CENSORING CRIMES

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ABSTRACT

Concerns regarding the harmful influence of films on youth and adults have always motivated censorship and justified, in some minds, greater government control over content. Many motion pictures portray illegal conduct—theft, robbery, embezzlement, arson, drug dealing, assault, rape, murder, treason, and other crimes. In most instances, commission of the underlying crime is not needed for the production of the film. Despite the perpetual fear of the "capacity for evil" of films, the legality of motion pictures that commercialize crimes has not been studied as a concept. This Essay explores the reasons for this neglect and examines the problems this omission created during the debates over the ban on crush videos. The Essay shows that the evolution of content regulation in the motion picture industry, the actions of special interest groups, and the simplified manner in which lawmakers sometimes address complex issues have led to censorship regimes that ban genres rather than types of content. The Essay therefore explains the historical tendency to censor film genres, rather than addressing the meaning of crimes in films. Thus, the Essay argues that a general legal rule could be drawn for crimes in films: the production of films that commercialize crime should be banned. This rule is consistent with traditional First Amendment requirements.

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INTRODUCTION

Commercial movie-going began on April 14, 1894, when the Holland Brothers opened their peepshow-machine arcade in a converted shoe store in New York City.[1] The peepshow machines that the Holland Brothers purchased from Thomas Edison showed ten films of twenty seconds each. One of the films showed the celebrated dancer Carmencita performing her famous Butterfly Dance in which she allowed glimpses of the lower portions of her legs.[2] Ten weeks later, in July 1894, as the Edison enterprise was negotiating distribution contracts in other towns, James Bradley, a wealthy industrialist and New Jersey State Senator, discussed with Edison's representatives the possibility of bringing the films to Asbury Park, New Jersey, a town Bradley had developed and controlled politically.[3] Bradley was concerned about the morality of films; he informed the newly born industry that "we must see the pictures before we give you the permission [to show them to the public]. We must be sure that the pictures are not objectionable."[4] Bradley watched the film of Carmencita's famous Butterfly Dance, which had "delighted so many thousands of New Yorkers," and vetoed its exhibition, reasoning that it would "shock the sensibilities of Asbury Parkites and deaden their sense of all that was modest and pure."[5] Bradley was confident and firm, despite the fact that Carmencita's dress was "a fairly long one and good folks who ha[d] seen her dance [said] there [was] nothing immodest in

1 GORDON HENDRICKS, THE KINETOSCOPE: AMERICA'S FIRST COMMERCIALLY SUCCESSFUL MOTION PICTURE EXHIBITOR 56–60 (1966); TERRY RAMSAYE, A MILLION AND ONE NIGHTS: A HISTORY OF THE MOTION PICTURE THROUGH 1925 104–08 (1926).
2 For Carmencita's early career, see JAMES RAMIREZ, CARMENCITA: THE PEARL OF SEVILLE (1890).
3 *Barred by Bradley*, THE EVENING WORLD, July 17, 1894, at 3.
4 *Id.*
5 *Id.*

her gyrations."[6] Senator Bradley exerted his political influence to ban film exhibition. Carmencita's famous Butterfly Dance was censored despite the fact that, in the eyes of the law, Carmencita's conduct was perfectly legitimate.

When the negotiations in Asbury Park took place, Edison was also planning to make boxing films. Bradley was asked whether he would allow the exhibition of such movies. In response, "he lifted his hands in horror, and after recovering his breath said in a dramatic tone of voice: 'Show such a [motion] picture to the good people of Asbury Park? No, no: never!"[7] Although boxing was very popular in the late nineteenth century, it was illegal in New Jersey,[8] as well as in many other states.[9] Three years later, in March 1897, states and localities began banning the exhibition of boxing films and censoring the commodification of the then-illegal conduct–boxing.[10]

Early film censors thus banned films that could offend their communities and films that portrayed illegal conduct in action.[11] These themes related to the motion pictures' capacity to offend local morés. Production choices regarding the portrayal of illegal conduct have hung over the motion picture industry since the late nineteenth century, posing many unresolved questions. This Article explores a neglected category of films: motion pictures and videos in which illegal conduct is committed during the production in order to cater to a particular audience.

Questions regarding the relationship between censorship and illegal conduct have attended the motion picture industry throughout its history and been transformed over the years by the introduction of new technologies. For example, at the turn of the twenty-first century, these questions resurfaced, framed as a debate over the legality of "virtual child pornography."[12] Film production methods that targeted pedophile consumers circumvented the federal ban on using minors in sex films by

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6 *Id*.
7 *Id*.
8 The 1835 New Jersey Penal Code outlawed prizefighting. N.J. REV. STAT. § 257:88 (1835).
9 For a general review of the legal status of boxing in the late nineteenth century and the sports' popularity, see Barak Y. Orbach, *Prizefighting and the Birth of Movie Censorship*, 21 YALE J.L. & HUMAN. 251 (2009) [hereinafter Orbach, *Prizefighting*].
10 *Id*. at 299–300.
11 *Id.* at 256–60 (discussing the debates over the legality of films that showed fake boxing matches).
12 In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Supreme Court struck down the Child Pornography Prevention Act's ban on virtual child pornography. 535 U.S. at 258. In response, Congress enacted the PROTECT Act of 2003 to prohibit computer-generated child pornography when "such visual depiction is . . . indistinguishable from[] that of a minor engaging in sexually explicit conduct." Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 502(a)(1), 117 Stat. 650, 678 (codified as amended in scattered sections of 18, 28, 42 U.S.C.). Five years later in *United States v. Williams*, 553 U.S. 285 (2008), the Supreme Court reviewed the PROTECT Act of 2003 and held that "an offer to provide or request to receive virtual child pornography is not prohibited by the statute." 553 U.S. at 302. *See* discussion in *infra* Section I.B.3.

using youthful-looking adults or computer-imaging technologies.[13] The debate over the legality of virtual child pornography was similar to the debate over the legality of showing films of staged boxing matches when boxing was illegal.[14] Several scholars have pointed out that today child pornography constitutes the only context in which "the Supreme Court has accepted the idea that we can constitutionally criminalize the depiction of a crime."[15]

In April 2010, in *United States v. Stevens*,[16] the Supreme Court struck down a federal statute against depictions of animal cruelty that "create[d] a criminal prohibition of alarming breadth."[17] One of the reasons that the Court declared the statute unconstitutional was the fact that it censored many undeniably legal activities.[18] Once again, the Court considered questions related to the censorship of illegal conduct, yet left them largely unanswered.

In December 2010, eight months after the Supreme Court handed down its decision in *Stevens*, President Barack Obama signed into law the Animal Crush Video Prohibition Act of 2010 (the "Crush Video Act"),[19] clarifying that "certain extreme acts of animal cruelty that appeal to a specific sexual fetish . . . commonly referred to as 'animal crush videos'"[20] constitute obscenity and are exempted from the protection of the First Amendment.

This Article shows that historically, without addressing the abstract question, film genres that commercialized crimes were banned. Thus, the Article argues that a general legal rule could be drawn for this category of films. This rule would ban films whose production depends upon the commission of crimes; films designed to appeal to consumers who are interested in watching actual crimes. The Article illustrates how censors have used this intuitive rule as a justification in the course of the history of the motion picture industry, without clearly distinguishing it from other justifications. The Article studies the legislative process of the Crush Video Act and shows how clumsy legislators and interest groups acted with good intentions, but ineffectively, and missed another opportunity to clarify the function of film censorship in the United States.

This Article continues as follows. Part I explains why, despite the concerns regarding their capacity for evil, movies that show crimes have

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13 *Ashcroft*, 535 U.S. at 234, 239–40.
14 *See* Orbach, *Prizefighting*, *supra* note 9, at 260.
15 Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 984 (2001). *See also* Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285 (1982).
16 130 S.Ct. 1577 (2010).
17 United States v. Stevens, 130 S. Ct. 1577, 1588 (2010).
18 *Id*.
19 For the language of the act, see Pub L. No. 111-294, 124 Stat. 3177 (2010).
20 § 2, 124 Stat. at 3177. Note that § 3, 124 Stat. at 3178-79 (codified as 18 U.S.C. § 48) has been invalidated. *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2734 (2011).

been neglected as a category of films. This Part shows that the discrepancy between the rise of censorship and First Amendment protection in the motion picture industry has prevented systematic examination of censorship questions. Specifically, Part I shows that in the history of the motion picture industry, two genres that showed filmed crimes—child pornography and boxing films—were banned. Part II examines the debates over crush films, the operation of interest groups in this debate, and the ineffective legislative process that repeatedly overlooked the complexities of the First Amendment jurisprudence. Part III concludes.

