

2012

Rethinking “Murderabilia”: How States Can Restrict Some Depictions of Crime as They Restrict Child Pornography

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Available at: <https://ir.lawnet.fordham.edu/iplj/vol22/iss2/3>

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Cover Page Footnote

Law Clerk, Hon. Sally D. Adkins, Court of Appeals of Maryland. I would like to thank Leonard Niehoff for his guidance and comments. I would also like to thank the IPLJ staff for their hard work editing this article. Finally, I would like to thank my family and friends for their constant support.

Rethinking “Murderabilia”: How States Can Restrict Some Depictions of Crime as They Restrict Child Pornography

Joseph C. Mauro*

Murderabilia refers to items whose commercial value stems from their relation to a notorious crime or criminal. To protect victims of crime from psychological harm, most states have passed laws restricting the sale of murderabilia. Many of these laws have been challenged on First Amendment grounds, and observers consider them to be of questionable constitutionality.

*I propose that the constitutional framework allowing states to restrict child pornography can solve this problem. In *New York v. Ferber*, the Supreme Court held that states may restrict child pornography as speech, without regard to its First Amendment value, because it is “intrinsically related” to crime in two ways—it creates an economic incentive to commit child abuse (to produce child pornography) and its circulation harms child victims by forcing them to recall their experiences. The same rationale applies to murderabilia, because it creates an economic incentive to commit crime and its circulation harms crime victims.*

Nevertheless, considering the range of speech that can be considered murderabilia—from bags of dirt to abstract paintings—laws that restrict murderabilia are more likely to run afoul of the First Amendment than child pornography laws. Therefore,

* Law Clerk, Hon. Sally D. Adkins, Court of Appeals of Maryland. I would like to thank Leonard Niehoff for his guidance and comments. I would also like to thank the IPLJ staff for their hard work editing this article. Finally, I would like to thank my family and friends for their constant support.

murderabilia laws must be strictly limited to the most harmful crimes, the most vulnerable victims, and the least expressive types of murderabilia. With properly limited laws, states should be free to restrict murderabilia as they restrict child pornography under Ferber.

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INTRODUCTION

A website called “murderauction.com” sells items such as a bag of dirt taken from the grave of James Byrd Jr.,¹ the man who was beaten, chained to the back of a truck, and dragged to his death over the course of about three miles.² The dirt is available for \$35.00.³ Other websites sell similar items—for example, a letter belonging to Coral Eugene Watts, a man who confessed to murdering thirteen women.⁴

Victims and their families sometimes protest these sales. The mother of one of Watts’ victims said, “I had reached the point after he was convicted and sentenced to life without parole that I could . . . remember Elena without seeing his face. All that has come back now.”⁵ Sentiments like these help explain why forty states have enacted laws restricting the sale of “murderabilia”—items whose commercial value stems from their relation to a notorious crime or criminal.⁶

¹ Renée C. Lee, *Byrd Murder Items Won’t be Sold, Victim’s Family Happy Web Site Called Off Auction*, HOUS. CHRON. Apr. 3, 2010, at B2.

² *Three Whites Indicted in Dragging Death of Black Man in Texas*, CNN.COM (July 6, 1998, 11:07 PM), <http://edition.cnn.com/US/9807/06/dragging.death.02/>.

³ Lee, *supra* note 1, at B2.

⁴ Larry Schooler, *Texas Law Would Prevent Sale of ‘Murderabilia’*, NPR.ORG (July 30, 2007), <http://www.npr.org/templates/story/story.php?storyId=12350079>.

⁵ *Id.*

⁶ See Karen M. Ecker & Margot J. O’Brien, *Simon & Schuster, Inc. v. Fischetti: Can New York’s Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075, 1075–76 (1991) (footnotes omitted). While there are a few definitions of this relatively new term, I have chosen a broad definition of “murderabilia” because it seems more logical to group together all items that are commercially valuable for their connection to crime than to attempt to break such items down into sub-categories (especially given that the item’s commercial value is the basis for most laws that attempt to regulate such items). See also Suna Chang, Note and Comment, *The Prodigal “Son” Returns: An Assessment of Current “Son of Sam” Laws and the Reality of the Online Murderabilia Marketplace*, 31 RUTGERS COMP. & TECH. L.J. 430, 432 (2005) (defining murderabilia as “crime-related memorabilia”); Ellen Hurley, Note, *Overkill: An Exaggerated Response to the Sale of Murderabilia*, 42 IND. L. REV. 411, 412 (2009) (defining murderabilia as “items associated with notorious criminals that have found a market on various Internet sites that cater to serious collectors and to those with a macabre fascination for crime-related memorabilia”); Hugo Kugiya, *Crime Does Not Pay—Unless you Sell ‘Murderabilia’*, TODAY PEOPLE, <http://today.msnbc.msn.com/id/40073425> (last updated Nov. 9, 2010) (defining murderabilia as “personal items belonging to convicted serial killers that are sold by private dealers”). Thus, this paper uses the term “murderabilia” to refer to anything that

Although some favor banning murderabilia, the First Amendment prohibits a simple ban.⁷ In *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, the Supreme Court held that states, under the First Amendment, could not restrict or tax a convicted criminal's speech because of its content, even if that content was a perverse interest in murder.⁸ *Simon* struck down a New York statute forbidding convicted criminals from profiting from descriptions of their crimes.⁹

In response to *Simon*, state legislatures began to address murderabilia indirectly. For example, a handful of states passed more narrowly crafted "anti-profiting" laws, which seek to prevent criminals from profiting from their crimes (as opposed to profiting from publications about their crimes, a distinction that has proved difficult to justify).¹⁰ Although some of these laws have been upheld in state courts, others have come under constitutional attack.¹¹ As a result, murderabilia laws are narrowly enforced, and sometimes struck down.¹²

has commercial value because of its connection to a notorious crime or criminal, including the personal items that convicts sell from prison, the personal journals of convicts like David Berkowitz (the "Son of Sam"), "snuff films" that depict a murder on screen, and original newspaper articles detailing a notorious crime. See discussion *infra* Part III; see also *David Berkowitz (former "Son of Sam") Journal*, ARISEANDSHINE.ORG, <http://www.ariseandshine.org/Journal.html> (last updated Dec. 29, 2011). The breadth of the definition, while internally consistent, makes it readily apparent that the category cannot, consistent with the First Amendment, be banned outright, and needs significant doctrinal limits. See discussion *infra* Part III.

⁷ See, e.g., *Simon & Schuster, Inc. v. Members of N.Y.S. Crime Victims Bd.*, 502 U.S. 105, 123 (1991).

⁸ See *id.* at 116–18.

⁹ See *id.* at 109–10, 123. The statutory scheme placed all revenues in an escrow fund, on which victims could make claims. *Id.* at 109–10.

¹⁰ See Hurley, *supra* note 6, at 417–23.

¹¹ See *id.*

¹² See Paul G. Cassel, *Crime Shouldn't Pay: A Proposal to Create an Effective and Constitutional Federal Anti-Profiting Statute*, 19 FED. SENT'G REP. 119, 120–21 (2006). Professor—and Judge—Cassel details how statutes similar to New York's "Son of Sam" Law have received a "rocky reception" in the courts because they still target expression under the First Amendment. *Id.* Many of these laws have been challenged and either held unconstitutional or otherwise given limiting constructions to avoid running afoul of *Simon*. See Hurley, *supra* note 6, at 417. For example, the Department of Justice has instructed its lawyers not to use the federal murderabilia law, 18 U.S.C. § 3681, because it might be unconstitutional. See *id.* Also, the California Supreme Court held its murderabilia law to be unconstitutional because it was too similar to the law struck down

United States Senator John Cornyn proposed a different strategy for combating murderabilia. He introduced a bill that would forbid prisoners from mailing anything with the intent that it be put into commerce.¹³ Like anti-profiting laws, Cornyn's bill is an attempt to combat murderabilia without running afoul of *Simon's* prohibition on content-based regulation. Cornyn's bill, however, does not address the constitutional concerns raised by *Simon*. Instead, it simply makes the restriction so broad that it appears not to be based on the content of the speech. Yet the Supreme Court has held that speech restrictions based on the speaker's identity are generally invalid.¹⁴ Moreover, Senator Cornyn's bill would restrict the liberty of prisoners more than is necessary to protect crime victims.¹⁵ Thus, even if the bill is passed, it is unlikely to survive Supreme Court review.

