content-based because it placed a financial burden only on a criminal's speech relating to the commission of the crime itself and not on all criminal speech.[213] Since the Court in *Simon & Schuster* determined there were two compelling interests at stake in that case—ensuring that criminals do not profit from their

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202 *Id.* at 112–13.

203 *Simon & Shuster*, 502 U.S. at 112–14.

204 *Id.* at 112.

205 *Id.* at 114–15.

206 *Id.* at 115.

207 *Id.* at 121, 123.

208 *Id.* at 121.

209 *See Simon & Shuster*, 502 U.S. at 121–22 (This broad definition would include works by, *inter alia*, Malcolm X, Martin Luther King, Jr., Henry David Thoreau, Sir Walter Raleigh, Jesse Jackson, and Emma Goldman. However, the Son of Sam law would only be applicable if those authors received monetary compensation for their works.).

210 *Id.* at 119 ("The State likewise has an undisputed compelling interest in ensuring that criminals do not profit from their crimes.").

211 *Id.* at 123.

212 Malecki, *supra* n. 195, at 676.

213 *See id.* at 677 (discussing why the statute in *Simon & Schuster* was content-based).

crimes and compensating crime victims—some scholars have suggested that, in order to withstand a constitutional attack, a criminal anti-profit statute would have to address both of these compelling interests.[214] However, the Supreme Court has never said that both compelling interests were necessary.[215] Therefore, it leaves open the possibility that a Son of Sam law could be constitutional with only the compelling interest in preventing criminals from profiting from their crimes. Alternatively, instead of having the compelling interest of victim compensation, a statute could substitute another interest, such as prevention of cruelty to animals.

C. Son of Sam Laws Post Simon & Schuster

After *Simon & Schuster*, many states either changed their Son of Sam laws or created new ones that were more narrowly tailored to the compelling state interests.[216] The laws are now primarily aimed at profits directly relating to the criminal act rather than at thoughts that may be only tangentially or incidentally related to the crime or to the criminal's notoriety.[217] The most common change made to the criminal anti-profit laws after *Simon & Schuster* was shifting to a focus on profits received as a result of the commission of the crime rather than on profits regarding the speech component.[218] However, there were other changes. For example, Georgia expanded its laws to include other individuals associated with high-profile cases, such as judges, prosecuting attorneys, investigating officers, and law enforcement officers who are witnesses in a case.[219]

After the Supreme Court's 1991 decision, there were several notable Son of Sam cases. Some, like *Simon & Schuster*, have struck down statutes for failing to meet the "narrowly tailored" test.[220] In others, courts have not ruled on the constitutionality of the law directly, instead ruling in favor of the accused on other grounds.[221] However, one promising case is *Arizona v. Gravano*.[222] That case involved Sammy Gravano, who, while in the witness-protection program in Arizona, was charged with heading an illegal drug-distribution ring.[223] The Ari-

214 *Id*. at 676, 681.
215 *Id*. at 676.
216 *Id.* at 677.
217 *Id.*; Cobb, *supra* n. 192, at 1495–96.
218 Malecki, *supra* n. 195, at 677.
219 *Id.*
220 *See e.g. Keenan v. Super. Ct. of L.A. Co.*, 40 P.3d 718 (Cal. 2002).
221 *See e.g. Sandusky v. McCummings*, 625 N.Y.S.2d 457 (N.Y. Supp. 1995) (New York's revised Son of Sam statute did not apply to settlements of lawsuits.); *N.Y. St. Crime Victims Bd. v. T.J.M. Prods., Inc*., 705 N.Y.S.2d 320, 323 (N.Y. App. Div. 2000) (New York's revised Son of Sam statute only applied to state crimes, not federal crimes.); *Curran v. Price*, 638 A.2d 93 (Md. 1994) (Applying Maryland's Son of Sam law would require the accused to incriminate himself in violation of his constitutional rights.).
222 *State v. Gravano*, 60 P.3d 246 (Ariz. App. 2002).
223 *Id.* at 248.

zona attorney general sought, under an Arizona forfeiture statute, Gravano's proceeds from *The Underboss*, a memoir detailing his life in organized crime.[224] The State alleged that the money Gravano received from his activities in organized crime was used to finance his drug enterprise and therefore sought to take the entire proceeds from his memoir.[225] The court in *Gravano* determined that strict scrutiny was not applicable in that case because the state was using a general forfeiture statute directed at non-speech activities rather than a Son of Sam law directed at speech.[226] Having determined that the law was content-neutral, the court applied an intermediate level of scrutiny and held that the statute was constitutional as applied to Gravano.[227]