I. FREEDOM OF FILMS

The Supreme Court has recognized a few narrow categories of speech that are excluded from First Amendment protection because they have minimal, if any, expressive value, and cause great harm. For these categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required [because] the balance of competing interests is clearly struck."[21] The scope and characterization of the categories of unprotected speech have varied over time. During the past three decades the list has included the following categories: obscenity,[22] child pornography,[23] fighting words,[24] defamation,[25] fraud,[26] threats,[27] incitement,[28] and speech integral to criminal conduct.[29]

When Thomas Edison commercialized moving pictures at the turn of the nineteenth century, the First Amendment jurisprudence was not yet developed and censorship was a common occurrence.[30] The censorship experience was particularly significant for the film industry as, until 1952, the First Amendment did not extend to motion pictures, thus forcing the industry to adapt itself to a censorship regime.[31]

This Part explains why certain questions have remained unanswered in motion picture censorship due to its legal evolution in the United States.

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21 New York v. Ferber, 458 U.S. 747, 763–64 (1982).
22 Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Roth v. United States, 354 U.S. 476 (1957).
23 *Ferber*, 458 U.S. 747.
24 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
25 Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952).
26 Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
27 Watts v. United States, 394 U.S. 705 (1969).
28 Brandenburg v. Ohio, 395 U.S. 444 (1969).
29 Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).
30 WAYNE E. FULLER, MORALITY AND THE MAIL IN NINETEENTH-CENTURY AMERICA 100 (2003); *see generally* HEYWOOD BROUN & MARGARET LEECH, ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD (1927).
31 For a general account of this period, see LAURA WITTERN-KELLER, FREEDOM OF THE SCREEN 1–148 (2008).

A. *Applying the First Amendment to Films*

The motion picture industry gained substantial economic and political influence in the first half of the twentieth century.[32] Nevertheless, until 1952, the industry struggled with state and municipal censors and did not have the protection of the First Amendment for its products. In 1913, a powerful film distributor, Mutual Film Corporation, challenged the constitutionality of the censorship laws, hoping to expand the protection of the First Amendment to films.[33] When *Mutual Film* reached the Supreme Court in 1915, with its challenges to the laws of Ohio and Kansas,[34] the Court reaffirmed the limited applicability of the First Amendment, holding that "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit like other spectacles, and not to be regarded, nor intended to be regarded . . . as part of the press of the country, or as organs of public opinion."[35] Furthermore, the Court expressed a concern that movies were "capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."[36] The premature move of *Mutual Film* to expand the scope of the First Amendment proved to be costly for the nascent film industry: its defeat concluded with a Supreme Court ruling that disqualified films from First Amendment protection.[37]

In 1952, fifty-eight years after the Holland Brothers opened the doors of their peepshow arcade,[38] the Supreme Court first recognized motion pictures as a form of protected speech, reversing its decision in the *Mutual Film* cases.[39] In *Joseph Burstyn, Inc. v. Wilson*, also known as the *Miracle* case for the movie that inspired the litigation,[40] the

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32 *See generally* MAE D. HUETTIG, ECONOMIC CONTROL OF THE MOTION PICTURE INDUSTRY: A STUDY IN INDUSTRIAL ORGANIZATION (1944); RAMSAYE, *supra* note 1.

33 Mutual Films challenged censorship laws of several states and localities. *See, e.g.*, Mut. Film Corp. v. City of Chicago, 224 F. 101 (7th Cir. 1915); Buffalo Branch, Mut. Film Corp. v. Breitinger, 95 A. 433 (Pa. 1915). For Mutual Film's legal operation, see W. Stephen Bush, *The Censorship Battle*, MOVING PICTURE WORLD, Oct.–Dec. 1913, at 1526.

34 Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230 (1915); Mut. Film Corp. of Mo. v. Hodges, 236 U.S. 248 (1915).

35 *Indus. Comm'n of Ohio*, 236 U.S. at 244. For film censorship laws until 1915, see Daniel Czitrom, *The Politics of Performance: From Theater Licensing to Movie Censorship in Turn-of-the-Century New York*, 44 AM. Q. 525 (1992); CHARLES MATTHEW FELDMAN, THE NATIONAL BOARD OF CENSORSHIP (REVIEW) OF MOTION PICTURES, 1909-1922 (1977); Orbach, *Prizefighting*, *supra* note 9; Barak Y. Orbach, *The Johnson-Jeffries Fight and Censorship of Black Supremacy*, 5 NYU J.L. & LIBERTY 270 (2010) [hereinafter Orbach, *Johnson-Jeffries*].

36 *Indus. Comm'n of Ohio*, 236 U.S. at 244.

37 For the Mutual Film Corporation and its battles against censorship, see Garth S. Jowett, *"A Capacity for Evil": The 1915 Supreme Court* Mutual *Decision*, *in* CONTROLLING HOLLYWOOD 16 (Matthew Benstein ed., 2000); John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL. HIST. 158 (1993).

38 *See supra* note 1 and accompanying text.

39 Joseph Burstyn, Inc. v. Wilson (Miracle Case), 343 U.S. 495 (1952).

40 *The Miracle* (*Il Miracolo)* is a segment of Roberto Rossellini's film *L'amore.* For a comprehensive analysis of the Miracle Case, see LAURA WITTERN-KELLER & REYMOND J. HABERSKI, JR., THE *MIRACLE* CASE: FILM CENSORSHIP AND THE SUPREME COURT (2008). *See also* Garth Jowett, *"A Significant Medium for the Communication of Ideas": The* Miracle *Decision and the Decline of Motion Picture Censorship, 1952-1968*, *in* MOVIE CENSORSHIP AND

Supreme Court held that the First Amendment applied to motion pictures.

Edison's entrepreneurial films of the 1890s were twenty-seconds long and silent. Since that time, motion pictures had greatly evolved, and as had their use, influence, and perception in society.[41] In 1952, when the Supreme Court ruled in the *Miracle* case, it stressed:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.[42]

The *Miracle* court also briefly addressed the concerns that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression."[43] The Court dismissed these concerns as a justification to disqualify films from the purview of the First Amendment, ruling that "[i]f there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship."[44]

Thus, not until 1952 did the Supreme Court release the motion picture industry from a wide range of burdening censorship constraints. The *Miracle* decision was triggered by the invasion of European films into the American market, rather than by a successful anti-censorship campaign by the established film industry. It was not the industry's lobbying arm that brought films under the umbrella of the First Amendment, but the actions of a maverick: Joseph Burstyn, a New York film distributor, who specialized in foreign and independent movies.[45] The established movie industry was invested in the familiar order that included its Production Code, a self-censorship system designed to maintain profitability for the studios.[46]

AMERICAN CULTURE 258 (Francis G. Couvares ed., 2d ed. 2006).

41 *See, e.g.*, RAYMOND FIELDING, THE AMERICAN NEWSREEL: A COMPLETE HISTORY, 1911-1967 (2d ed. 2006) (studying the use of newsreels in the motion picture industry); EDITORS OF LOOK, MOVIE LOT TO BEACHHEAD: THE MOTION PICTURE GOES TO WAR (1945).

42 *Wilson*, 343 U.S. at 501 (internal citations omitted).

43 *Id.* at 502.

44 *Id.*

45 Jowett, *supra* note 40; WITTERN-KELLER & HABERSKI, *supra* note 40, at 59–89.

46 *See generally* GREGORY D. BLACK, HOLLYWOOD CENSORED: MORALITY CODES, CATHOLICS, AND THE MOVIES (1994); CONTROLLING HOLLYWOOD: CENSORSHIP AND REGULATION IN THE STUDIO ERA (Matthew Bernstein ed., 1999); THOMAS DOHERTY, HOLLYWOOD'S CENSOR: JOSEPH I. BREEN AND THE PRODUCTION CODE ADMINISTRATION (2007); RUTH A. INGLIS, FREEDOM OF THE MOVIES: A REPORT ON SELF-REGULATION FROM THE COMMISSION ON FREEDOM OF THE PRESS (1944); RAYMOND MOLEY, THE HAYS OFFICE (1945); LOUIS NIZER, NEW COURTS OF INDUSTRY: SELF-REGULATION UNDER THE MOTION PICTURE

The *Miracle* decision came just four years after the Supreme Court handed down *United States v. Paramount Pictures*,[47] marking the end of Hollywood's golden era and forcing the industry to reorganize itself and diffuse economic power.[48] This diffusion of power allowed industry entrepreneurs, like Joseph Burstyn, to challenge the old order that the studios had dictated.