I propose that a different doctrinal framework can solve this problem. The Supreme Court has identified some categories of speech for which content-based restrictions can be constitutional.¹⁶

in *Simon*. Keenan v. Superior Ct., 40 P.3d 718, 728 (Cal. 2002). The only difference was that the California law applied only to convicted felons and the work had to be more than a "mere passing mention of a felony." *Id.* The same was true in Nevada and Massachusetts, where murderabilia laws were struck down under *Simon*. *Id.* at 421–23. The Massachusetts law actually tried to address *Simon's* warning against underinclusiveness by covering all contracts related to crime, but it was still held to be an impermissible content-based regulation of speech because it required enforcers to determine whether contracts for publication were "substantially related to a crime." *Id.* at 421 (citing *In re* Opinion of the Justices to the Senate, 764 N.E.2d 343, 347 (Mass. 2002)). Finally, in Maryland and Washington, the highest courts of both states ducked the question of constitutionality. *Id.* at 417–18, 420–21. These examples help confirm the notion that murderabilia laws are generally suspect under the First Amendment. There is also a strange holding in the Ninth Circuit, affirming a portion of an injunction that forbids Ted Kaczynski, the "Unabomber," from publishing in his own name; anything he publishes must be anonymous. See Samuel P. Nelson & Catherine Prendergast, *Murderabilia Inc.: Where the First Amendment Fails Academic Freedom*, 108 S. ATLANTIC Q. 667, 682 (2009).

¹³ Hurley, *supra* note 6, at 411 (citing Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. (2007)).

¹⁴ See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 883 (2010).

¹⁵ Thus, I agree with Hurley that Senator Cornyn's bill is "overkill." See generally Hurley, *supra* note 6.

¹⁶ For a list of such categories, see Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273 (2003).

One such category is child pornography.¹⁷ Indeed, child pornography is unique in that it receives no First Amendment protection whatsoever. Although laws that prohibit child pornography are based on the content of the speech, they are nonetheless constitutional because child pornography is exceptionally harmful.¹⁸ As the Supreme Court reasoned in *New York v. Ferber*, child pornography merits an exceptional rule because it is “intrinsically related” to crime in two ways: (1) it encourages others to commit child abuse, and (2) it harms victims by forcing them to relive their hurtful experiences.¹⁹ Cases interpreting *Ferber* refined the rule.²⁰

This article contends that *Ferber* should apply to murderabilia. The Court in *United States v. Stevens*, while rejecting an attempt to apply *Ferber* outside of child pornography,²¹ suggested that child pornography is not the only category of speech to which *Ferber* can apply.²² Thus, I argue that *Ferber* should permit the regulation of murderabilia, with significant limitations. Part I describes child pornography laws under *Ferber* and its progeny. Part II describes how *Ferber* should apply to murderabilia. Part III discusses three limitations on the application of *Ferber* to murderabilia—namely, which crimes are involved, what form the murderabilia takes, and the need to avoid ad hoc balancing.

¹⁷ See *id.* at 287–335.

¹⁸ See *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

¹⁹ See *id.* at 759 & n.10.

²⁰ See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 254 (2002); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

²¹ See *Stevens*, 130 S. Ct. at 1592 (striking down a law banning depictions of animal cruelty).

²² See *id.* at 1586

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the *First Amendment*. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that ‘depictions of animal cruelty’ is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.

Id.

I. BACKGROUND: CHILD PORNOGRAPHY LAWS UNDER FERBER AND ITS PROGENY

The First Amendment’s prohibition on laws “abridging the freedom of speech”²³ requires courts, when faced with statutes that restrict certain types of speech, to examine the speech in question and determine whether it merits First Amendment protection.²⁴ Often this calculus involves “balancing” or “weighing” the value of the speech against the interests advanced by the statute.²⁵ Occasionally, weighing is unnecessary because the category of speech, properly cabined, may be banned outright.²⁶

Ferber represents the latter type of case. It created a categorical rule allowing states to ban child pornography.²⁷ *Ferber* held that child pornography is peculiar, under the First Amendment, in that “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.”²⁸ Thus, although the Court recognized the “inherent dangers of undertaking to regulate any form of expression,” it upheld New York’s categorical ban on child pornography.²⁹

²³ U.S. CONST. Amend. I.

²⁴ *New York v. Ferber*, 458 U.S. 747, 763 (1982) (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976)).

²⁵ *See Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 740–41 (1996) (“The essence of [First Amendment] protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required. . . . Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application.”); *see also*, *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011) (employment law context); *Davis v. FEC*, 554 U.S. 724, 754 (2008) (citing *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976)) (election law context); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (copyright context); *Hill v. Colorado*, 530 U.S. 703, 707–16 (2000) (protest and privacy context); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 371 (1969) (media context).

²⁶ *Brenner*, *supra* note 16, at 273 (discussing categories of speech such as Child pornography, criminal libel, criminal contempt, perjury, conspiracy, treason, espionage, harassment, criminal solicitation, fraud, and aiding and abetting).

²⁷ *See Ferber*, 458 U.S. at 763–64.

²⁸ *Id.*

²⁹ *Id.* at 755 (quoting *Miller v. California*, 413 U.S. 15, 23 (1973)).

Ferber distinguished child pornography from obscenity.³⁰ Unlike obscenity, in child pornography cases the “trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.”³¹ Thus, legislatures appear to have greater flexibility in crafting child pornography statutes than obscenity statutes, because only the latter depend on the definition of “prurient interest” and the determination of community standards.³²

Subsequent cases have clarified *Ferber*’s breadth and limitations. *Osborne v. Ohio* held that states could prohibit the private “possession and viewing of child pornography.”³³ It also held that mere nudity does not constitute child pornography; the image must be “lewd.”³⁴ *United States v. Stevens* and *Ashcroft v. Free Speech Coalition* placed two limits on the doctrine, holding respectively that *Ferber* does not permit states to ban depictions of animal cruelty or “virtual” child pornography, in which no real children appear.³⁵ These cases also expanded upon the rationales in *Ferber*, explaining in more depth why child pornography may be banned without reference to its First Amendment value.³⁶ These rationales, I will argue, allow states to regulate murderabilia under *Ferber*.

³⁰ See *id.* at 764.

³¹ *Id.* On the other hand, some argue that child pornography should fall under the Supreme Court’s obscenity doctrines. See, e.g., Scot A. Duvall, *A Call for Obscenity Law Reform*, 1 WM. & MARY BILL RTS. J. 75, 96 & n.137 (1992).

³² See *Miller v. California*, 413 U.S. 15, 24 (1973); *Roth v. United States*, 354 U.S. 476, 489 (1957).

³³ *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

³⁴ *Id.* at 113–14.

³⁵ *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002).

³⁶ See *Stevens*, 130 S. Ct. at 1586; *Ashcroft*, 535 U.S. at 250–51.

II. ARGUMENT: UNDER FERBER, STATES MAY RESTRICT SOME TYPES OF MURDERABILIA AS THEY RESTRICT CHILD PORNOGRAPHY BECAUSE BOTH ARE “INTRINSICALLY RELATED” TO CRIME

Although the child pornography at issue in *Ferber* was unquestionably speech, it was unprotected by the First Amendment, and could be regulated, because it was “intrinsically related” to crime.³⁷ Child pornography has been the principal example of completely unprotected speech.³⁸ The Supreme Court, however, in fashioning its jurisprudence regarding child pornography, created two factors that indicate which other kinds of speech could be regulated under *Ferber*. First, how speech is made, not what it says, determines its intrinsic relationship to crime.³⁹ Second, the crime must be sufficiently harmful, which can depend on two things: (1) whether the victims are especially vulnerable, and (2) whether the harm is grave enough to remove or reduce First Amendment protection.⁴⁰ Applying these factors to murderabilia, it appears that *Ferber* left room for states to restrict certain depictions of crime just as they restrict child pornography.

A. *How Speech is Made Determines its Intrinsic Relationship to Crime*

Speech is “intrinsically related” to crime, for purposes of the First Amendment, when the *generation* of the speech is inextricably tied up with crime.⁴¹ As the Court explained in *Ashcroft*, “*Ferber’s* judgment about child pornography was based upon how it was made, not on what it communicated.”⁴² In other words, because child pornography cannot be generated without sexually abusing children, it is “intrinsically related” to that crime.

Ashcroft struck down a federal statute banning “virtual” child pornography.⁴³ The Child Pornography Prevention Act of 1996

³⁷ *New York v. Ferber*, 458 U.S. 747, 759 (1982).

³⁸ *Ashcroft*, 535 U.S. at 249 (citing *Ferber’s* holding that legislatures may ban “distribution and sale of child pornography, as well as its production, because these acts [are] ‘intrinsically related’ to the sexual abuse of children . . .”).

³⁹ *Id.* at 250–51.

⁴⁰ *See Osborne v. Ohio*, 495 U.S. 103, 111 (2010).

⁴¹ *See Ashcroft*, 535 U.S. at 249–51.

⁴² *Id.* at 250–51.