Although *Gravano* involved a general forfeiture statute and not a Son of Sam law, the court's analysis is similar to that of earlier Son of Sam law cases.[228] However, *Gravano* suggests that if a criminal anti-profit statute is content-neutral, it could withstand constitutional attack. With the focus not solely on speech, a criminal anti-profit statute, like the Arizona forfeiture statute, would be content-neutral. Content-based speech restrictions have a strong presumption of invalidity, whereas a content-neutral restriction does not.[229]

D. Including Depictions of Animal Cruelty in Son of Sam Laws

Given that many Son of Sam laws have been amended to include all profits from criminal activity and not those solely related to speech, they would be a better means of regulating depictions of animal cruelty than § 48. Specifically, Son of Sam laws would apply to a narrower category of speech than § 48 and therefore would be less likely to restrict protected speech. Son of Sam laws would also avoid the overinclusiveness and underinclusiveness problems of § 48. Further, they would be much more likely to pass constitutional muster due to the lower level of scrutiny applied to content-neutral speech. This Section outlines the different components of a Son of Sam law that would constitutionally regulate depictions of animal cruelty.

1. The Government Interest

One risk with § 48, as well as with a categorical exception for depictions of animal cruelty based on child pornography or obscenity doctrines is that there is only one asserted compelling interest: preventing animal cruelty. A court's finding that preventing animal cruelty is not a compelling interest would be fatal to the creation of the category. In

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[224] *Id.* at 249.

[225] *Id.*

[226] *Id.* at 253.

[227] *Id.* at 254–55.

[228] Kathleen Howe, *Is Free Speech Too High a Price to Pay for Crime? Overcoming the Constitutional Inconsistencies in Son of Sam Laws*, 24 Loy. L.A. Ent. L.J. 341, 361 (2004).

[229] *Simon & Schuster*, 502 U.S. at 115–16.

contrast, there are several government interests implicated in criminal anti-profit statutes that would encompass depictions of animal cruelty. First, like other Son of Sam laws, there is a compelling interest in ensuring that criminals do not profit from their crimes. Second, there is also an important if not compelling interest in preventing cruelty to animals. Third, there is a compelling interest in victim compensation. By relying on multiple compelling interests, a criminal anti-profit statute is more likely to be held constitutional.

Several courts, including the Supreme Court, have found that there is a compelling government interest in seeing that criminals do not profit from their crimes.[230] There is also an important interest in preventing animal cruelty.[231] While the Supreme Court has not specifically determined whether the interest in preventing acts of animal cruelty would be compelling, it has not precluded the issue. Finally, the compelling interest in victim compensation is still present with depictions of animal cruelty, although the issue is more complicated in this context than it is with other crimes.

Depending on the particular act of animal cruelty committed and the applicable state statute, there could be several possible victims in need of compensation. First, there are the animals themselves. While animals would not benefit from monetary compensation in the same way as human victims, funds could be allocated for the proper care of animals rescued from abuse.[232] This occurred when Michael Vick was charged with animal cruelty in 2007 and had approximately fifty dogs were seized on his property.[233] Twenty-five dogs were placed in foster homes, and twenty-two were sent to a no-kill non-profit animal sanctuary.[234] The court ordered Vick to pay $928,000 for the lifelong care of these dogs.[235] In a similar vein, when Colorado's animal-cruelty statute was enacted, it created an animal-cruelty prevention fund that was designed to "assist with the care, treatment, impoundment, or shelter

230 *See e.g. Simon & Schuster*, 502 U.S. at 119 ("Like most if not all States, New York has long recognized the 'fundamental equitable principle,' . . . that 'no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.'"); *see also State ex rel. Napolitano v. Gravano*, 60 P.3d 246, 254 (Ariz. App. 1st Div. 2002) ("Arizona has a compelling interest . . . in ensuring that criminals do not profit from their crimes . . . , even if the victims do not reside in Arizona and the crimes were committed elsewhere.").

231 *See e.g. Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 n. 15 (1973) ("Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles."); *but see Stevens*, 533 F.3d at 226. ("No matter how appealing the cause of animal protection is to our sensibilities, we hesitate—in the First Amendment context—to elevate it to the status of a *compelling* interest.") (emphasis in original).

232 *See* Frasch et al., *supra* n. 41, at 73 (noting that several states have provisions in their anti-cruelty laws allowing courts to order reimbursement for the cost of care of the animals).