In 1954, the Supreme Court reaffirmed its *Miracle* decision in *Superior Films, Inc. v. Department of Education*.[49] Writing for the Court, Justice William Douglas established a formal "freedom of the screen" under the First Amendment:

> The argument . . . the government may establish censorship over moving pictures is one I cannot accept.
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> . . . .
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> Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas.
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> . . . .
>
> In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor.[50]

The evolution of the motion picture industry, therefore, did not follow developments in free speech jurisprudence during the industry's formative decades. During that time, the First Amendment did not protect films, and the studios chose models of self-censorship. In fact, for another fourteen years after the *Miracle* case, the industry maintained its Production Code, a coercive self-censorship system.[51]

CODE (1935).

47 United States v. Paramount Pictures, 334 U.S. 131 (1948).

48 For discussions of the *Paramount* decision, see MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY: ECONOMIC AND LEGAL ANALYSIS (1960); Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 YALE J. ON REG. 317, 335–46 (2004). The *Paramount* decision reshaped the motion picture industry but was only one factor that escalated its decline. *See generally* THOMAS SCHATZ, BOOM AND BUST: AMERICAN CINEMA IN THE 1940S (1999).

49 Superior Films, Inc. v. Dep't of Educ., 346 U.S. 587 (1954). *See also* Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684 (1959); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955); Commercial Pictures Corp. v. Regents of the Univ. of the State of N.Y., 346 U.S. 863 (1953); Gelling v. Texas, 343 U.S. 960 (1952).

50 *Superior Films*, 346 U.S. at 588–89.

51 In a provocative 1964 book that criticized Hollywood practices in, Murray Schumach observed:

> Censorship would neither be created nor sustained without pressure groups. Today, these organizations are on the increase and on of their prime target is the American movie. They constitute a form of censorship more dangerous than a code, because it can operate in secrecy with rules of its own making.

MURRAY SCHUMACH, THE FACE ON THE CUTTING ROOM FLOOR: THE STORY OF MOVIE AND TELEVISION CENSORSHIP 83 (1964),

Finally, between May 1967 and June 1968, within a period of thirteen months, the Supreme Court handed down twenty-six decisions unfavorable to censorship.[52] Robert Bork, a defeated Supreme Court nominee,[53] attributed considerable significance to this set of decisions. In his 2003 book, *Coercing Virtue*, he wrote:

> [T]he suffocating vulgarity of popular culture is in large measure the work of the [Supreme] Court. The Court did not create vulgarity, but it defeated attempts of communities to contain and minimize vulgarity. Base instincts are always present in humans, but better instincts attempt, through law and morality, to suppress pornography, obscenity, and vulgarity. When the law is declared unfit to survive, not only are base instincts freed, they are also validated.[54]

The Motion Picture Association of America quickly responded to the 1967-68 tide of anti-censorship decisions and replaced the Production Code with the rating system.[55] Local censorship boards, however, survived until 1992.[56]

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52 *See* Henry v. Louisiana, 392 U.S. 655 (1968) (June 17, 1968); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968) (June 17, 1968); Rabeck v. New York, 391 U.S. 462 (1968) (May 27, 1968); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) (Apr. 22, 1968); Felton v. City of Pensacola, 390 U.S. 340 (1968) (Mar. 11, 1968); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) (Jan. 29, 1968); Robert-Arthur Mgmt. Corp. v. Tennessee *ex rel* Canale, 389 U.S. 578 (1968) (Jan. 15, 1968); I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968) (Jan. 15, 1968); Chance v. California, 389 U.S. 89 (1967) (Nov. 6, 1967); Cent. Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967) (Oct. 23, 1967); Conner v. City of Hammond, 389 U.S. 48 (1967) (October 23, 1967); Potomac News Co. v. United States, 389 U.S. 47 (1967) (Oct. 23, 1967); Schackman v. California, 388 U.S. 454 (1967) (June 12, 1967); Mazes v. Ohio, 388 U.S. 453 (1967) (June 12, 1967); A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967) (June 12, 1967); Rosenbloom v. Virginia, 388 U.S. 450 (1967) (June 12, 1967); Books, Inc. v. United States, 388 U.S. 449 (1967) (June 12, 1967); Corinth Publ'ns, Inc. v. Wesberry, 388 U.S. 448 (1967) (June 12, 1967); Aday v. United States, 388 U.S. 447 (1967) (June 12, 1967); Avansino v. New York, 388 U.S. 446 (1967) (June 12, 1967); Sheperd v. New York, 388 U.S. 444 (1967) (June 12, 1967); Cobert v. New York, 388 U.S. 443 (1967) (June 12, 1967); Ratner v. California, 388 U.S. 442 (1967) (June 12, 1967); Friedman v. New York, 388 U.S. 441 (1967) (June 12, 1967); Keney v. New York, 388 U.S. 440 (1967) (June 12, 1967); Redrup v. New York, 386 U.S. 767 (1967) (May 8, 1967).

53 *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. (1987). *See also* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (2007 ed. 2007); *Response Prepared to White House Analysis of Judge Bork's Record* (the Biden Report), *reprinted in* 9 CARDOZO L. REV. 219 (1987). Bork greatly influenced the interpretation of American antitrust law, but as most antitrust lawyers acknowledge, his influence built on economic mislabeling and unsupported legal arguments regarding the origins of the Sherman Act. *See* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

54 ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 64 (2003).

55 *See generally* STEPHEN FARBER, THE MOVIE RATING GAME (1972); WITTERN-KELLER, FREEDOM OF THE SCREEN, *supra* note 31, at 247–71.

56 Dallas was the last city to have a Motion Picture Classification Board. It operated continuously until December 1992. *See* Corie Brown, *Breaking the Board*, PREMIERE, Feb. 1994, at 40; Sherry Jacobson, *City Cuts Power of Movie Board*, DALLAS MORNING NEWS, Dec. 10, 1992, at 31A.

Maryland was the last state to censor movies openly. In 1965, the Supreme Court struck down the state's censorship law in *Freedman v. Maryland*, 380 U.S. 51 (1965). In late 1980 the Maryland Board of Film Censors was defunded and it stopped operating in 1981. *See* Eugene L.

For many years, therefore, the motion picture industry sidestepped several fundamental questions of censorship. When the motion picture industry was born—and for several decades thereafter—conceptual issues in censorship were purely theoretical because the First Amendment did not cover films. Until 1952 and effectively until the demise of the Production Code in 1968, the question of whether illegal conduct should be banned from the screens was mostly academic.

B. *Obscenity and Child Pornography*

1. Obscenity in Films

On November 4, 1907, Chicago passed a censorship ordinance that prohibited public exhibition of motion pictures without a permit from the Chief of Police.[57] The Ordinance required the Chief of Police to deny permits for "immoral or obscene" films.[58] In 1909, the Supreme Court of Illinois upheld the constitutionality of the Ordinance.[59] For many years, film historians and First Amendment scholars treated the Chicago Ordinance as the first censorship law that exclusively targeted motion pictures,[60] but film censorship was hardly a legislative innovation in 1907.[61]

States and localities began banning boxing films in 1897.[62] Congress, many state legislatures, and city councils that had not adopted censorship laws by 1907 had considered various bills against boxing films.[63] By 1907, the motion picture industry possessed experience with censorship—industry participants made conscious production decisions based on censorship trends against boxing films and interacted with lawmakers in efforts to limit local censorship.[64]

Meyer, *Last Reel Rolls for Maryland Censorship Board That Has Banned Obscene Movies for 65 Years*, WASH. POST, June 26, 1981 at B1; Saundra Saperstein, *Maryland Censor Board in Last Hurrah Views Hundreds of Porno Films*, WASH. POST, Jan. 14, 1981, at C1; Christopher Sullivan, *Censor Snipped by Maryland Legislature*, DALLAS MORNING NEWS, Jul. 12, 1981, at 7C.

57 Ordinance of the City of Chicago, Act of Nov. 4, 1907, § 1 (Prohibiting the exhibition of obscene and immoral pictures and regulating the exhibition of pictures of the classes and kinds commonly shown in mutoscopes, kinetoscopes, cinematographs and penny arcades).

58 *Id.* § 3.

59 Block v. City of Chicago, 239 Ill. 251 (1909). For the events that led to the adoption of the ordinance and the first years of enforcement, see Kathleen D. McCarthy, *Nickel Vice and Virtue: Movie Censorship in Chicago, 1907-1915*, 5 J. POPULAR FILM 37 (1976).