⁴³ *See generally id.*

attempted to “extend the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children.”⁴⁴ In striking down the statute, *Ashcroft* observed that *Ferber* “relied on virtual images . . . as an alternative and permissible means of expression.”⁴⁵ By permitting virtual images, *Ferber* was able to avoid content discrimination, because in *Ferber* there was not “any question . . . of censoring a particular literary theme or portrayal of sexual activity. The *First Amendment* interest [in this case] is limited to that of rendering the portrayal somewhat more ‘realistic’ by utilizing or photographing children.”⁴⁶ *Ashcroft*, then, clarified that the way in which speech is generated determines whether it is “intrinsically related” to crime under *Ferber*.⁴⁷

Crimes other than child sexual abuse logically fit into the “intrinsically related” framework.⁴⁸ Although *Ashcroft* may have attempted to limit its holding by stating, “where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment,”⁴⁹ the Court cannot have intended to limit its holding so drastically. Indeed, the Court has held that there are numerous categories of speech, neither obscene nor the product of sexual abuse, that do not receive First Amendment protection in certain circumstances—criminal solicitation and conspiracy, to name just two.⁵⁰

⁴⁴ *Ashcroft*, 535 U.S. at 239 (citing 18 U.S.C. §§ 2251–56 (1998)).

⁴⁵ *Ashcroft*, 535 U.S. at 251 (citing *New York v. Ferber*, 458 U.S. 747, 763 (1982)).

⁴⁶ *Ferber*, 458 U.S. at 763 (quoting *People v. Ferber*, 409 N.Y.S.2d 632, 637 (N.Y. Sup. Ct. 1978)).

⁴⁷ See *Ashcroft*, 535 U.S. at 250–51. It probably goes without saying that virtual murders, like virtual child pornography, should remain constitutionally protected. Murder and other heinous crimes are omnipresent in popular movies, television shows, books, video games, and other forms of expression. See, e.g., CORMAC MCCARTHY, *NO COUNTRY FOR OLD MEN* (2005); *SE7EN* (New Line Cinema 1995); *Dexter* (Showtime Networks 2006); *GRAND THEFT AUTO* (BMG Interactive 1997); EMINEM, *RECOVERY* (Aftermath Records 2010).

⁴⁸ *Ferber*, 458 U.S. at 759.

⁴⁹ *Ashcroft*, 535 U.S. at 251 (citing *Ferber*, 458 U.S. at 764–65).

⁵⁰ See *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999). And textually, the statement in *Ashcroft* would seem to allow the restriction of speech “intrinsically related” to the sexual abuse of adults.

Moreover, there is no principled reason why *Ferber* should be limited to child pornography. Is a victim of sexual abuse harmed significantly more than a victim of attempted murder when she recalls her terrifying experience? Is she harmed more than the family members of a murder victim? Does it make sense for the First Amendment to leave unprotected a video of a naked child—harmful as it may be—yet protect a “snuff film” in which an adult victim is raped and brutally murdered on tape?⁵¹ I believe it is impossible to objectively weigh the harm suffered by these victims, which is why I argue that the First Amendment should not arbitrarily draw the line at child pornography while protecting snuff films and rape videos—especially considering that they lack any “serious literary, artistic, political, or scientific value.”⁵²

In *Ashcroft*, the Court suggested that what is unique about child pornography is not only that children are sexually abused, but also that crime is recorded and victims are created.⁵³ Citing *Ferber*, the Court reasoned that “virtual” child pornography is different from real child pornography because it “records no crime and creates no victims by its production.”⁵⁴ Recording crime and creating victims, therefore, are important parts of the intrinsic relationship between crime and speech that allows the latter to be regulated.

⁵¹ A bill was introduced in the California legislature in 2000 that would have prohibited crush videos of animals and human beings. B. 1853, Reg. Sess. (Cal. 1999–2000). A First Amendment public outcry stemmed from the ACLU based on the human part of the bill. See CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 97 (2005).

Instructively, the joint crush/snuff bill had a consent provision only for people. Welcome to humanity: While animals presumably either cannot or are presumed not to consent to their videotaped murder, human beings could have consented to their own intentional and malicious killing if done to make a movie, and the movie would be legal. Even that was not enough to satisfy the avatars of freedom of speech. One wonders anew if human rights are always better than animal rights.

Id.

⁵² *United States v. Stevens*, 130 S. Ct. 1577, 1591 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

⁵³ See *Ashcroft*, 535 U.S. at 249 (citing *Ferber*, 458 U.S. at 759).

⁵⁴ *Id.* at 250.

This rationale can apply to crimes other than child pornography.⁵⁵ I will now turn to two kinds of intrinsic relationships identified by the Court.

B. Two Ways in which Speech is “Intrinsically Related” to Crime

Two rationales support extending *Ferber*’s framework to some non-pornographic speech. First, *Ferber* and *Ashcroft* relied heavily on the argument that the circulation of child pornography continued to harm the victims.⁵⁶ Second, *Ferber* reasoned that child pornography was “intrinsically related” to crime because its consumption created an economic incentive to continue abusing children.⁵⁷ As I will attempt to show, these two rationales invite the extension of *Ferber*-type regulation to depictions of other crimes.⁵⁸

1. The Circulation of Speech Continues to Harm Victims

Child pornography may be restricted because its circulation continues to harm the victims of child sexual abuse. *Ashcroft*

⁵⁵ See *id.* (citing *Ferber*, 458 U.S. at 759). “Under either rationale, the speech ha[s] . . . a proximate link to the crime from which it came.” *Id.*

⁵⁶ See *id.* at 249; *Ferber*, 458 U.S. at 759.

⁵⁷ See *Ferber*, 458 U.S. at 761.

⁵⁸ Furthermore, *Ashcroft* implied that either of these rationales is sufficient, on its own, to create the intrinsic relationship necessary to remove First Amendment protection. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249–51 (2002) (citing *Ferber*, 458 U.S. at 764–65). *Ferber* briefly mentioned a third rationale supporting the outright ban on distribution, but it did not elaborate on it, and in any case it would prove too much. See *Ferber*, 458 U.S. at 761. The Court noted that because the state would eliminate all child pornography if it could fully enforce its child abuse laws, it had the right to completely eliminate child pornography through other means. *Id.* at 762, 762 n.14 (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 389 (1973) (“Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.”)).

While this argument may have *prima facie* appeal, it proves too much. If legislatures could ban all speech predicated on an illegal act, nobody could learn that a crime had been committed, because nobody could talk about it—because there would be nothing to talk about “but for” the commission of the crime. In my opinion, therefore, the other two rationales—continued harm to the victim and motivation for the continued commission of crime—must support the doctrine alone. Those crimes can stray into First Amendment territory and must be appropriately limited. See discussion *infra* Part III.

reasoned that, "as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated."⁵⁹ The same would appear to be true of recordings of other crimes that cause similar kinds of harm to victims. While it may be debated which crimes, when recorded and memorialized, cause continued harm, certainly some do. The severe and long-lasting psychological effect of violent crime on victims is well documented.⁶⁰

Relatives and friends of victims suffer psychological harm as well. For example, a study of family members of murder victims found that twenty-five percent developed full-blown posttraumatic stress disorder ("PTSD"), fifty percent exhibited some symptoms of PTSD, and twenty-two percent continued suffering some symptoms of PTSD a full decade after the murder.⁶¹ Indeed, "the emotional and psychological distress suffered by the relatives of murder victims in many ways resembles that of rape victims, combat veterans, and prisoners who have been tortured."⁶² Additionally, as documented by M. Regina Asaro and Paul T. Clements, "[m]urder has a serious immediate and obvious, as well as long-term and subtle impact on the stability, development, communication patterns and role performance of surviving [family] members."⁶³ Accordingly, this paper treats the family members of murder victims as victims themselves, subject to the risk of continued harm from depictions of their victimization.⁶⁴

⁵⁹ *Ashcroft*, 535 U.S. at 249 (citing *Ferber*, 458 U.S. at 759).

⁶⁰ See, e.g., NAT'L CTR. FOR VICTIMS OF CRIME, *Posttraumatic Stress Disorder* (2002), <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32364>; NAT'L ORG. FOR VICTIM ASSISTANCE, *Psychological Trauma of Crime Victimization* (2001), <http://www.trynova.org/victiminfo/readings/PsychologicalTraumaofCrime.pdf>.

⁶¹ M. Regina Asaro & Paul T. Clements, *Homicide Bereavement: A Family Affair: Impact of Murder on the Family*, 1 J. FORENSIC NURSING 101, 101-05 (2005).

⁶² Eric Schlosser, *A Grief Like No Other*, 280 THE ATLANTIC MONTHLY 37, 37-76 (1997), available at <http://www.theatlantic.com/past/docs/issues/97sep/grief.htm>.