233 China, *supra* n. 1, at 4.

234 *Id.*

235 *Id.*

of any animal that is the subject of cruelty."[236] The fund also assisted with the costs of psychological evaluations and court-ordered treatment programs for juvenile offenders.[237]

The next possible victims of animal cruelty are humans. As discussed, with acts of animal cruelty there are often human victims who may have suffered emotional pain as a result of witnessing the cruelty. This would be the case in a domestic violence setting where an abuser inflicts physical pain on a pet in order to control human victims. For example, abused women may be more likely to leave their abusers if they have a safe environment in which to place their pets.[238] Funds from an animal-cruelty victim compensation fund could assist in the accommodation of pets while the human victim flees the abuser.[239] There are also owners or custodians of animals who could potentially be victims if they did not consent to or participate in the unlawful acts against their animals. These human victims could be compensated in a similar manner that victims of other crimes are currently compensated by crime-victims boards.

Thus, there are at least three interests at stake with regulating depictions of animal cruelty: (1) the prevention of criminals profiting from their crimes; (2) the prevention of acts of animal cruelty; and (3) victim compensation. The Supreme Court has already found two of these interests to be "compelling,"[240] and has left open the possibility that the third might be as well. Further, even if the Supreme Court ultimately finds that the interest in preventing animal cruelty is not compelling, or that the interest in victim compensation is not present in the animal-cruelty context, the established compelling interest of preventing criminals from profiting from their crimes should be enough to carry the day.[241] Having established these interests, a criminal anti-profit statute that encompassed depictions of animal cruelty

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236 Colo. Rev. Stat. § 18-9-201.7 (Lexis 2003) (repealed 2005).

237 *Id.* (Although that provision of the statute was subsequently repealed, it provides an illustration of how a fund, similar to that of a crime victims board, could be created as a way to effectively compensate animal victims.).

238 Mark J. Parmenter, *Does Iowa's Anti-Cruelty to Animals Statute Have Enough Bite?*, 51 Drake L. Rev. 817, 834 (2003).

239 *Id*. ("Money from the animal abuse fund could be given to shelters in a coordinated effort to help reduce domestic violence and animal abuse.").

240 *Simon & Schuster*, 502 U.S. at 118–19.

241 Some scholars have suggested that in order to be constitutional, a Son of Sam statute needs both compelling interests: victim compensation and prevention of criminals profiting from their crimes. However, the Supreme Court has not explicitly said that both are needed. Further, this interest implicates established public policy that wrongdoers should not receive the benefits from their wrongful acts. *U.S. v. Darby*, 312 U.S. 100, 121–22 (1941) (holding that Congress could place restrictions on the sale of goods manufactured in violation of Fair Labor Standards Act); *In re Estate of Laspy*, 409 S.W.2d 725, 730 (Mo. Ct. App. 1967) (wife convicted of manslaughter her of husband not entitled to statutory widow's allowance); *Petrie v. Chase Manhattan Bank*, 307 N.E.2d 253, 253 (N.Y. App. Div. 1973) (murderer ineligible to receive trust benefits); *Ames v. Commr. of IRS*, 112 T.C. 304, 305 (1999) (taxpayer required to pay taxes on money received from illegal espionage activities); *Wong Sun v. U.S*., 371 U.S. 471 (1963)

would therefore need only to be drafted to achieve those interests in order to be constitutional.

2. Narrowly Tailored

Regulating depictions of animal cruelty through a Son of Sam statute would remedy the problems of overinclusiveness discussed *supra* because it would apply to a narrower category of speech. A Son of Sam statute, by definition, does not apply to legal acts. Therefore, if the animal abuse is legal where the depiction is created, there is no criminal to prevent from profiting on the sale of those depictions and thus no restriction on speech. Likewise, a criminal anti-profit statute would be less likely to restrict valuable speech because it would not prevent everyone from profiting from the illegal acts, only the perpetrators of those acts and their accomplices. For example, Michael Vick could not profit from selling depictions of the dogs utilized in his dogfighting operation. He also could not profit from selling dog-related paraphernalia based on his notoriety from having committed the crime. However, third parties would be free to sell depictions of the dogs and their rehabilitation after the abuse[242] or to sell "Michael Vick" chew-toys for dogs.[243] These third parties would not have to rely on an exceptions clause to demonstrate that the depictions have "serious" value, and they would automatically be allowed to profit from these depictions without justifying their value because the third parties are not criminals. By enacting a statute that would only affect the speech of individuals who have committed illegal acts, it would have the effect of restricting less speech than § 48.

3. Persons Convicted or Accused of a Crime

A Son of Sam statute that encompasses depictions of animal cruelty would also not be overinclusive because it would only apply to persons convicted or accused of a crime. In *Simon & Schuster*, the Supreme Court said that in defining the phrase "person convicted of a crime," the New York statute actually allowed profits to be taken from people who had neither been accused nor convicted but who had admit-

(holding that the government may not use the "fruits" of an unconstitutional search as evidence against the defendant at trial).