60 *See, e.g.*, KEVIN BROWNLOW, BEHIND THE MASK OF INNOCENCE: SEX, VIOLENCE, PREJUDICE, CRIME: FILMS OF SOCIAL CONSCIENCE IN THE SILENT ERA 4–-8 (1990); LEE GRIEVESON, POLICING CINEMA: MOVIES AND CENSORSHIP IN EARLY-TWENTIETH CENTURY AMERICA 76–78 (2004); RICHARD S. RANDALL, CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM 11 (1968); PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 295–96 (2004); WITTERN-KELLER, *supra* note 31, at 22; Wertheimer, *supra* note 37, at 166 ("Late in 1907, the City of Chicago became the nation's first jurisdiction to pass . . . a censorship law aimed exclusively at motion pictures.").

61 Orbach, *Prizefighting*, *supra* note 9.

62 *Id.*

63 *Id.*

64 *Id.*

The legislative innovation that the 1907 Chicago ordinance introduced was the incorporation of immorality and obscenity standards into film censorship. "Immorality" and "obscenity" governed the law and politics of censorship long before the emergence of the First Amendment jurisprudence.[65] The 1907 Chicago ordinance formally introduced these terms into the lexicon of the motion picture industry, and they have remained with the industry since that time.[66] The *Miracle* decision and subsequent legal developments altered the legal meanings of immorality and obscenity as applied to censorship in the motion picture industry and subjected them to existing First Amendment jurisprudence.[67]

2. The Obscenity Standard

Under the First Amendment obscenity standards, the primary rule that governs censorship in the motion picture industry is the 1973 test articulated in *Miller v. California*.[68] Written by Chief Justice Warren Burger, the *Miller* obscenity test consists of three parts: (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[69]

Writing for the majority in *Miller*, Chief Justice Burger addressed the commercialization of obscenity, stating that "to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom."[70] In essence, this legal intuition echoes the logic of Senator James Bradley, who in 1894 vetoed the exhibition of Carmencita's Butterfly Dance in Asbury Park.[71] Screening of perfectly legal activities could be prohibited because the cinematic depiction of legal activities would "shock the sensibilities"[72] of the local community, in Senator

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65 *See generally* BROUN & LEECH, *supra* note 30; ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1946); FULLER, *supra* note 30; HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA (2002); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

66 Prior to 1907, the standards played a role in the industry though courts. *See, e.g.*, Barnes v. Miner, 122 F. 480 (C.C.S.D.N.Y. 1903) (holding that copyright law did not protect immoral motion pictures).

67 For the perceptions of obscenity in American courts during the *Miracle* decision, see William B. Lockhart & Robert C. McClure, *Obscenity in the Courts*, 20 L. & CONTEMP. PROB. 587 (1955).

68 Miller v. California, 413 U.S. 15 (1973).

69 *Id.* at 24 (citations omitted).

70 *Id.* at 34.

71 *See supra* notes 3–7 and accompanying text.

72 *Barred by Bradley*, *supra* note 3.

Bradley's words, or "appeal[] to the prurient interest"[73] in Chief Justice Burger's words.

This legal standard focuses on the availability of works to the public; availability that in itself is perceived to offend public standards of decency. The standard intends to eliminate the ability to consume films that depict legal but "offensive" activities, even though no person is required to watch the films or to be exposed to their content.[74] This standard, as articulated by Senator Bradley and by the Supreme Court, is a local standard.

Two years after *Miller*, in *Paris Adult Theatre I v. Slaton*, Chief Justice Burger returned to the *Miller* obscenity test and examined the question of whether obscene films acquire constitutional immunity from state regulation because they are exhibited only to consenting adults.[75] He concluded that states have a legitimate interest in regulating the use of obscene material in local commerce in all places of public accommodation[76] because of "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[77]

3. Child Pornography and Prizefighting

Since articulating the obscenity standard in *Miller* in 1973, the Supreme Court's application of censorship has been quite consistent with one exception. In 1982, in *New York v. Ferber*,[78] the Court expanded the scope of the First Amendment to ban child pornography, finding that the state's interest in protecting children from participating in the production of these content products was strong enough to justify any restrictions that would undermine the market for child pornography, including bans on private possession of materials.[79]

The *Ferber* ban on child pornography had the same purpose as the late-nineteenth century ban on exhibitions of boxing films: both were censorship laws intended to prohibit depictions of illegal conduct. At the turn of nineteenth century, social and religious groups mobilized political capital to ban both boxing and the commercialization of the sport through moving pictures.[80] In the twentieth century, social and political groups lobbied for laws to ban sex with minors and restrict the

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73 *Miller*, 413 U.S. at 24.
74 The restrictions on obscene films applied only to consumptions in public places. In *Stanley v. Georgia*, 394 U.S. 557, 564–65 (1969), the Supreme Court held that obscenity regulation could not reach the privacy of one's own home.
75 Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
76 *Id.* at 57–59.
77 *Id.* at 58. *See generally* Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005).
78 New York v. Ferber, 458 U.S. 747 (1982).
79 *Id.*
80 *See* Orbach, *Prizefighting*, *supra* note 9; Orbach, *Johnson-Jeffries*, *supra* note 35.

use of minors in the porn film industry.[81] The *Ferber* court stressed this theme, stating that "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[82]

Consistent with this logic, twenty years later, in *Ashcroft v. Free Speech Coalition*, the Court refused to include virtual child pornography in the child pornography category of unprotected speech. When adult actors portray minors or a computer generates images, no crime is actually committed.[83] Writing for the Court, Justice Anthony Kennedy clarified that "*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated."[84]

In response to *Ashcroft*, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003.[85] The PROTECT Act imposes some restrictions on trade in child pornography, including virtual child pornography. In *United States v. Williams*,[86] the Supreme Court reviewed these restrictions, holding that the First Amendment does not protect offers or requests to trade in or transfer child pornography, including virtual child pornography.[87] Once again, this outcome mirrors the censorship of boxing films.

In July 1912, President William Howard Taft signed into law "An Act To prohibit the importation and the interstate transportation of films or other pictorial representations of prize fights, and for other purposes."[88] In 1894, when motion picture technologies were introduced to the public, motion picture entrepreneurs started producing prizefighting films even though boxing was illegal in most states.[89] The new medium of expression commercialized a sport that until then was relatively unprofitable.[90] The popularity of prizefighting films led to massive censorship campaigns, but all attempts to pass a federal bill failed until 1912.[91] The rise of Jack Johnson as the first black heavyweight champion of the world, and even worse in the minds of many—an undefeated champion—finally convinced Congress that

81 *See, e.g.*, Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001).
82 *Ferber*, 458 U.S. at 761–62 (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).
83 Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002).
84 *Id.* at 250–51.
85 Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18, 28, 42 U.S.C.).
86 United States v. Williams, 553 U.S. 285, 289 (2008).
87 *Id.* at 299 ("In sum, we hold that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.").
88 Pub. L. No. 62-246, 37 Stat. 240 (1912) (repealed 1940).
89 Orbach, *Prizefighting*, *supra* note 9. *See also supra* notes 7–10 and accompanying text.
90 Orbach, *Prizefighting*, *supra* note 9.
91 *Id.*; Orbach, *Johnson-Jeffries*, *supra* note 35.

action was needed, resulting in the 1912 law banning importation and interstate transportation of prize fighting films.[92]

By June 1938, boxing was legal in most states, but interstate transportation of boxing films was still illegal. Joe Louis, an African-American heavyweight champion of the world, met Adolf Hitler's favorite German boxer, Max Schmeling, in a fight that for many symbolized much more than an athletic competition.[93] Louis knocked out Schmeling, but the American public were unable to watch the victory. Pressured by this event, but slow to act, Congress finally repealed the ban on interstate transportation of prizefighting films in June 1940.[94]

This discussion of the analogy between child pornography and boxing films is about the process of censorship of illegal conduct, despite the radically different characteristics of the proscribed conduct. The striking differences between the crimes only emphasize the similarities in the processes of their censorship. Lawmakers ban film genres that film illegal conduct, even though the illegal conduct is included for the purpose of marketing movies to audiences who are interested in watching illegal conduct. Yet, thus far, censors have targeted genres, rather than films, that commercialize crimes. The reason is that, despite concerns regarding the potentially harmful influence of motion pictures throughout the history of the industry, questions related to the censorship of crimes on the screen have never been answered. This omission complicated the analysis of crush films for law enforcement agencies and lawmakers.

II. CRUSHING ANIMAL CRUELTY ON SCREEN

A. *Outlawing Animal Cruelty*

1. The Humane Society Exposes Crush Videos

In 1998, the Humane Society of the United States contacted the office of the District Attorney for Ventura County, California, to complain about a relatively unknown film genre—"crush videos."[95] The films featured women, barefoot or in spiked heels, slowly crushing small animals to death. The films appealed to individuals with a

92 For the rise of Jack Johnson as the undefeated champion of the world and the responsive censorship waves, see Orbach, *Johnson-Jeffries*, *supra* note 35.