⁶³ *Id.* at 51 (citing a study by Dean G. Kilpatrick, the director of the National Crime Victims Research and Treatment Center, at the Medical University of South Carolina).

⁶⁴ Who counts as a "family member" is beyond the scope of this paper, but research suggests that nearly every murder victim has some persons related closely enough to be psychologically harmed. As noted by Asaro and Clements, when dealing with murder victims,

traditional definitions of family are insufficient. In terms of the reactions that may occur in the aftermath of a murder, those in a

Osborne reasoned that because the circulation of child pornography continues to harm victims, it is important to regulate its production, sale, and possession.⁶⁵ The Court explained that “the materials produced by child pornographers permanently record the victim’s abuse. The pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come. The State’s ban on possession and viewing encourages the possessors of these materials to destroy them.”⁶⁶ If other crimes, when depicted and circulated, cause continuing harm to victims, then similar restrictions should apply to depictions of those crimes. Thus, to combat continued harm to victims, states should be able to regulate, to some extent, the production, sale, and possession of speech that is “intrinsically related” to those crimes.⁶⁷

Indeed, regulating possession could do more to protect victims than existing murderabilia laws or anti-profiting laws, because it might prevent the government, in some circumstances, from circulating harmful speech for its own benefit. For instance, the *South Atlantic Quarterly* documented a government-sponsored exhibit in Washington, D.C., devoted to the murders of Ted Kaczynski, the “Unabomber.”⁶⁸ Among the potentially disturbing

relationship with the victim may experience the loss to the degree to which they were emotionally attached. It is therefore important to explore how survivors define themselves, in terms of family or nonfamily, avoiding judgment about whether they are, in fact, family in a legal sense. This more inclusive view takes into account those individuals who were, for example, engaged to the victim, a common-law spouse, or a child ‘taken in’ by a family in light of geographic, emotional or physical nonavailability of the parents/primary caretakers (Clements & Burgess, 2002). It also includes those who were bound to the victim in a less traditional manner, such as same-sex relationships, children who perceived the victim to be closer to them emotionally than an actual parent or sibling, and grandparents who had custodial care of a child who was murdered.

Asaro & Clements, *supra* note 61, at 3. See below, *infra* Part III.B for a discussion of which crimes, in which circumstances, could fall under *Ferber*’s rationale.

⁶⁵ See *Osborne v. Ohio*, 495 U.S. 103, 110–11 (1990).

⁶⁶ *Id.* at 111.

⁶⁷ See *Osborne*, 495 U.S. at 110–11.

⁶⁸ See Nelson & Prendergast, *supra* note 12, at 678–79.

parts of the exhibit was “an interactive display including the names and, in many cases, photos of all of Kaczynski’s victims. Visitors could use a touch screen to select any of the Unabomber’s victims to learn more about the injuries each one sustained.”⁶⁹ It is not difficult to imagine how such a display could humiliate victims and their families by causing them to recall their painful memories, just as the mother of Coral Eugene Watts’ victim was forced to recall her daughter’s death when Watts’ letter was sold online.⁷⁰ In these circumstances, circulating speech arguably harms the victims just as child pornography harms adults who know that thousands of people—or even one person—might be observing the sexual abuse they suffered as children.

The Kaczynski display highlights an issue that could arise if murderabilia were regulated under *Ferber*—namely, whether the victims, in whose interest the speech is suppressed, should have the ability to free it from regulation. Such a rule might make sense from the standpoint of addressing continued harm to victims, but it does not make sense in light of *Ferber*’s second rationale, that possessing and circulating child pornography creates an incentive for others to commit crime.

2. Eliminating the Motive to Commit the Same Crime

Ashcroft and *Ferber* reasoned that child pornography may be restricted because it creates an incentive for pornographers to abuse children. *Ferber* found this rationale implicit in the maxim of *Giboney v. Empire Storage & Ice Co.*⁷¹: “It 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.”⁷² The *Ferber* Court reasoned that, as with the speech in *Giboney* (illegal

⁶⁹ *Id.* at 678.

⁷⁰ See Larry Schooler, *supra* note 4. On the other hand, perhaps governmental speech and educational displays should not be subject to regulation under *Ferber*, considering that they have different and perhaps more valuable purposes than the artifacts traded on murderauction.com. I will deal with the task of distinguishing between different forms of murderabilia later in this paper.

⁷¹ 336 U.S. 490 (1949).

⁷² *New York v. Ferber*, 458 U.S. 747, 762 & n.14 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

picketing), child pornography is “an integral part” of criminal behavior because “[t]he advertising and selling of child pornography provide an economic motive for . . . the production of such materials.”⁷³ Therefore, as with illegal picketing, states can restrict images of child pornography without violating the First Amendment. *Ashcroft* reiterated this rationale, holding that “[b]ecause the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network.”⁷⁴

It is also important to regulate *possession* in order to remove the economic incentive to commit crime.⁷⁵ *Osborne* upheld Ohio’s restriction on the possession of child pornography, agreeing with the State that, “since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution.”⁷⁶

Depictions of crime can also create non-economic incentives to commit crime. For example, the mass murderer at Virginia Tech stated that he had been inspired by the high school shooters in Columbine, Colorado,⁷⁷ whose crimes had been broadcast throughout the country.⁷⁸ Thus, publicity can be a powerful motivating force to commit crime. Indeed, right before the Virginia Tech shooter committed the murders, he mailed a

⁷³ *Id.* at 761–62 (quoting *Giboney*, 336 U.S. at 498).

⁷⁴ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002) (citing *Ferber*, 458 U.S. at 760); *see also Ferber*, 454 U.S. at 777–78 (Stevens, J., concurring) (“The character of the State’s interest in protecting children from sexual abuse justifies the imposition of criminal sanctions against those who profit, directly or indirectly, from the promotion of such films.”).

⁷⁵ *See Ashcroft*, 535 U.S. at 249.

⁷⁶ *Osborne v. Ohio*, 495 U.S. 103, 109–11 (1990).

⁷⁷ Howard Berkes, Barbara Bradley Hagerty, & Jennifer Ludden, *NBC Defends Release of Va. Tech Gunman Video*, NPR.ORG (Apr. 19, 2007), <http://www.npr.org/templates/story/story.php?storyId=9604204>.

⁷⁸ *See, e.g.*, DAVE CULLEN, *COLUMBINE* (2009); *ELEPHANT* (Fine Line Features 2003); *BANG BANG YOU’RE DEAD* (Paramount Pictures 2002); *BOWLING FOR COLUMBINE* (United Artists 2002); *Law & Order: School Daze* (NBC television broadcast May 16, 2001); *Columbine Killers Planned to Kill 500*, BBC NEWS (Apr. 27, 1999, 3:00 AM), <http://news.bbc.co.uk/2/hi/americas/329303.stm>.

“multimedia manifesto” to NBC that contained pictures and videos of himself and his weapons, and referenced his plans for mass murder.⁷⁹ In light of these events, it is not difficult to understand why *Ferber* concluded that depictions of crime can create incentives to commit more crime.⁸⁰ The story of the Virginia Tech shooter provides a clear example of how depictions of crime can inspire copycat criminals seeking fame, a mouthpiece, or both.⁸¹

Nevertheless, Justice Alito has suggested that *Ferber*’s motivational rationale should be interpreted narrowly. Dissenting in *Stevens*, he contended that the key to *Ferber* was that the “underlying crimes could not be effectively combated without targeting the distribution of child pornography,” which is a narrow description of the motivational rationale—indeed, it does not reference motive at all.⁸² Alito’s version of the test likely would not apply much outside of child pornography, because most crimes can be “effectively combated” without regulating depictions of them (although the Virginia Tech shooting might be an exception).⁸³ Even so, Alito argues that the “crush videos” (stomping on animals) at issue in *Stevens* had a sufficient motivational nexus:

[T]he criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by § 48—the creation, sale, and possession for sale of depictions of animal torture with the intention of realizing a commercial profit. . . . Faced with this

⁷⁹ See Berkes, *supra* note 78.

⁸⁰ See *infra* Part III.B for a discussion of how one could determine which crimes are harmful enough to warrant regulation under *Ferber*.

⁸¹ Moreover, the maxim from *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), which *Ferber* used to support its rationale, is by no means limited to purely economic motivations—it extends to non-economic motivations as well. See *New York v. Ferber*, 458 U.S. 747, 761–62 (1982). On the other hand, these are exceptional examples, and the motivational rationale will of course not be as strong for every crime or every type of murderabilia. Thus, this is an important factor to keep in mind when judging which crimes and which kinds of murderabilia could fall under *Ferber*.