[242] *See e.g.* Best Friends Animal Society, *Dogtown at Best Friends* (television series) Season Two—Episode 1: "Saving the Michael Vick Dogs" (Sept. 5, 2008) (Best Friends Animal Society has a series on the National Geographic Channel featuring their "Dogtown" rescue facility. An episode aired in their second season that showed the Michael Vick dogs being rehabilitated at the Dogtown facility.).

[243] Huffington Post, *Michael Vick Chew Toy: Fla. Attorney General Sues*, http://www.huffingtonpost.com/2009/04/09/michael-vick-chew-toy-fla_n_185430.html (Apr. 9, 2009) (last accessed Nov. 22, 2009) (After the Michael Vick controversy, a company in Florida, Showbiz Promotions, made a "Michael Vick" dog toy. The company was recently sued by Florida's attorney general because the company advertized that it would donate the proceeds from the toy to animal shelters but allegedly never made any donations.).

ted in their work that they committed a crime in the past.[244] The concern was that the law could take earnings from people who were potentially innocent but who may have nonetheless admitted to a crime they did not commit for artistic reasons.[245] The New York law was therefore overinclusive because it did not advance the state's interest in preventing criminals from profiting.[246] Although many states have revised their statutes to include only persons convicted of a crime, the Supreme Court did not specifically say that the person had to be convicted but suggested it was sufficient for the person to be accused of a crime.[247] Further, by only being applicable to convicted individuals, a Son of Sam statute would allow accused persons to "take advantage of what may be a long period of profit-making before actually being convicted of a crime."[248]

In order to address these concerns, a criminal anti-profit statute that covers depictions of animal cruelty should have two categories of restrictions: one for persons convicted of crimes and another for persons who have been accused. Profits from most mediums of expression, such as books, music, plays, etcetera, should only be confiscated if the individual has actually been convicted of the crime. Profits from other mediums, particularly video and audio recordings that depict the actual crime being committed, may be confiscated if the person has been formally accused of the crime. The profits would be placed in an escrow account while the individual awaits and stands trial. If the person is acquitted, the funds would be returned. Such a distinction between mediums of expression is permissible in order to address the specific concerns presented with each one. As the Supreme Court noted in *Southeastern Promotions, Ltd. v. Conrad*,[249] different mediums of expression present different problems and "must be assessed for First Amendment purposes by standards suited to it."[250] With mediums that record the actual crimes, either video or audio, there is evidence that a crime has in fact been committed. This is not necessarily the case with other mediums, such as books, where it is possible that the crime described never actually occurred. There is therefore a far greater likelihood that the person who creates, sells, or distributes a film either committed the crime or was an accomplice.

A content-neutral Son of Sam statute that encompasses, among other things, depictions of animal cruelty would not only remedy the problems of underinclusiveness discussed *supra*, but would be held to

244 502 U.S. at 121.

245 Malecki, *supra* n. 195, at 684 (An example of this would be a recording artist writing lyrics about crimes for artistic purposes although he did not actually commit the crimes.).

246 *Id.*

247 *See Simon & Shuster*, 502 U.S. at 121; Cobb, *supra* n. 192, at 1511 (noting that states revised their statutes to be effective only after conviction).

248 Cobb, *supra* n. 192, at 1511.

249 420 U.S. 546 (1975).

250 *Id.* at 557.

a lower level of scrutiny. As discussed, when their constitutionality was challenged, most criminal anti-profit statutes failed to meet the narrowly-tailored prong of strict scrutiny. Indeed, this has been the case with the majority of laws affecting constitutional rights that are subjected to strict scrutiny.[251] However, a content-neutral law is subject to intermediate scrutiny[252] and is more likely to be held constitutional.[253] Therefore, the most important feature of a Son of Sam statute regulating depictions of animal cruelty is content-neutrality.[254]

4. Types of Crimes

A Son of Sam statute should only include certain types of animal cruelty deemed to be more serious than others. In *Simon & Schuster*, the Court noted that if a prominent figure were to mention in his autobiography that he stole a "nearly worthless item as a youthful prank," then his entire income could be available to his creditors.[255] Including such a crime in a criminal anti-profit statute would be overinclusive.[256] Therefore, a Son of Sam statute should only include "serious" crimes. However, there is inherent difficulty in determining which crimes are "serious." For example, statutes could exclude "victimless" crimes.[257] They could also be limited to crimes resulting in physical injury.[258] Victims of fraud or burglary could also be included because they may suffer emotional or financial harm although they are not physically harmed.[259] However, crimes like illegal drug use become problematic because, although some may deem them to be serious crimes, including them in criminal anti-profit statutes could have a

[251] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 797 (2006) (noting that the majority of laws subjected to strict scrutiny fail); *id.* at 815 (Compared to other constitutional rights, strict scrutiny is the most fatal in the free speech context, where strict scrutiny has been satisfied in only 22% of the cases.).