93 For this match and preceding events, see RICHARD BAK, JOE LOUIS, THE GREAT BLACK HOPE (1996); DAVID MARGOLICK, BEYOND GLORY: JOE LOUIS VS. MAX SCHMELING, AND THE WORLD ON THE BRINK (2005); PATRICK MYLER, RING OF HATE: JOE LOUIS VS. MAX SCHMELING: THE FIGHT OF THE CENTURY (2005).

94 Act of June 29, 1940, ch. 443, Pub. L. No. 76-673, 54 Stat. 686 (1940).

95 *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999*: *Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 18 (1999) [hereinafter *Punishing Depictions of Animal Cruelty*] (statement of Rep. Robert C. Scott).

peculiar sexual fetish.[96] The investigation that followed recovered information revealing a national market with over 2,000 available titles for which consumers were paying $30 to $300 per video.[97]

The underlying acts of animal cruelty were illegal in every state,[98] but law enforcement officers struggled to detect and convict wrongdoers despite having films of the acts as evidence. It was difficult to identify the participants in the films, because in most videos of this genre only the women's legs appeared.[99] It was also challenging to determine where and when the films were produced, and this uncertainty provided potential defendants with jurisdictional and statute of limitation defenses to avoid conviction.[100] At the time, state and federal laws did not prohibit the production, sale, or possession of crush films or any films that depicted animal cruelty.[101] Censorship laws did not expressly address animal cruelty. Crush videos were commonly available through the Internet and were "almost exclusively distributed for sale through interstate or foreign commerce," and thus appeared an appropriate subject for federal regulation.[102]

2. Legislative Drafting

Representative Elton Gallegly of California decided to bring the crush video problem that his jurisdiction was struggling to address to Congress. With the help of "[s]ome of the leading constitutional lawyers in the nation," he drafted a bill "very narrowly" to target "the profits made from promoting illegal cruel acts toward animals."[103] In May 1999, Gallegly introduced the bill, H.R. 1887, in the House with a strong statement:

> Sick criminals are taking advantage of the loopholes in the local law and the lack of federal law on animal cruelty videos. This is a serious problem. Thousands of these videos are being sold. Thousands of dollars are being made. By not closing these loopholes and allowing this sick behavior, we are encouraging people to profit from violating the state animal cruelty laws. This must be stopped!
>
> H.R. 1887 will put a stop to this offensive behavior. This legislation is narrowly tailored to prohibit the creation, sale or possession of a depiction of animal cruelty in interstate commerce for commercial

96 *Id.* at 8.
97 *Id.* at 20 (statement of Rep. Elton Gallegly); *id.* at 53 (statement of Susan Creede, Investigator, Ventura County District Attorney Office).
98 *Id.* at 8 (statement of Chairman McCollum).
99 *Id.* at 42 (statement of Tom Connors, Deputy District Attorney, Ventura County District Attorney Office).
100 *Id.* at 2–3, 19, 22; 145 CONG. REC. E1067 (daily ed. May 24, 1999) (statement of Rep. Elton Gallegly); H.R. REP. NO. 106-397, at 3 (1999).
101 145 CONG. REC. E1067 (daily ed. May 24, 1999) (statement of Rep. Elton Gallegly).
102 H.R. REP. NO. 106-397, at 2 (1999).
103 *Punishing Depictions of Animal Cruelty*, *supra* note 95, at 21, 23 (statement of Rep. Elton Gallegly).

> gain. H.R. 1887 does not preempt state laws on animal cruelty. Rather, it incorporates the animal cruelty law of the state where the offense occurs.
>
> I urge all of my colleagues to join me in pursuing this legislation which will put an end to profiting from these disgusting criminal acts.[104]

H.R. 1887 banned the creation, sale, or possession of a "depiction of animal cruelty"[105] when the person who engages in such activity has knowledge of it and does so "with the intention of placing that depiction in interstate or foreign commerce for commercial gain."[106] The bill defined "depiction of animal cruelty" as:

> [A]ny visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct 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, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State.[107]

Despite Gallegly's expressed commitment to draft the bill very narrowly to protect freedom of speech,[108] the original bill was plainly broad. H.R. 1887 banned the use of films for educational purposes and by relying on state law, expanded the scope of illegality. In September 1999, four months after introducing H.R. 1887, Representative Gallegly acknowledged that it contained some "unforeseen problems," and he introduced an amendment to his original bill.[109] The amendment defined an exception to the term "animal cruelty": "any depiction that has serious political, scientific, educational, historical, or artistic value."[110]

The House Committee Report that accompanied H.R. 1887 included a section-by-section analysis and addressed the exception. The Committee explained that the exception was "designed to ensure that the creation, sale, and possession of material with at least some value recognized by society is not hampered by the statute."[111] However, it placed the burden of proving the value of these materials on a

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104 145 CONG. REC. E1067 (daily ed. May 24, 1999) (statement of Rep. Elton Gallegly).
105 H.R. 1887, 106th Cong. § 1 (1999).
106 *Id.*
107 *Id.* § (1)(b)(1).
108 *Punishing Depictions of Animal Cruelty*, *supra* note 95, at 21, 23 (statement of Rep. Elton Gallegly).
109 *Id.* at 21.
110 *Id*. at 22.
111 H.R. REP. NO. 106-397, at 7 (1999).

defendant.[112] Examples of valuable materials to which the Committee believed H.R. 1887 did not apply included the following:

> [T]elevision documentaries about Spain which depict bullfighting or which show poachers killing elephants for their tusks, Doris Day Animal League training materials on the problem of cruelty to animals, and information packets sent by animal rights organizations to community and political leaders urging them to act to combat the problem of cruelty to animals.[113]

3. A Limited Congressional Hearing

In September 1999, the Subcommittee on Crime of the Committee on the Judiciary held a one-day hearing on H.R. 1887. The witnesses that appeared before the Subcommittee included Representative Gallegly, two members of the Ventura County District Attorney office who had investigated the crush films, and an animal right activist.[114] The Subcommittee did not invite any First Amendment experts or other potentially interested parties. The Chairman, however, felt that it was "entirely appropriate . . . to consider the bill [that day], in part for the interest [of] preventing harm to animals [and] we also know that those who commit the most violent crimes and especially those who commit murders often have progressed to that point after first killing animals."[115]

The link between crush films and other violent crimes toward humans was a featured theme in the legislative process of H.R. 1887. Representative Gallegly and others perceived it as a strong justification for H.R. 1887.[116] While animal cruelty may be related to other forms of violence,[117] H.R. 1887 generally focused on consumers of crush videos who were not necessarily directly engaged in animal cruelty.[118] The House Report that accompanied the bill specifically emphasized that the bill "does not punish the acts of cruelty themselves, rather it prohibits the creation, sale, or possession of depictions of such cruelty with the intent to place them into interstate or foreign commerce for commercial

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112 *Id.*
113 *Id.*
114 *Punishing Depictions of Animal Cruelty*, *supra* note 95, at 5.
115 *Id.* at 9 (statement of Rep. Bill McCollum, Chairman).
116 *See, e.g.*, *id.* at 21, 23 (statement of Rep. Elton Gallegly) ("Many studies have found that individuals who commit violent acts on animals later commit violent acts on people. . . . By putting an end to these disgusting videos, we could also help stop the sick behavior of these individuals before it involves more serious crimes toward people."). *See also* 145 CONG. REC. E1067 (daily ed. May 24, 1999) (statement of Rep. Elton Gallegly); H.R. REP. NO. 106-397, at 4 (1999).
117 *See, e.g.*, CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION (Randall Lockwood & Frank Ascione eds., 1998); LINDA MERZ-PEREZ & KATHLEEN M. HEIDE, ANIMAL CRUELTY: PATHWAY TO VIOLENCE AGAINST PEOPLE (2003).
118 *See* 145 CONG. REC. E1067 (daily ed. May 24, 1999) (statement of Rep. Elton Gallegly), H.R. REP. NO. 106-397, at 2 (explaining that the consumers of crush videos are "persons with a very specific sexual fetish who find [crush videos] sexually arousing or otherwise exciting").

gain."[119] Thus, at least one of the justifications that influenced Congress relied on a logical leap: the drafters had in mind concerns regarding individuals who engage in animal cruelty, but their bill did not target this group—rather it focused on individuals who derive pleasure from watching animal cruelty.