⁸² *United States v. Stevens*, 130 S. Ct. 1577, 1599 (2010) (Alito, J., dissenting) (citing *Ferber*, 458 U.S. at 759).

⁸³ See *id.*

evidence, Congress reasonably chose to target the lucrative crush video market.⁸⁴

Perhaps, then, Alito does not conceive of the motivational rationale as narrowly as he claims.

In any event, the *Ferber* majority described the motivational rationale differently. Regulating speech need not be an integral part of regulating the crime itself; it need only be an integral part of regulating material that cannot be produced without committing the crime.⁸⁵ *Ferber* reasoned that “the distribution network for child pornography must be closed if the production of *material* which requires the sexual exploitation of children is to be effectively controlled.”⁸⁶ Thus, *Ferber* suggests that closing the distribution network is necessary to combat the creation and circulation of *material* related to crime, not the crime itself.⁸⁷

This statement leaves open the possibility that *Ferber* applies to depictions of other crimes. While the logic is somewhat circular (of course regulating speech is necessary to regulate speech), this formulation of the motivational rationale comports with the continued harm to victims rationale, and shows that the two rationales work in tandem.⁸⁸ Moreover, *Ferber* clarifies that speech cannot be regulated unless it “requires” the commission of crime. This limitation ensures that the rule deals with actual crimes, just not as directly as Justice Alito might have wanted.

The Court has consistently deferred to legislatures to determine which kinds of depictions incentivize crime strongly enough to be considered “an integral part” of such crime.⁸⁹ Regarding whether a motivational nexus existed, *Ferber* held that it was sufficient that “[t]hirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature

⁸⁴ *Id.*

⁸⁵ *See Ferber*, 458 U.S. at 761–62 (quoting *Giboney*, 336 U.S. at 498).

⁸⁶ *Id.* at 759 (emphasis added).

⁸⁷ *See id.* at 760.

⁸⁸ *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249–50 (2002) (citing *Ferber*, 458 U.S. at 759–60).

⁸⁹ *Ferber*, 458 U.S. at 761–62.

and testimony to support these legislative conclusions.”⁹⁰ *Osborne*, too, deferred to legislatures in this regard: “It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product,” in addition to those who produce and market it.⁹¹ If deference to legislatures is the appropriate way for courts to determine whether the motivational nexus exists, then the fact that approximately forty states and Congress have enacted murderabilia laws suggests that *Ferber*-type restrictions would be constitutional in this area.

III. LIMITING THE EXTENSION OF FERBER

While it appears that one could constitutionally extend *Ferber*'s framework to the depiction of other crimes, the framework must still be adequately limited, as with any doctrine permitting the regulation of speech, so as not to eviscerate the First Amendment. *Stevens* clarified that any extension of *Ferber* must be properly cabined. The Court struck down a statute prohibiting depictions of animal cruelty because ““a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.””⁹² *Ferber* itself, however, held that the tailoring need not be 100% precise:

While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the *National Geographic* would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works

⁹⁰ *Id.* at 760.

⁹¹ *Osborne v. Ohio*, 495 U.S. 103, 109, 139 (1990). Also, it should not matter whether the material is the original or a reproduction—both can constitute the same motivation for continued crime. See *Ferber*, 458 U.S. at 765–66 (holding that states can ban reproduction of child abuse that occurred and was recorded in a different state).

⁹² *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (citing *Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring)).

cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.⁹³

Tracing the line between *Stevens* and *Ferber*, a statute is likely not overbroad as long as its application to protected materials constitutes a "tiny fraction" of its reach.

Nevertheless, murderabilia is a broader category than child pornography, and laws that restrict it must contain more significant limits in order to avoid overbreadth. I believe that three limits, stemming from *Ferber* and its progeny, should be sufficient to this end: avoiding ad hoc balancing, cabining murderabilia laws to the most heinous crimes, and distinguishing between different types of murderabilia.

A. Avoiding Ad-Hoc Balancing

No extension of *Ferber* should create an ad-hoc balancing test. Not only did *Ferber* disclaim any intent to create a balancing test (it held that child pornography could be regulated regardless of its expressive content), but Justice O'Connor also explained, in her concurring opinion, that a balancing test would be particularly inappropriate in this area.⁹⁴ She wrote: "An exception for depictions of serious social value . . . would actually increase opportunities for the content-based censorship disfavored by the *First Amendment*."⁹⁵ In other words, a rule that allowed judges to decide in each case whether a certain depiction is valuable enough to merit protection would invite judges to use their own biases to decide which instances of speech to protect. Justice O'Connor's argument is particularly cogent because she is often regarded as favoring ad hoc balancing.⁹⁶

⁹³ *Ferber*, 458 U.S. at 773.

⁹⁴ See *Ferber*, 458 U.S. at 774–75 (O'Connor, J., concurring).

⁹⁵ *Id.* at 775.

⁹⁶ See generally, e.g., ROBERT MELTZ, CONG. RESEARCH SERV., RS 22227, PROPERTY RIGHTS "TAKINGS": JUSTICE O'CONNOR'S OPINIONS (2005) available at <http://stuff.mit.edu/afs/sipb/contrib/wikileaks-crs/wikileaks-crs-reports/RS22227.pdf>.

This is not to suggest that the value of speech is entirely irrelevant under *Ferber*. The potential value of a category of speech is relevant to whether it may be restricted consistent with the First Amendment. For example, even if newspapers began to print child pornography, they could not be outlawed as such; the category of “newspaper” is too broad, and too full of First Amendment value, to justify such a ban. Thus, the value of speech is relevant to drawing doctrinal lines around categories of speech, some of which may be restricted without reference to the value of each individual instance of speech. Child pornography—along with criminal libel, criminal contempt, perjury, conspiracy, treason, espionage, harassment, criminal solicitation, fraud, and aiding and abetting—is one category of speech that may be regulated without reference to how expressive each instance may be.⁹⁷ While courts must determine whether each case falls within one of the categories, they do not consider the value of the instance of speech in making the determination.⁹⁸ Thus, courts need not reinvent the doctrine each time it is applied.

B. To Which Crimes Should Ferber Apply?

1. The Crimes Must be Precisely Defined in Both the Criminal Statute and the Murderabilia Statute

Although the Court has not specified which types of crimes are sufficient for *Ferber*, it has clarified two principles. First, the conduct must be criminal in the relevant jurisdiction.⁹⁹ Second, the murderabilia statute must define its underlying crimes precisely, narrowly tailoring the restriction on speech to those crimes for which publication causes the most harm.¹⁰⁰

Murderabilia laws can apply only to speech that depicts actual crimes. *Ferber* held that “the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.”¹⁰¹ This limitation is an obvious one,

⁹⁷ See generally Brenner, *supra* note 16.

⁹⁸ See *id.*

⁹⁹ See *United States v. Stevens*, 130 S. Ct. 1577, 1579 (2010).

¹⁰⁰ See *id.* at 1580–81.

¹⁰¹ *New York v. Ferber*, 458 U.S. 747, 764 (1982).

but it is worth mentioning for two reasons. First, it prevents legislatures from attempting to pass off a pure speech restriction as a murderabilia law. Simple disapproval of a speaker's message or manner of speaking will never justify a murderabilia law under *Ferber* because the actions depicted must in fact be criminal.¹⁰² Second, the above language limits the doctrine to depictions of "adequately defined" crimes.¹⁰³ Thus, legislatures may not point to a vague criminal law to support a murderabilia statute.

Furthermore, the murderabilia statute itself must be limited to crimes for which the two parts of the *Ferber* doctrine apply—namely, that the circulation of speech encourages people to commit crime or causes additional harm to the victims.¹⁰⁴ The Court elaborated upon this rule in *Stevens*, which held that *Ferber* could not be extended wholesale to depictions of animal cruelty because, while the distribution of animal "crush videos" may motivate further acts of animal cruelty, there is no continued harm to the animal victim.¹⁰⁵

Stevens is an important case for those who seek to extend *Ferber* beyond child pornography. At several points in the opinion, the Court states that the doctrine can indeed be extended to depictions of crimes other than child sexual abuse.¹⁰⁶ For example, the opinion states: "We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional."¹⁰⁷ If *Ferber* were strictly limited to child pornography, the Court could simply have held *Ferber* may not be extended to other crimes. The Court did not do this, however.¹⁰⁸ Rather, it explained that the statute was overbroad because it banned speech that was clearly protected by the First Amendment, in addition to speech that might not have been:

¹⁰² See *id.* at 764–66.

¹⁰³ *Id.* at 764.

¹⁰⁴ See, e.g., *id.* at 761.

¹⁰⁵ See *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010).

¹⁰⁶ See *id.* at 1586, 1592.

¹⁰⁷ *Id.* at 1592.