[252] *U.S. v. O'Brien*, 391 U.S. 367, 381–82 (1968).

[253] *See* Sean J. Kealy, *A Proposal for a New Massachusetts Notoriety-for-Profit Law: The Grandson of Sam*, 22 W. New Eng. L. Rev. 1, 12–13 (2000).

[254] *Id.* at 12 ("Critical to the constitutionality of a Son of Sam statute is the statute's content-neutrality."); Cobb, *supra* n. 192, at 1509–10 (same); Howe, *supra* n. 228, at 365–67 (arguing that Son of Sam laws should be content-neutral in order to avoid being analyzed under strict scrutiny and to be held constitutional).

[255] 502 U.S. at 123.

[256] *Id.*; *See also* Cobb, *supra* n. 192, at 1512.

[257] Some have argued that there are indeed "victims" of pornography. *See generally* Catharine MacKinnon, *Only Words* (Harvard U. Press 1993). Others have discussed whether pornography is in fact a depiction of the illegal act of prostitution. *See e.g.* Zachary David Streit, *Birds of an Illegal Feather: Prostitution and Paid Pornography Should be Criminalized Together*, 5 Cardozo Pub. L. Policy & Ethics J. 729, 733 (2007). However, because with pornography and prostitution there is the issue of consent, it would be difficult to determine who should be compensated as a victim.

[258] *See* Cobb, *supra* n. 192, at 1512.

[259] *See id.*

grave effect for many artists and authors.[260] The need to draw a line as to which crimes are serious and the fact that doing so may be problematic, however, should not deter legislatures from enacting criminal anti-profit statutes.[261]

With depictions of animal cruelty, a possible way to delineate "serious" crimes is to include those that are considered felonies under state anti-cruelty statutes. Thus, each state would define for itself which crimes it deemed "serious." In any event, depictions of animal cruelty that would fall under a Son of Sam statute should only include intentional acts of animal abuse rather than neglect.

5. No Automatic Forfeiture

A final requirement for a Son of Sam statute encompassing depictions of animal cruelty is that forfeiture should not be automatic. Such a statute might require a showing of probable cause in a hearing or other formal procedure before confiscating the property of the accused.[262] The Texas Son of Sam law is an example of a statute that uses such a hearing.[263] A hearing would provide an extra safeguard for the accused, reduce the risk of potential abuse, and would create less likelihood of infringement on First Amendment rights.[264] Having this type of proceeding would also reduce some of the concerns the Supreme Court had in *Simon & Schuster* regarding individuals who were not accused or convicted of a crime. When a judge in a hearing determines there is probable cause to believe that the person committed the crime, rather than merely mentioning the crime for artistic purposes, this concern is reduced.

V. CONCLUSION

Acts of animal cruelty and depictions of such acts are a growing problem in this country. Animal cruelty has been linked to other social ills such as violence towards humans, drugs, and illegal gambling. Although 18 U.S.C. § 48 attempted to combat the problem of animal cruelty, its constitutional validity remains in question.

While depictions of animal cruelty share many salient characteristics of existing categories of unprotected speech, expanding those categories or creating a new category specifically for depictions of animal cruelty is not the best solution. Son of Sam laws are less restrictive alternatives to creation of a wholesale restriction on the sale and distribution of depictions of animal cruelty. Such laws also have the addi-

260 *See* Howe, *supra* n. 228, at 369.

261 *See* Volokh, *Crime Severity*, *supra* n. 20, at 1983 ("[T]here are several ways these severity lines may be drawn. The problems with any one line-drawing model . . . should thus not by themselves lead us to entirely renounce constitutional severity distinctions.").

262 *See* Howe, *supra* n. 228, at 369–70; Cobb, *supra* n. 192, at 1512–13.

263 Tex. Crim. Proc. Code Ann. § 59.05 (2008).

264 *Id.*

tional benefit of content-neutrality and would therefore be better able to withstand constitutional attack. A narrowly tailored criminal anti-profit statute that allows for all profits of a crime to be regulated—not just those associated with speech—and that defines the types of crimes and prevents automatic forfeiture is a better solution for depictions of animal cruelty.