During the congressional hearing, the Californian Deputy District Attorney who worked with Representative Gallegly stressed:

> The legislation will eliminate the need to identify the participants [in crush films] because we [will] no longer [be] after the production part . . . but instead we [will be] going after the commercial incentive of it, the actual selling of it or possession to sell. Additionally, jurisdictional and statute of limitations will no longer be an impediment.[120]

The Deputy District Attorney also explained that H.R. 1887 will be "directed to the method of killing and not the killing itself."[121] He noted that "[m]illions of animals are legally killed every day in slaughter houses, governmental animal control facilities, veterinarian offices and the like" in methods that are "adequately controlled by current regulations and do not fall under animal cruelty statutes."[122]

The House Committee Report that accompanied H.R. 1887 was titled "Punishing Depictions of Animal Cruelty," and indeed focused on the federal government's "interest in regulating the treatment of animals."[123] The Report emphasized anti-animal cruelty values and the importance of "[o]rganizations which work to improve the treatment of animals in our society [and] are active participants in political dialog."[124] Thus, the Committee recognized "the widespread belief that animals, as living things, are entitled to certain minimal standards of treatment by humans."[125] This recognition led the Committee to conclude that "it is proper for our nation's laws [to] reflect society's desire that animals be treated appropriately."[126] Put simply, censorship of animal cruelty appeared as the corresponding regulatory measure to the anti-animal cruelty social values.

The Committee further expressed the view that H.R. 1887 was "narrowly drawn to proscribe only a limited class of material [that] has little or no social utility,"[127] and stressed its firm belief that "no

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119 H.R. REP. NO. 106-397, at 3.
120 *Punishing Depictions of Animal Cruelty*, *supra* note 95, at 43 (statement of Tom Connors, Deputy District Attorney, Ventura County District Attorney Office).
121 *Id*. at 46.
122 *Id*.
123 H.R. REP. NO. 106-397, at 3.
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.* at 4.

reasonable person would find any redeeming value in the material proscribed by the new statute."[128]

The House Committee Report included the dissenting view of two Congressmen who questioned the constitutionality of a federal law prohibiting crush videos.[129] They argued that, while all states have laws that prohibit the underlying animal cruelty inherent in crush videos, the "films of animals being crushed are communications about the acts depicted, not the doing of the acts. Shooting, possessing or selling such films are distinct from the act [sic] crushing an animal."[130]

The dissent compared the crush videos "to 'cops on the beat' shows using closed-circuit films of actual robberies or other crimes in order to compete for ratings and the advertising revenues these ratings bring in."[131] The dissent concluded that "[c]ommunication through film is speech which is protected by the First Amendment to the United States Constitution,"[132] and "although H.R. 1887 is designed to achieve a worthy goal, it fails to do so consistent with the First Amendment requirements[;] . . . speech, including detestable speech, can be abridged only where there is a compelling governmental reason to do so and the abridgement is narrowly tailored."[133]

4. Congress Bans Depictions of Animal Cruelty

In October 1999, the House passed H.R. 1887 by a vote of 372 to 42. A month later, the Senate passed the bill unanimously. On December 9, 1999, President Clinton signed the bill into law, expressing support for the objectives of the legislation that he believed "should assist in reducing or eliminating some of these deplorable and indefensible practices."[134] President Clinton, however, warned that "[i]t is important to avoid constitutional challenge to this legislation and to ensure that the Act does not chill protected speech."[135] To protect the law, President Clinton declared that:

> I will broadly construe the Act's exception and will interpret it to require a determination of the value of the depiction as part of a work or communication, taken as a whole. So construed, the Act would prohibit the types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex. I will direct the Department of Justice to enforce the

128 *Id.* at 5.
129 *Id.* at 10 (dissenting views of Rep. Robert C. Scott & Rep. Melvin L. Watt).
130 *Id.* at 10.
131 *Id.* at 8.
132 *Id.*
133 *Id.* at 10.
134 Presidential Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty, 2 PUB. PAPERS 2245 (Dec. 9, 1999).
135 *Id.*

Act accordingly.[136]

H.R. 1887 became law and was codified as 18 U.S.C. § 48, *Depiction of Animal Cruelty*.

B. *United States v. Stevens*

Censorship laws probably cannot avoid constitutional challenges, and the 1999 Act was no exception. In April 2010, the Supreme Court struck down the law for its overbreadth in a case involving the trade in dog fighting films.[137]

Robert Stevens of Virginia was an entrepreneur who owned a business for the sale of certain specialized videos and merchandise.[138] He occasionally advertised his products in *Sporting Dog Journal*, an underground publication featuring articles on illegal dogfighting.[139] In 2003, law enforcement officers arranged to buy from him three videotapes that depicted dogfighting. Two tapes showed old films that were produced in the United States in the 1960s and 1970s. The third one was a gruesome imported Japanese film that showed a pit bull attacking a domestic farm pig.[140] Stevens supplemented the three videos with introductions, narration and commentary. He also provided buyers with complementary related literature that he had written himself.[141]

In March 2004, a federal grand jury returned a three-count indictment against Stevens.[142] "All three counts charged Stevens with knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce for commercial gain, in violation of 18 U.S.C. § 48."[143] In November of 2004, "the District Court denied Stevens' motion to dismiss the indictment based on his assertion that § 48 abridged his First Amendment right to freedom of speech," holding that the statute was not substantially overbroad because the exceptions clause sufficiently narrowed the statute to constitutional applications.[144] The case proceeded to trial as the first prosecution under § 48 to be tried.[145] In January 2005, a jury returned a verdict of guilty on each of the three counts. "The District Court sentenced Stevens to thirty-seven months of imprisonment and three years of supervised release."[146]

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136 *Id*.
137 United States v. Stevens, 130 S.Ct. 1577 (2010).
138 United States v. Stevens, 533 F.3d 218, 220–21 (3d Cir. 2008) (en banc).
139 *Id*. at 221.
140 *Id*.
141 *Id*.
142 *Id*.
143 *Id*. at 220.
144 *Id*. at 221.
145 *Id*.
146 *Id*.

Stevens appealed his conviction to the Third Circuit. The en banc court declared § 48 facially unconstitutional and vacated Steven's conviction, holding that § 48 could not survive strict scrutiny as a content-based regulation of protected speech[147] and declining to recognize a new category of unprotected speech for animal cruelty.[148] The Third Circuit stressed that "[t]he *acts* of animal cruelty . . . are reprehensible, and indeed warrant strong legal sanctions,"[149] but distinguished the criminalization of animal cruelty from its depiction.[150]

The Government appealed the decision to the Supreme Court. In April 2010, in an 8-to-1 decision, the Supreme Court affirmed the Third Circuit's decision, holding that § 48 was "substantially overbroad, and therefore invalid under the First Amendment."[151]

While the legislative process of 18 U.S.C. § 48 solicited comments exclusively from animal-rights advocates, the Supreme Court received a diverse set of amici curiae briefs in support of Stevens, criticizing the constitutionality of § 48. The groups that filed these briefs included constitutional law scholars,[152] free speech and civil rights advocates,[153] media,[154] writers,[155] filmmakers, photographers, gun-rights advocates,[156] hunting organizations,[157] and dog-breeders.[158]

The Court also received briefs in support of § 48 from animal

147 *Id*. at 232–35.
148 *Id*. at 232.
149 *Id*. at 223.
150 *Id*.
151 United States v. Stevens, 130 S. Ct. 1577, 1581-82 (2010).
152 Brief of Constitutional Law Scholars Bruce Ackerman et al. as Amici Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2331222.
153 Brief of First Amendment Lawyers Ass'n as Amicus Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2331224; Brief of DKT Liberty Project et al. as Amici Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2247129; Brief of Nat'l Coal. Against Censorship & Coll. Art Ass'n as Amici Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2248370; Brief for Cato Inst. as Amicus Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2331221 [hereinafter Brief for Cato Inst.]; Brief of Thomas Jefferson Ctr. for the Prot. of Free Expression as Amicus Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2349021; Brief of Reporters Comm. for Freedom of the Press et al. as Amici Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2219305 [hereinafter Brief of Reporters Comm. for Freedom of the Press].
154 Brief of Prof'l Outdoor Media Ass'n et al. as Amici Curiae in Support of Respondent, (No. 08-769), 2009 WL 2247128 [hereinafter Brief of Prof'l Outdoor Media Ass'n]; Brief of Ass'n of Am. Publishers, Inc. et al. as Amici Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2331225 [hereinafter Brief of Ass'n of Am. Publishers]; Brief of Reporters Comm. for Freedom of the Press, *supra* note 154.
155 Brief of Prof'l Outdoor Media Ass'n, *supra* note 154; Brief of Ass'n of Am. Publishers, *supra* note 154.
156 Brief of Nat'l Rifle Ass'n of Am., Inc. as Amicus Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769) 2009 WL 2349020; Brief of Nat'l Shooting Sports Found., Inc. as Amicus Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2349019; Brief of Cato Inst., *supra* note 153.
157 Brief of Safari Club Int'l et al. as Amici Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2331223.
158 Brief of Endangered Breed Ass'n et al. as Amicus Curiae in Support of Respondent, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 2388115.