¹⁰⁸ See *id.* at 1586.

[T]he Government makes no effort to defend the constitutionality of § 48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct . . . and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities—depictions that are presumptively protected by the First Amendment but that remain subject to the criminal sanctions of § 48. Nor does the Government seriously contest that the presumptively impermissible applications of § 48 (properly construed) far outnumber any permissible ones.¹⁰⁹

The fact that the Court mentions “permissible” sanctions against depictions of crimes other than child sexual abuse demonstrates that *Ferber* is ripe for extension to other crimes.¹¹⁰

2. The Harm Must Be Sufficiently Grave

Ferber held that child pornography is exceptionally harmful. Most crimes are not harmful enough that depictions of them may be regulated without First Amendment protection.¹¹¹ With respect to child pornography, however,

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. . . . ‘It is irrelevant to the child [who has

¹⁰⁹ *Id.* at 1592.

¹¹⁰ *Cf. id.* at 1594 (Alito, J., dissenting) (“[T]he Court tacitly assumes for the sake of argument that § 48 is valid as applied to these depictions [i.e., crush videos and depictions of animal fighting] . . .”). The Court has also stated that pornography that is merely degrading to women is not enough to merit the application of the *Ferber* doctrine, which makes sense because the actions depicted are not necessarily criminal. *See generally* Am. Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

¹¹¹ *See* New York v. Ferber, 458 U.S. 747, 757 (1982).

been abused] whether or not the material . . . has a literary, artistic, political or social value.’¹¹²

Although child pornography is exceptionally harmful, the Court never intimated that it was unique in its ability to generate speech unprotected by the First Amendment.¹¹³ As discussed above, *Stevens* appears to have rejected such a notion.¹¹⁴ So, which crimes should fall under *Ferber*?

Methodologically, I believe this question must be answered, to the extent possible, by existing Supreme Court precedent. In this regard, I disagree with Joseph Anclien, author of a recent article in the *Memphis Law Review* suggesting that *Stevens* was wrongly decided and that *Ferber* should have been extended to cover depictions of animal cruelty.¹¹⁵ Anclien argues that *Ferber* should extend beyond depictions of child abuse, and I agree with this, but I disagree with his method for determining how far *Ferber* should extend. *Stevens*, rather than being wrongly decided, actually helps clarify *Ferber*’s reach.¹¹⁶ In striking down the federal statute outlawing depictions of animal cruelty, *Stevens* emphasized that it restricted too many kinds of depictions, reaching well beyond the “crush videos” and “animal fighting movies” that constituted the worst kind of harm.¹¹⁷

A more limited statute, however, might have been constitutional. The Court stated that some of the statute’s restrictions may have been “permissible,” referencing the animal fighting and “crush videos” emphasized by the government’s attorneys.¹¹⁸ Of course, the statute reached beyond such depictions, outlawing speech “presumptively protected by the First

¹¹² *Id.* at 761 (quoting Memorandum from Assemblyman Lasher in Support of N.Y. PENAL LAW § 263.15 (McKinney 2006); *id.* at 763–64.

¹¹³ *See generally id.*

¹¹⁴ *Stevens*, 130 S. Ct. at 1592 (“We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.”).

¹¹⁵ Joseph J. Anclien, *Crush Videos and the Case for Criminalizing Criminal Depictions*, 40 U. MEM. L. REV. 1, 9 (2009). Anclien clerked for Judge Robert E. Cowen on the Third Circuit who dissented in *Stevens*. *Id.* at 54 n.1.

¹¹⁶ *See generally id.*

¹¹⁷ *Stevens*, 130 S. Ct. at 1592.

¹¹⁸ *Id.*

Amendment.”¹¹⁹ Yet if crush videos and animal fighting may have been harmful enough to merit restriction under *Ferber*, then other types of crimes may be harmful enough.

I submit, then, that murder is harmful enough. If the gruesome, premeditated torture and killing of an animal might be harmful enough to warrant an extension of *Ferber*, then the gruesome, premeditated killing of a person should be as well.¹²⁰ In this way, I agree with Anclien that “snuff films” are the most obvious extension of *Ferber*.¹²¹ Similarly, certain types of violent pornography, in which someone is tortured and abused on camera, should also fall under *Ferber*. In fact, the contrast between an animal dying in “crush videos” and someone living in violent pornography highlights a significant distinction.¹²² As *Ferber* explained, the continued circulation of such violent pornography is certainly more harmful to a victim who is still alive than it is to a victim who is dead, notwithstanding the harm to family members.¹²³

I disagree with Anclien, however, regarding “films in which perpetrators assault strangers while the act is recorded.”¹²⁴ Snuff films and violent pornography are definable categories of speech that satisfy both of *Ferber*’s rationales. Films recording stranger assaults, on the other hand, do not lend themselves to such tight definition. If *Ferber* created an ad hoc balancing test, then perhaps particularly gruesome stranger assaults could be restricted on a case-by-case basis. As discussed above, however, the First Amendment in general, and *Ferber* in particular, do not allow for ad hoc balancing—only tightly cabined *categories* of speech may be restricted under *Ferber*, with courts considering only whether an instance of speech falls within a particular category.¹²⁵ As a category of speech, stranger assault videos are not harmful enough

¹¹⁹ *Id.*

¹²⁰ *Cf.* Brief for Amicus Curiae Northwest Animal Rights Network in Support of Petitioner at 5, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769).

¹²¹ Anclien, *supra* note 116, at 49.

¹²² *See* Anclien, *supra* note 116, at 9.

¹²³ *See* *New York v. Ferber*, 458 U.S. 747, 759 (1982). This conclusion is in agreement with Anclien, *supra* note 116, at 52, but under a different analysis.

¹²⁴ Anclien, *supra* note 116, at 52.

¹²⁵ *See supra* Part III.A.

that “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.”¹²⁶ Accordingly, while stranger assaults do generate harm, that harm does not always rise to the level of crush videos, snuff films, or violent pornography.

Thus, at this point, I would allow the regulation of murderabilia only when it is related to murder and torture, with the possibility of gruesome assault as a properly cabined category. Such a limitation respects the notion that *Ferber* is indeed exceptional and that the First Amendment cannot bow to anything but the most serious harm.¹²⁷ I would not suggest that this should forever be the limit, however, because cases may arise to challenge the bounds of any doctrine. Thus, perhaps my most important point is methodological; that any extension or contraction of *Ferber* must be consistent with precedent and based upon the severity of harm that the crime typically causes, not the value, high or low, of the instance of speech involved.¹²⁸

3. Especially Vulnerable Victims

Ferber also suggests that a crime must create a certain kind of victim to be subject to regulation. In upholding the ban on child pornography, the Court compared the statute to “legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”¹²⁹ For example, the Court cited *Prince v. Massachusetts*, which held that states can prevent children from distributing literature in the streets even though such

¹²⁶ See *Ferber*, 458 U.S. at 763–64; Anclien, *supra* note 115, at 52–53 (explaining that stranger assault videos have varying degrees of severity). Thus, I wonder if Anclien would propose “case-by-case adjudication” in this area, notwithstanding his recitation of the categorical nature of the *Ferber* doctrine. See Anclien, *supra* note 116, at 12 (quoting *Ferber*, 458 U.S. at 763–64).

¹²⁷ See Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 288 (2000) (arguing that laws should not impinge upon the First Amendment unless the harms sought to be avoided are “serious one[s], with some gravity”).

¹²⁸ However, exactly which forms of murderabilia might fall under *Ferber* must be determined with reference to the potential First Amendment value of that category of murderabilia. See discussion *infra* Part III.C.

¹²⁹ *New York v. Ferber*, 458 U.S. at 747, 757 (1982).

activity falls squarely within the First Amendment.¹³⁰ *Ferber* also cited *Ginsburg v. New York*, which held that states can protect children from non-obscene literature even though accessing such literature is a First Amendment right for adults.¹³¹ These activities could be circumscribed because the victims were especially vulnerable.

While *Prince* and *Ginsburg* suggest that children are a unique class of victim, they need not imply that children are the only victims for whom speech “intrinsically related” to crime may be restricted. Again, *Stevens* refuted such a notion when it implied that “crush videos” could be restricted in the interest of victimized animals.¹³² In *Prince* and *Ferber*, the victims were vulnerable because they were children. But the altercations in the street that concerned the Court in *Prince* are not dangerous for children alone. They are dangerous for any particularly vulnerable group—for example, the developmentally disabled.

The same would seem to be true of other kinds of exposure that are especially harmful for certain groups—for example, murderabilia for crime victims. In murderabilia cases, some victims are just as vulnerable as children, or perhaps more so, because they are victims of crimes, the depiction of which can harm them just as much as altercations in the street or offensive non-obscene material can harm a child. Thus, following *Prince* and *Ginsburg*, a given article of murderabilia should be suppressed under *Ferber* only when the crime underlying it creates especially vulnerable victims.