rights organizations,[159] civil rights organizations,[160] a criminal law think tank,[161] and a group of twenty-six states.[162] The Government argued that depictions of animal cruelty should constitute a category of speech that the First Amendment does not protect.[163] Specifically, the Government argued that:

> Depictions of illegal acts of animal cruelty made, sold, or possessed for commercial gain lack expressive value, and they are integrally linked to harms to animals, humans, and society. Those depictions share critical characteristics with other kinds of unprotected speech, such as child pornography and obscenity. Accordingly, they may be regulated as unprotected speech.[164]

Writing for the majority, Chief Justice Roberts began by pointing out that § 48 regulated expression based on content, while "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[165] Chief Justice Roberts stressed that, while "the prohibition of animal cruelty itself has a long history in American law," there was no "similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment."[166] Thus, while Roberts acknowledged the possibility that there might be some unidentified categories of unprotected speech, he decisively held that there was no evidence that depictions of animal cruelty were among them.[167]

Refusing to carve a new exception out of the First Amendment for depictions of animal cruelty, Justice Roberts reviewed the constitutionality of § 48 and held that it "create[d] a criminal prohibition of alarming breadth."[168] First and foremost, Justice Roberts pointed out

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159 Brief of Nw. Animal Rights Network as Amicus Curiae in Support of Petitioner, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1703215; Brief of Am. Soc'y for the Prevention of Cruelty to Animals as Amicus Curiae in Support of Petitioner, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1703216; Brief Int'l Soc'y for Animal Rights as Amicus Curiae in Support of Petitioner, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1655154; Brief of Humane Soc'y of the U.S. as Amicus Curiae in Support of Petitioner, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1681460; Brief Amicus Curiae of Animal Legal Def. Fund in Support of Petitioner, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1703212.

160 Brief of Wash. Legal Found. & Allied Educ. Found. as Amici Curiae in Support of Petitioner, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1703211.

161 Brief of Ctr. on the Admin. of Criminal Law as Amicus Curiae in Support of Petitioner, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1703213.

162 Brief of Florida et al. as Amici Curiae in Support of Petitioner, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1703214.

163 Brief for Petitioner, United States v. Stevens, 130 S.Ct. 1577 (2010) (No. 08-769), 2009 WL 1615365.

164 *Id*. at 10.

165 United States v. Stevens, 130 S.Ct. 1577, 1584 (2010) (quoting Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002)).

166 *Id*. at 1585.

167 *Id*. at 1586.

168 *Id*. at 1588.

that, despite the legislative title, the statutory language did not require the depicted conduct to be cruel.[169] Section 48 banned "any . . . depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed"; "wounded" and "killed," however, do not necessarily convey cruelty.[170]

Justice Roberts then pointed out that the illegality requirement of § 48 was not limited to animal cruelty. Myriad federal and state laws impose restrictions on wounding and killing of animals: bans on killing of endangered species, permit requirements, seasonal and geographic rules, quota regulations, and others. These laws are not designed to guard against animal cruelty.[171] Justice Roberts also noted that state laws present substantial variance in restrictions on treatment of animals; however, § 48 effectively utilized the differences among states to expand the national standard of illegality. The statute prohibited any depiction of activity, if the activity was illegal in the state in which "the creation, sale, or possession takes place, regardless of whether the . . . wounding . . . or killing took place in [that] State."[172]

Justice Roberts dismissed the Government's promise that § 48 would be construed to reach only extreme animal cruelty, noting that Stevens' case was "itself evidence of the danger in putting faith in government representations of prosecutorial restraint."[173] When President Clinton signed the statute, the promise was that the statute would cover only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex," but Stevens' videos did not fit this description.[174]

C. *Banning Crush Videos*

The Supreme Court struck down 18 U.S.C. § 48, the Depiction of Animal Cruelty Statute, on April 20, 2010. The next day, Representative Elton Gallegly rushed to fill the void with a bill to amend § 48 that would ban "animal crush videos,"[175] rather than simply "depictions of animal cruelty."[176]

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169 *Id*.
170 *Id.*
171 *Id*.
172 *Id*. at 1589 (quoting 18 U.S.C. § 48(c)(1)).
173 *Id*. at 1591.
174 *Id*.
175 H.R. 5092, 111th Cong. (2010). The bill defined "animal crush video" as:

> [A]ny visual depiction, including any photograph, motion-picture film, video recording, or electronic image, which depicts animals being intentionally crushed, burned, drowned, or impaled, that
> (A) depicts actual conduct in which a living animal is tortured, maimed, or mutilated that violates any criminal prohibition on intentional cruelty under Federal law or the law of the State in which the depiction is sold; and
> (B) taken as a whole, does not have religious, political, scientific, educational, journalistic, historical, or artistic value.

Id.
176 18 U.S.C. § 48 (2006).

Taking a literal approach to the Supreme Court's criticisms of § 48, Gallegly removed the words "wounded or killed," narrowed the scope of the prohibited activity to that which "violates any criminal prohibition on intentional cruelty under Federal law or the law of the State in which the depiction is sold," and included an exception for videos of "religious, political, scientific, educational, journalistic, historical, or artistic value."[177] Gallegly did not attempt to craft the bill to meet one of the "well-defined and narrowly limited classes of speech,"[178] such as obscenity[179] or speech integral to criminal conduct,[180] "the prevention and punishment of which have never been thought to raise any Constitutional problem.[181] Instead, he relied on a refined definition and an exceptions clause to skirt First Amendment concerns.

The bill received overwhelming bipartisan support in the House—341 Representatives joined Gallegly as cosponsors.

A month later, Representative Gary Peters of Michigan introduced his own version of the crush video bill: H.R. 5337: Animal Torture Prevention Act of 2010.[182] Representative Peters' bill used similar language to that in Representative Gallegly's bill, with the significant addition of a requirement that the conduct "appeal[] to the prurient interest."[183]

On May 26, 2010, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the *Stevens* decision.[184] The Subcommittee received testimony from two constitutional law scholars[185] and one practitioner[186] as to the meaning

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177 H.R. 5092.

178 United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

179 Roth v. United States, 354 U.S. 476, 483 (1957).

180 Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

181 *Stevens*, 130 S. Ct. 1577, 1584 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

182 H.R. 5337, 111th Cong. (2010).

183 H.R. 5337 § 3(a). Rep. Peter's bill defined "extreme animal cruelty" as:

> [A]ny visual depiction, including any photograph, motion-picture film, video recording, or electronic image, that--
>
> (A) depicts actual conduct in which one or more animals is tortured, maimed, mutilated, or subjected to other acts of extreme animal cruelty, if such conduct is committed for the primary purpose of creating the depiction;
>
> (B) depicts conduct that violates a criminal prohibition of intentional cruelty to animals under Federal law or the law of the State in which the depiction is created, sold, or distributed;
>
> (C) appeals to the prurient interest; and
>
> (D) taken as a whole, does not have more than de minimis religious, political, scientific, educational, journalistic, historical, or artistic value . . . .

Id.

184 *United States v. Stevens: The Supreme Court's Decision Invalidating the Crush Video Statute, Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Judiciary Comm.*, 111th Cong. (2010) [hereinafter *Hearing on Stevens*].

185 Professor Nathaniel Persily of Columbia Law School and Professor Stephen Vladeck of American University Washington College of Law. *Id.* at 29, 32.

186 J. Scott Ballenger, a Partner at Latham & Watkins. *Id*. at 48.

of the Court's opinion in Stevens and its implications for future legislation on crush videos. The witnesses told the Subcommittee that the obscenity doctrine, as articulated by the Supreme Court in *Miller v. California*, could be used to ban crush videos.[187] Under present obscenity laws, Congress can ban interstate and foreign commerce in depictions of acts of illegal animal cruelty that appeal to the 'prurient interest,' are 'patently offensive,' and 'lack serious literary, artistic, political or scientific value.'[188] Thus, the witnesses predicted that the Supreme Court would be receptive of a narrowly-tailored law that regulated interstate sale of crush videos.[189]

In late June 2010, Representative Gallegly introduced yet another version of the crush video bill, H.R. 5566: Animal Crush Video Prohibition Act of 2010. H.R. 5566 incorporated language from the two earlier bills,[190] providing a more nuanced definition of the term "animal crush video."[191] The revised bill once again received broad bipartisan support, drawing 262 Representatives as cosponsors.

The version of H.R. 5566 that proceeded to the Senate included legislative findings that the federal government has "a compelling interest in preventing animal cruelty," that states criminalize animal cruelty, that the criminal acts are "an integral part of the production and market for crush videos[,]that the "creation and sale of crush videos . . . are intrinsically related to the underlying acts of criminal conduct [, that t]he United States has a long history of prohibiting the interstate sale of obscene and illegal materials," and that crush videos "appeal to the prurient interest and are obscene."[192] The bill provided an exclusion for visual depictions of "customary and normal veterinary or agricultural husbandry practices" and for "hunting, trapping, or fishing."[193]

The Senate produced its own version of the crush video legislation. On September 27, 2010, Senator Kyl introduced S. 3841, The Animal Crush Video Prohibition Act of 2010.[194] Senator Kyl's introductory statement underscored the obscene nature of crush videos, stressing that his bill "would ban animal crush videos that fit squarely within the obscenity doctrine, a well-established exception to the First

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187 *Hearing on Stevens*, *supra* note 182, at 39 (statement of Nathaniel Persily); *id.* at 48 (statement of Scott Ballenger); *id.* at 65 (statement of Stephen Vladeck).
The easiest and the safest way of coming at this from a legal perspective would be to confine section 48 entirely to materials that meet the legal definition of obscenity. The Supreme Court has held clearly and repeatedly that obscene materials have no First Amendment protection, and if materials that are obscene can be banned, then, of course, materials that are obscene and involve the torture of animals can also be banned. *Id.* at 48 (statement of Scott Ballenger).
188 *Id.* at 79 (statement of Scott Ballenger, referencing Miller v. California, 413 U.S. 15, 24 (1973)).
189 H.R. REP. NO. 111-549, at 4–5 (2010).
190 H.R. 5092, 111th Cong. (2010); H.R. 5337, 111th Cong. (2010).
191 H.R. 5566, 111th Cong. (2010).
192 *Id.* § 2.
193 *Id.* § 3(b)(1)–(2).
194 156 CONG. REC. S7509 (daily ed. Sept. 27, 2010) (statement of Sen. Kyl).

Amendment."[195] Senator Kyl also referred to the "long-history of prohibiting speech that is essential to criminal conduct," stating that "[i]n the case of animal crush videos, the videos themselves drive the criminal conduct depicted in them."[196]

The final form of H.R. 5566 captured the language of Senator Kyl's bill and focused on the obscene nature of crush videos as a specific criterion for their prohibition.[197] The bill defined "animal crush video" as

> [A]ny photograph, motion-picture film, video or digital recording, or electronic image that—
>
> (1) depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury . . . ; and
>
> (2) is obscene.[198]

H.R. 5566 took the approach that animal crush videos are one form of obscenity and thus constitute unprotected speech under the present law.

The legislative findings in H.R. 5566 expressly articulated the view that crush films belong to an established category of unprotected speech. The findings provided that "[t]he United States has a long history of prohibiting the interstate sale, marketing, advertising, exchange, and distribution of obscene material and speech that is integral to criminal conduct."[199] The findings also stressed the compelling interest the government has in preventing animal cruelty[200] and that "[i]n the judgment of Congress, many animal crush videos are obscene in the sense that the depictions . . . (A) appeal to the prurient interest in sex; (B) are patently offensive; and (C) lack serious literary, artistic, political, or scientific value."[201] Thus, since "obscenity is an exception to speech protected under the First Amendment to the Constitution of the United States,"[202] the bill merely clarified the status of crush videos as unprotected speech.

Finally, H.R. 5566 specifically exempted visual depictions of "customary and normal veterinary or agricultural husbandry practices," "the slaughter of animals for food," and "hunting, trapping, or fishing."[203] The bill also exempted good-faith distribution to law

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195 *Id.* at S7509-10.
196 *Id*. at S7510.
197 H.R. 5566, 111th Cong. (2010) (as referred in Senate, July 22, 2010).
198 *Id.* § 3(a).
199 *Id.* § 2(1).
200 *Id.* § 2(2)–(3).
201 *Id.* § 2(6).
202 *Id.* § 2(5).
203 *Id.* § 3(e)(1)(A)–(C).

enforcement officers and to third parties to determine whether a referral to a law enforcement agency is appropriate.[204]

On December 9, 2010, the President signed into law H.R. 5566, the "Animal Crush Video Prohibition Act of 2010."[205]

III. CONCLUSION

Reasoning why the First Amendment should not protect motion pictures, in February 1915, the Supreme Court noted that films are "capable of evil."[206] This view was not novel in 1915 and has never vanished.[207] Concerns regarding the capacity of movies to influence individuals have served as the primary motivation for movie censorship. When the Supreme Court expanded the scope of the First Amendment to cover motion pictures, it pointed out that, even if films have the "capacity for evil," while this "may be relevant in determining the permissible scope of community control, it, . . . does not authorize substantially unbridled censorship . . . ."[208]

Despite the extensive discussion of movie censorship, the legality of one category of evil has never been addressed: the commercialization of crimes through films. Motion pictures often portray illegal conduct—theft, robbery, embezzlement, arson, drug dealing, assault, rape, murder, treason, and many other forms of illegal conduct. The depictions of these illegal acts are usually staged. There are other instances when illegal conduct is caught on camera and is used in films—robbery, assault, conspiracy, and other crimes; rarely, these depictions motivate the filmed illegal conduct.[209] Several peculiar genres commercialize illegal conduct—child pornography, crush videos, and snuff films (if they exist).[210] In the past, boxing films also fell into this category. The illegal conduct in these films is committed for the production of the product and designed specifically to appeal to the consumption preferences of certain movie viewers.Congress can close this loophole with a rule that bans the production of films that

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204 *Id.* § 3(e)(2).
205 Statement by the Press Secretary, The White House, Office of the Press Secretary, (Dec. 9, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/12/09/statement-press-secretary.
206 Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244 (1915).
207 For concerns regarding the evil influence of films prior to 1915, *see*, *e.g.*, McCarthy, *supra* note 59; J.E. Wallace Wallin, *The Moving Picture Relation to Education, Health, Delinquency and Crime*, 17 PEDAGOGICAL SEMINARY 129 (1910).
208 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).
209 Miscegenation and interracial relations were subject to censorship under the Code of Production and obscenity laws. The definitions of illegal conduct and motivations in the context of regulating interpersonal relationships are more complex. For the censorship of miscegenation and interracial relations, see THE BIRTH OF WHITENESS: RACE AND THE EMERGENCE OF U.S. CINEMA (Daniel Bernardi ed., 1996); SUSAN COURTNEY, HOLLYWOOD FANTASIES OF MISCEGENATION (2005). *See also* STEVEN D. CLASSEN, WATCHING JIM CROW: THE STRUGGLE OVER MISSISSIPPI TV, 1955-1969 (2004).
210 DAVID KEREKES & DAVID SLATER. KILLING FOR CULTURE: DEATH FILM FROM MONDO TO SNUFF (rev. ed. 1996).

commercialize illegal activities. History shows that this rule would be consistent with First Amendment tests.

Despite the obsession with film's capacity for evil, the legality of films that commercialize crimes has never been addressed. This Article explores the reasons for the neglect of this category of films. It shows that their legality has been neglected mostly due to historical reasons involving the evolution of movie censorship in the United States.

During the first six decades of commercial motion pictures, when the First Amendment did not protect movies, the legality of films that showed crimes could not be anything other than an academic question. Moreover, during the First Amendment era of motion pictures, the question of censoring crimes is one that the established industry has generally avoided. Nevertheless, the federal government and state legislatures have banned film genres whose production design involves the commission of an actual crime. This was the case with child pornography, boxing films, and crush videos. In the case of boxing films, the legal status of boxing changed, but the repeal of the ban on the genre was delayed. This delay offers some insights into the limitations of censorship of crimes through restrictions on genres, rather than on the depictions of illegal conduct. The Article therefore proposes a general rule for films that commercialize crimes.

This Article documents the process through which the United States banned crush videos. This study stresses how good intentions of lawmakers and interest groups may not be enough to accomplish any goal when the general legal landscape is complex and the participating players ignore the complexities. When a new genre of filmed crimes emerges, in which the filming commercializes the crime, this Article provides the necessary framework to address the general question of how to censor such films. Time to close the loophole.