This rationale again supports the notion that violent pornography should fall under *Ferber*. It would be difficult to argue that the continued circulation of a depiction of someone being raped or tortured is less harmful to the victim than the continued circulation of the least harmful example of child pornography. This rationale also supports the notion that some stranger assault films might fall under *Ferber* in categories where

¹³⁰ *Id.* at 757 (citing *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

¹³¹ *Id.* (citing *Ginsburg v. New York*, 390 U.S. 629, 637–43 (1968)).

¹³² *See United States v. Stevens*, 130 S. Ct. 1577, 1588 (2010).

the victims are especially vulnerable.¹³³ For example, people who have been victimized by multiple filmed assaults may be more psychologically vulnerable to the circulation of the recordings, thus justifying some regulation of the films.

A different calculus emerges with respect to murder victims, however, because the primary victims are dead. Should snuff films retain First Amendment protection because their continued circulation harms only friends and family of the victim? One could argue that murder victims' friends and family are especially vulnerable in just the way that *Ferber* requires. As described above, serious psychological harm results when a family member is murdered.¹³⁴ One presumes that such harm would be exacerbated if depictions of the murder were widely published—for example, if the spouse of a murder victim were forced to see the slashed body of his or her spouse on billboards or television advertisements for a book depicting the killing.¹³⁵ On the other hand, perhaps snuff films are so harmful that the motivational nexus is strong enough by itself to justify regulation, leaving aside the question of continued harm. Thus, I contend that just as child pornography does not magically become legal when its child subject dies, a snuff film should not be legal simply because its victim is dead.

4. The Legislature Must Determine that the Speech Should be Restricted

Another prerequisite to upholding the ban on child pornography in *Ferber* was that the legislature had determined that it was harmful enough to merit regulation.¹³⁶ In this way, *Ferber* declined to

second-guess this legislative judgment. . . . Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating “child

¹³³ See Anclien, *supra* note 116, at 51–52.

¹³⁴ See *supra* Part II.B.2.

¹³⁵ See Gigi Stone, ‘Murderabilia’ Sales Distress Victims’ Families, ABC NEWS (Apr. 15, 2007), <http://abcnews.go.com/WNT/US/story?id=2999398>.

¹³⁶ See *New York v. Ferber*, 458 U.S. 747, 758 (1982).

pornography. The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.¹³⁷

In other words, because state and federal legislatures had determined that child pornography was harmful enough to warrant an exception to the First Amendment, the Court declined to pass judgment on that determination. Can the same be true of the murderabilia laws passed by approximately forty states and the federal government?¹³⁸

While federalism and separation of powers must place some limit on this kind of rationale, they also support it when properly limited. On the one hand, "[i]t is emphatically the province and duty of the judicial department to say what the law is,"¹³⁹ which suggests that federal courts may not blindly defer to Congress or state legislatures to determine the bounds of First Amendment protection. Furthermore, the scope of countermajoritarian constitutional protections like free speech is wisely entrusted to the judiciary, not the political branches where majority rules.¹⁴⁰ On the other hand, when it comes to evaluating complex empirical questions, such as the difference between certain kinds of psychological or physical harm, legislatures may be better equipped than courts to investigate and provide answers. And even when the question is not empirical, the Court has stated that "evolving standards of decency" may be measured at least in part by reference to the collective views of state and federal legislatures.¹⁴¹ Thus, in the same way that Congress and state legislatures are well-equipped to empirically investigate harm and

¹³⁷ *Id.*

¹³⁸ See *In re* Opinion of the Justices to the Senate, 764 N.E.2d 343, 347 n.4 (Mass. 2002); Ecker & O'Brien, *supra* note 6, at 1075–76, n.6.

¹³⁹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹⁴⁰ See *United States v. Butler*, 297 U.S. 1, 62–63 (1936).

¹⁴¹ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 283 (1972) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

express evolving standards of decency (as well as duty-bound to uphold the Constitution), courts are perhaps wise to consider legislative judgments regarding which crimes are sufficiently harmful to remove First Amendment protection from their depictions. Approximately forty states decided that murderabilia, in one form or another, can be sufficiently harmful to overcome First Amendment protection.¹⁴² Which forms, however, remains an important question.

C. Which Forms of Murderabilia Might Fall Under Ferber?

I have argued that the question of which crimes are covered by *Ferber* must not depend on the value of individual instances of speech. Ad hoc determinations of the value of certain instances of speech are impossible to predict, give no notice to litigants or speakers, and are subject to the whims of individual judges. Moreover, *Ferber* did not base its rule on the “low value” of the speech it examined.

Nevertheless, it is plausible to assume that *Ferber* would not have been able to disregard the First Amendment value of child pornography unless, in general, such value was low. In other words, by holding that child pornography is so harmful that no First Amendment interest can overcome it, the Court presumably recognized that First Amendment interests would not be affected as much as if, for example, newspaper publication were subjected to a similar rule.

It is therefore not the value of any specific *instance* of speech that bears on the *Ferber* analysis, but the likely potential value of certain *categories* of speech. In other words, the value-blind *Ferber* analysis cannot sweep away forms of speech that commonly carry high-value expression, because such a rule would impinge upon the interests that the First Amendment is meant to protect. Thus, I disagree with Anclien that *Ferber* should not “extend to *any* speech that forms an ‘essential part of any exposition of ideas,’”¹⁴³ for it must extend to child pornography in

¹⁴² See *In re Opinion of the Justices to the Senate*, 764 N.E.2d at 347 n.4.

¹⁴³ Anclien, *supra* note 116, at 53 (emphasis added) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

which the child recites the Declaration of Independence just as it applies to any instance of child pornography. But Anclien is right that the doctrine must not apply to those *categories* or *forms* of speech that typically have the potential to touch the "essential . . . exposition of ideas."¹⁴⁴ Only in this way can the doctrine be cabined in a way that adequately protects First Amendment values.

Perhaps it is easy to identify some categories of murderabilia that could never fall subject to *Ferber* because their value is in the information they convey. For example, even if they depict heinous crimes, memoirs, works of fiction, biographies, newspapers and the like allow the public to learn about important topics in a way that would be impossible if such stories were subject to regulation under *Ferber*. The same would seem to be true of oral recordings or taped interviews. Thus, just as the First Amendment would never allow the government to outlaw a documentary about child pornography simply because it describes child pornography, it would also never allow the government to ban a documentary or tell-all confession about a homicide. *Simon*, then, as it must, remains untouched by my argument. And this is true even when the most notorious murderers are interviewed and their notoriety contributes to the popularity of the publication.

This analysis seems to suggest a sharp distinction between visual and written depictions of crime, i.e., that *Ferber* can extend to visual depictions of crime but not written ones. In general, I might agree that this is a good description *Ferber*'s bounds, but I am not willing to say that all visual depictions may be banned. For example, visual depictions of crimes that are not sufficiently harmful to fall under *Ferber* cannot be banned—such as the videos of animal cruelty protected in *Stevens*. Also, paintings by famous killers have become one of the more popular forms of murderabilia.¹⁴⁵ Although victims object to selling such paintings,

¹⁴⁴ *Id.* at 20–22 (quoting *Chaplinsky*, 315 U.S. at 571–72).

¹⁴⁵ See, e.g., David Lohr, *Murderabilia: Art or a New Form of Victimization?*, AOLNEWS.COM (Feb. 13, 2010, 4:33 PM), <http://www.aolnews.com/2010/02/13/murderabilia-art-or-a-new-form-of-victimization/> (describing a painting by serial killer Danny Rolling on sale for \$2000); *Sean Richard Sellers 12"x16" Painting Acrylic on Canvas*, SERIAL KILLERS INK.NET, http://serialkillersink.net/skistore/index.php?_a=

the harm to victims seems less direct than where the depiction is a photograph or film. Perhaps here, too, the harm is not weighty enough to merit disregarding the expressive value of the category of speech (not to mention the therapeutic value for those who may be dealing with psychological and emotional issues).¹⁴⁶ Indeed, it would seem that a painting depicting a murderer's victim would have to be protected under *Simon*. Perhaps it is the creative element that separates such works from snuff films. Whatever the reason, it must be true that people cannot be silenced simply because they have been convicted of a crime, and for this reason Senator Cornyn's proposed bill, which would prohibit prisoners from mailing anything that is for sale, is too broad as well.¹⁴⁷

But what is perhaps the most popular form of murderabilia—or at least the form that has garnered the most attention of late— involves no depiction at all.¹⁴⁸ A number of websites sell or auction items that are simply related to a notorious crime or criminal, with no expressive modification whatsoever.¹⁴⁹ In fact, these items likely led to the development of the term “murderabilia.”¹⁵⁰ Applying the analysis that I have enunciated to this type of murderabilia might seem simple—its potential expressive value as a category of speech is low, its harm to victims is high (at least for significant crimes), and it is “intrinsically

viewProd&productId=28 (last visited Oct. 17, 2011) (advertising a painting by satanic ritualistic Sean Sellers, on sale for \$1050).

¹⁴⁶ See, e.g., Angie Holdsworth, *Looming Budget Cuts Threaten Therapy Program for Arizona's Mentally Ill*, ABC15.COM (Dec. 17, 2010), <http://www.abc15.com/dpp/news/state/Looming-budget-cuts-threaten-therapy-program-for-Arizona's-mentally-ill> (describing art therapy); Stacy Jacobson, *Psychiatric Patients Show Off Art Therapy Pieces*, WBOY.COM, <http://66.118.80.206/story.cfm?func=viewstory&storyid=91266> (last updated Dec. 17, 2010, 7:16 PM).

¹⁴⁷ See Hurley, *supra* note 6, at 416–17 (citing Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. (2007)). It seems difficult to think of a written depiction of crime that could be banned after *Simon*, but I do not think this needs to be an ironclad rule, either. If there were to be some form of written depiction that *as a category of speech* had little expressive value, then perhaps it could be restricted for the worst crimes as well under the *Ferber* rationale.

¹⁴⁸ See, e.g., Schooler, *supra* note 4.

¹⁴⁹ See, e.g., *id.*; MURDERAUCTION.COM, <http://www.murderauction.com/index.php> (last visited Oct. 17, 2011); SERIAL KILLERS INK,NET, <http://serialkillersink.net/skistore/> (last visited Oct. 17, 2011).

¹⁵⁰ See *supra* INTRODUCTION.

related” to crime; therefore it falls under *Ferber* and may be restricted. The question, though, is whether its expressive value is truly as low as child pornography just because it is an item and not a depiction.

By analogy, cases interpreting the Lanham Act and the right to publicity do not afford constitutional protection for works that piggyback on another’s notoriety unless the work uses the subject’s fame in a creative manner.¹⁵¹ For example, simply using Rosa Parks’ name in the title of a song is not protected by the First Amendment unless it is a creative use, not one that simply hopes to attract attention by mentioning her name.¹⁵² Perhaps a similar rule could apply to murderabilia, i.e., that it is not protected under the First Amendment unless it modifies or addresses the criminal’s notoriety in a creative way. Such a rule seems logical considering that a celebrity’s right to profit from his or her name—the right that overcomes the First Amendment under the Lanham Act—should not be weightier than the right of victims of heinous crimes to be free from uncreative products that recall their suffering and encourage more crime. Such a rule would allow governments to regulate essentially all “item murderabilia”—artifacts with no creative element whose value derives solely from their connection to crime—since arguably none of it is creative.¹⁵³

On the other hand, *Ferber* allows much stricter regulations than the Lanham Act. Whereas the Lanham Act allows celebrities to sue for profits wrongly obtained through the use of their names,¹⁵⁴ *Ferber* and its progeny allow governments to *outlaw* certain kinds of speech and subject possessors and distributors to criminal

¹⁵¹ *Parks v. LaFace Records*, 329 F.3d 437, 451–52 (6th Cir. 2003).

¹⁵² *Id.* at 461.

¹⁵³ Another potential justification for restricting “item murderabilia” is that it could sometimes be pure commercial speech, which generally may be restricted more easily than other kinds of speech, though commercial speech is not as unprotected as child pornography. *See generally* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980). In any case, it might be difficult to determine when murderabilia is also commercial speech.

¹⁵⁴ *Parks*, 329 F.3d at 445.

sanctions.¹⁵⁵ While victims of crime might like this kind of rule, it almost certainly goes too far. Would the victims themselves be prohibited from possessing items related to a crime? Would they have to destroy mementos of their lost loved ones? Would a criminal released from jail have to knock down his own house because a murder was committed there? Would the Newseum have to close down its exhibit displaying Ted Kaczynski's cabin, bomb, and handmade gun?¹⁵⁶ Such examples highlight the fact that murderabilia, because it is a broad category, involves more instances of First Amendment expression than child pornography, which means that any application of *Ferber* must be strictly cabined.

Regarding "item murderabilia," therefore, I submit that the eight states (plus the federal government) that have passed anti-profiting laws have found the correct line—namely, that unexpressive, uncreative murderabilia cannot be banned completely, but legislatures may restrict its sale.¹⁵⁷ Drawing the line at sales for profit would seem to comport with *Ferber* in that selling such items encourages others to commit heinous crimes, and continues to harm the victims by bringing up their bad memories, but merely possessing or viewing such items is unlikely to cause the same kind of harm.

Therefore, existing anti-profiting laws seem to strike the correct balance with respect to "item murderabilia."¹⁵⁸ The anti-

¹⁵⁵ See generally *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002); *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

¹⁵⁶ See Nelson & Prendergast, *supra* note 12, at 678–79.

¹⁵⁷ See Hurley, *supra* note 6, at 417–23. Legislatures enacted anti-profiting laws for a different reason, i.e., to get around *Simon* and ensure that their anti-murderabilia laws were based on something other than the content of speech. *Id.* But this rationale involves the inferential leap that "profiting from crime" involves selling something only tangentially related to that crime—for example, Richard Ramirez's shirt that he wore at his trial, which is currently on sale for \$1,400.00, arguably has nothing to do with Ramirez's murders. MURDERAUCTION.COM, *supra* note 148. He simply wore it at his trial, after the crimes were committed. And for this reason anti-profiting laws are still open to criticism under the First Amendment and *Simon*, because the anti-profiting rationale can seem like a weak subterfuge to get at the speech content of relatedness to crime or criminals. *But see* Hurley, *supra* note 6, at 417–23.

¹⁵⁸ Hurley, *supra* note 6, at 439.

profiting rationale does not distinguish those statutes from *Simon*, as some legislators may have hoped, but instead *limits* the application of *Ferber* in this realm. In other words, *Ferber* overrides *Simon* in certain categories of particularly harmful speech, such as murderabilia, but in the category of "item murderabilia," *Ferber* should apply only up to the point where anti-profiting laws currently operate, i.e., restricting sales for profit. In this way, Eric Gein, the founder of SerialKillersInk.net, may be correct that "item murderabilia" is speech under the First Amendment, but he would still have to shut down his auctioneering website, at least insofar as it sells the murderabilia.¹⁵⁹ This rule would also square with the notion that the academic and historical justifications for websites that auction murderabilia were always a thinly veiled excuse for profiteering, not unlike the uncreative use of the title "Rosa Parks" in a commercially-marketed song.

CONCLUSION

I have argued that *Ferber* should extend to murderabilia because its doctrinal language and underlying rationales apply. As with child pornography, murderabilia is "intrinsically related" to crime, and allowing it to be restricted in certain circumstances has the potential to help victims avoid continued harm and prevent more crimes from being committed. *Stevens* clarified that *Ferber* can be extended beyond child pornography, and the kinds of murderabilia that I have identified in this article seem like a good fit.

But none of this explains why extending *Ferber* is the best way to address this problem. Forty states and the federal government have decided that murderabilia is a problem worth addressing, but they have not used *Ferber* to do it. Rather, in one way or another, they have tried to get around *Simon*. In other words, legislatures appear to have tried to restrict murderabilia by pretending that they were not dealing with speech at all—as if by simply restricting "profit" (anti-profiting laws) and "commerce" (Senator Cornyn's

¹⁵⁹ Kugiya, *supra* note 6.

proposed bill), they can take the First Amendment problem off the table.

I think the First Amendment prefers that lawmakers deal directly with the constitutional issue. There is no shortage of precedent to support the notion that the most harmful kinds of speech can be restricted *as speech* under properly cabined statutes that recite grave harm. *Ferber*, in my opinion, is not only the most effective way of dealing with the problem of murderabilia, but also the most honest. *Ferber* and its progeny forthrightly acknowledge that some speech is so harmful that it can be restricted, and because the cases acknowledge that they are restricting speech, they make sure to limit the doctrine to the narrowest categories of speech necessary to prevent grave harm. Virtual child pornography and depictions of animal cruelty, no matter how distasteful, do not fit.

But some murderabilia should fit. As described above, snuff films, depictions of rape, and some item murderabilia are so harmful to victims, and so lacking in potential value as categories of speech, that the First Amendment should not be concerned about restricting them any more than it is concerned about restricting child pornography. It is not always the case that where doctrinal tests may be extended to new categories, it is wise to do so, but this is one of those cases.